2/18/98

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SPANG AND COMPANY	)	Docket No. RCRA-III-169
	)	
Respondent.	)	

ORDER PENDING OPPORTUNITY FOR SUPPLEMENTAL HEARING

Background

This matter arises under Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928. The Complainant is the Associate Director, Office of RCRA Programs, Hazardous Waste Management Division, United States Environmental Protection Agency, Region III ("EPA"). Spang and Company ("Spang") is the Respondent.

For the reasons which follow, I find that, as a consequence of the decision by the D.C. Circuit in Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991) ("Shell Oil"), invalidating the "mixture rule" and the subsequent adoption of that case by the Environmental Appeals Board in In re: Hardin County, OH, 1994 RCRA Lexis 36; 5 E.A.D. 189, (April 12, 1994) ("Hardin County"), as well as the Seventh Circuit's decision in United States v. Bethlehem Steel Corp., 38 F.3d 862 (7th Cir.1994), ("Bethlehem Steel" or "Bethlehem"), the EPA's claim against Spang must be dismissed, subject first, however, to affording EPA the option to accept or decline an opportunity for a supplemental hearing for the purpose of demonstrating facts supporting the alleged violations which do not run afoul of the invalidated "mixture rule." The parameters, within which EPA would have to prove a violation, should it opt for the supplemental hearing, are set forth at the conclusion of this Order[1]. Should EPA decline the opportunity for supplemental hearing, this Order then will be formally re-issued as the Initial Decision in this matter.

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[1]In light of this Order, it is unnecessary at this time to address Spang's Motion to Strike Complainant's Proposed Findings of Fact and Conclusions of Law, a motion which argued that the Complainant's submission of proposed findings were untimely filed.

The original complaint in this matter was filed on September 28, 1989 and was subsequently twice amended.[2] EPA alleged in its Second Amended Complaint, filed April 8, 1991, that Spang had violated RCRA, the Pennsylvania Solid Waste Management Act (the Act of July 7, 1980 , P.L. 380, No. 97, 35 PA. CONS. STAT. ANN. §§ 6018.101-6018.1003 (Solid Waste Act), and the Rules and Regulations of the Environmental Quality Board adopted thereunder, 25 Pa. Code §§ 75.259-75.450.

There are three Counts to the Complaint.[3] Count I alleges that Respondent violated 25 Pa. Code § 75.265(n)(13) (40 C.F.R. § 265.93(a)) from November 19, 1981 until September 10, 1990. This provision requires each owner or operator of a surface impoundment[4] used to manage hazardous waste to prepare an outline of a groundwater quality assessment and abatement program and submit it to the Pennsylvania Department of Environmental Resources for approval by November 19, 1981. EPA determined that Spang had failed to submit the required outline. The first count asserts that the outline was not submitted until September 10, 1990.

Count II asserts that Spang violated 25 Pa. Code §§ 75.265 (n)(1) and 75.265(n)(3)(i) and (3)(ii), (40 C.F.R. §§ 265.90 and 265.91(a)(1) and (a)(2)), by failing to implement a groundwater monitoring program. These provisions require, in part, that the owner or operator of a surface impoundment which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facility's impact on the quality of any groundwater system which it had the potential to affect and that the employed system be capable of yielding groundwater samples for analysis. The provisions spell out the minimum number of monitoring wells required to accomplish this as well as other details for satisfying the groundwater monitoring system. In March and August 1985 and again in April 1986 Spang submitted a plan to DER for its groundwater monitoring program. DER found these plans unacceptable and added requirements to it. EPA reviewed the groundwater monitoring information and concluded that the system was not capable of immediately detecting contaminants

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[2]The same alleged violations were cited in all three complaints.

[3]In 1981 the Commonwealth of Pennsylvania was given interim authorization, and in 1986 final authorization, to administer a hazardous waste management program in lieu of the federal program. By virtue of these authorizations, the provisions of the Pennsylvania hazardous waste management program became requirements of RCRA. For this reason the complaint citations are to the Pennsylvania hazardous waste provisions with parenthetical references to the analogous federal program under RCRA, Subtitle C.

[4] 40 C.F.R. § 260.10 defines a "Surface Impoundment" as "...a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons."

which might flow from the surface impoundment. This resulted, on October 22, 1987, in the issuance by DER of a notice of violation to Spang, alleging failure to implement a groundwater monitoring program in accordance with the above cited regulations.

Count III is based upon the assertion that Spang failed to submit a bond for closure, (i.e. failure to establish financial assurance for closure of the facility) as required by 25 Pa. Code § 75.311(a), (40 C.F.R. § 265.143), from September 9, 1985 until May 11, 1990. That provision requires all hazardous waste storage, treatment, and disposal facilities which have a permit or are on interim permit status, to file a bond.

Prior to the assignment of this case on June 23, 1997 to the undersigned, Judge J.F. Greene was the Presiding Judge. On May 1, 1996 Judge Greene issued an accelerated (i.e. a summary determination) decision on liability. After first determining that Spang owned and operated an "existing hazardous waste facility" as defined in 25 Pa. Code § 260.2 (40 C.F.R. § 260.10) and that, consequently, Spang was subject to the standards of Chapter 265, (40 C.F.R Part 265), the judge then turned to the issue of whether Spang's surface impoundments were subject to that Chapter.

EPA argued that Spang discharged hazardous waste to the impoundments and stored such waste there subsequent to the November 19, 1981 effective date of the Pennsylvania regulations.[5] Finding that there was no genuine issue of fact and that it was therefor established that hazardous waste was discharged to and stored at Spang's impoundments[6], Judge Greene ruled that Spang's surface impoundments constituted a hazardous waste management facility which is subject to RCRA regulation and the Pennsylvania hazardous waste regulations. Addressing the particular Counts, the Judge noted that, as to Count I, Spang admitted it did not submit an outline of a Groundwater Quality Assessment and Abatement Program to DER by November 19, 1981, instead submitting it on September 10, 1990.

For Count II, the implementation of a groundwater monitoring program by November 19, 1981, Spang admitted that it completed the installation of the monitoring wells on October 31, 1985. Thus, the judge determined that Spang violated the requirement from November 19, 1981 to October 31, 1985. As part of Count II, it was also alleged that Spang failed to install additional wells and that this resulted in a second notice of violation being issued on October 22,

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[5] EPA relied upon eleven transmittals from Spang which it viewed as admissions that hazardous waste was discharged to and stored in its surface impoundments. Memorandum in Support of EPA's Motion for Accelerated Decision as to Liability, at pages 14-19.

[6]Judge Greene relied upon the transmittals (deemed admissions) from the Respondent to EPA or the Pennsylvania's DER and cases cited by EPA counsel in concluding that "hazardous waste was discharged to Respondent's impoundments and stored there." Orders Upon Motion for Summary Decision as to Liability and Other Motions at 4.

1987 and in this regard the judge also found Spang liable from the date of the notice of violation[7] through September 27, 1990. For Count III, the failure to file a bond by September 9, 1985, the judge referred to Spang's answer stating that bonds were filed on May 25, 1990 and accordingly found a violation spanning that period of time.

Although Judge Greene granted EPA's Motion for Accelerated Decision as to liability on May 1, 1996,[8] Spang has raised the issue of whether the decision in Bethlehem Steel mandates a dismissal of the present case. At the September 17-19, 1997 hearing, I directed the parties to address this issue.

As a threshold matter the question before me is whether, in light of Bethlehem Steel, Spang's impoundments were, during the time in question, hazardous waste management units subject to regulation under RCRA. As explained within, if Bethlehem applies, a decision as to the particular violations alleged cannot be reached.

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[7] The judge rejected EPA's position that this violation ran from the date of the notice of deficiency, finding instead that the violation began with the notice of violation. May 1, 1996 Order at 10.

[8] When before Judge Greene, the parties did not argue the impact of the Bethlehem Steel and Hardin County decisions to this case. Spang did, however, reference the Shell Oil decision in its Response to Motion for Accelerated Decision, which was filed on June 4, 1992. Motion at 3. Judge Greene's decision did not address the Bethlehem Steel case and was limited "to the extent that the Counts are not affected by 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir. 1994). Order at 12. EPA concedes that Spang referenced the "mixture rule" and the fact that it had been declared invalid by a U.S. Court of Appeals but asserts that Judge Greene addressed this in her order. EPA brief at 4. The judge's order, at footnote 17, states:

> In addition, Respondent argues that EPA is relying on the so called 'mixture rule' in this case. This is incorrect. EPA has not claimed that all of the waste in the surface impoundments was hazardous. Rather, EPA's argument is that one hazardous waste stream entered the impoundment, was stored there, and that as a result, the impoundment became subject to RCRA regulation.

Order at 7.

EPA's Position

This action is based upon F006 waste. As EPA notes in the opening of its brief: "Spang's Manufacturing and Tool Division manufactured steel joints...[the threads of which] were copper coated in an electroplating process...[which] process generated a hazardous waste in the tanks which is listed at 40 C.F.R. § 261.31: 'wastewater treatment sludges from electroplating operations' (F006)." EPA Post-Hearing Brief at 2. Prior to April 1984, Spang pumped the entire contents of the tanks to Lagoon A. In April 1984, the tanks were modified so that only effluent (not the sludge) would go to Lagoon A. Thereafter the sludge was shipped off-site for disposal as F006 hazardous waste. *Id.* at 2-3.

More directly, EPA states:

> Region III's position is that a listed hazardous waste, 'the wastewater treatment sludge from electroplating operations' (F006), was pumped to Spang's Lagoon A.

EPA Post-Hearing Brief at 16-17.

EPA also notes that **"Spang has consistently claimed that at all relevant times *wastewater* from its other manufacturing processes also entered Lagoon A."** (emphasis added) EPA Brief at 3. However, EPA adds that it was not until the hearing that Spang asserted that its F006 waste was pumped to the *same pipe* which carried wastewater from its other processes to Lagoon A. *Id.* From EPA's perspective, all that is necessary to show that Spang's impoundment (Lagoon A) is a hazardous waste management facility and therefore subject to the Pennsylvania and RCRA hazardous waste management regulations is that a listed hazardous waste (in this case F006) entered the lagoon. *Id.* at 17, 19.

EPA sets about in its Post-Hearing Brief to show that "Spang's case is factually distinguishable from Bethlehem Steel by first contending that the definition of a 'Listed Waste' is separate and distinct from the Mixture Rule." EPA notes that the implementing regulations for the RCRA program, found at 40 C.F.R. Parts 260-270, include the definition of "hazardous waste" which is set forth at 40 C.F.R. § 261.3. This section provides, in relevant part, that a solid waste is a hazardous waste if it is: a listed hazardous waste *or* a waste mixture *or* a characteristic waste.

EPA further asserts that the regulation speaks to the point in time when a hazardous waste becomes hazardous, referring to the rulemaking's preamble statement that a hazardous waste must begin to be managed as a hazardous waste "when it first meets the Subpart D listing description." The preamble, it notes, goes on to provide that: "[m]ost of the hazardous wastes listed...are process residues...or wastewater treatment sludges, and the point in time when they are created is generally well-defined." 45 Fed. Reg. at 33095.

Citing to the Preamble to the defective implementing regulations, EPA notes:

> [I]n the case of a waste mixture containing a listed hazardous waste, paragraph (b) requires that the waste mixture be managed as a hazardous waste as soon as the listed waste is added to it.

Id.

EPA argues that this means the hazardous waste management requirements for F006 start at the point of generation. EPA Brief at 9. According to EPA's analysis, the critical distinction is the fact that while in Bethlehem there had been *previous* treatment of the wastewater *before* it entered the lagoon, that was not the case in Spang.

As a secondary basis to avoid application of the mixture rule, EPA asserts that it never mentioned the rule in its complaint. Instead it states that the complaint referenced Spang's wastewater treatment sludges from electroplating operations (F006).

EPA asserts in the alternative that, even if the invalidation of the mixture rule applies, several courts have found that those who commingle hazardous and nonhazardous wastes can still be held liable under other theories. These theories are the "continuing jurisdiction" rule, which asserts that hazardous waste continues to be hazardous until it is delisted, and the "contained in" rule, which holds that a listed hazardous waste contained in other waste, remains hazardous until delisted.

Under EPA's analysis, Spang's point of generation of the F006 hazardous waste began at the treatment tanks and its subsequent management is regulated. EPA Brief at 11. EPA further argues that the Complaints were not based upon the mixture rule since its position is that Spang generated F006 wastewater treatment sludges from its electroplating operations, then stored this waste in the lagoons.

In its Motion for Accelerated Decision before Judge Greene, EPA argued that the mixture rule did not apply to the Spang case. EPA acknowledged its awareness that Spang's lagoons received waste streams other than F006 and it did not assert that everything that was mixed with the F006 became hazardous waste. However it took the position that:

> [i]f any one hazardous waste stream enters an impoundment, that impoundment becomes a hazardous waste management facility subject to RCRA regulation. EPA is claiming that one hazardous waste stream, F006, entered Spang's impoundments.

EPA Post-Hearing Brief at 15.

Thus, EPA's position is that once it has been shown that a listed hazardous waste, (in this case the wastewater treatment sludge from electroplating operations, (F006)), was pumped to

Spang's Lagoon A, a violation has been demonstrated. *Id.* at 17. In this regard EPA notes that on March 7, 1984 (one month prior to the modification of its treatment tanks, as described *supra*), Spang submitted a Part A Hazardous Waste Permit Application which indicated that it generated 13,944 gallons of F006 hazardous waste annually and that the processes included a treatment tank and lagoons.

EPA takes the position that it is only necessary to find that F006 entered Lagoon A and that it is irrelevant for purposes of liability that the lagoon had other wastes in it besides F006. It is not necessary, EPA maintains, that the entire volume of sludge at the bottom of Lagoon A consist of F006.

While skeptical about Spang's allegation that the slurry from its electroplating process joined a pipe carrying wastewater from its other processes which then was deposited in Lagoon A, EPA asserts that it is irrelevant whether the waste streams entered the lagoon through separate pipes or were commingled in a joint pipe. From EPA's perspective it need only show that F006 entered the lagoon.

EPA believes that the Bethlehem case is distinguishable because:

> ...the sludges that entered Bethlehem's lagoons and landfill were 'sludges the plant previously generated from the treatment of electroplating and [the four] other wastewaters.'

EPA Post-Hearing Brief at 24, quoting from Bethlehem at 864. (emphasis in EPA Brief.)

Continuing its argument, EPA asserts that since there is no "indication that Spang's electroplating process rinse wastewater was treated with wastewaters from any other [Spang] operation...any sludge generated from the treatment of Spang's electroplating process rinse wastewater would be 'pure' F006." Thus, EPA concludes, Spang's lagoon is subject to RCRA because it contained F006.

As mentioned *supra*, EPA also attempts to present alternative theories of liability apart from the "mixture" and "derived from" rules, by raising the "continuing jurisdiction" and "contained in" principles. In support of this, it cites to In the Matter of Chem-Met Services, Inc., 1993 RCRA LEXIS 231 (February 23, 1993) ("Chem-Met"), a case involving the reprocessing and shipment for disposal of F006 and K086 wastes. EPA acknowledges that it is not alleging land disposal restrictions in Spang and that the land disposal restrictions litigated in Chem-Met were not promulgated until 1988, a point in time after Spang had ceased disposing wastes in its impoundment, but maintains that the rationale expressed in that decision is applicable to Spang for the proposition that the hazardous waste management requirements become applicable at the point of generation.

The second case raised by EPA in support of alternative theories of liability is Hardin

County, a case in which the Presiding Officer dismissed the Complaint in light of the invalidated mixture rule. The Environmental Appeals Board upheld the decision, concluding that the D.C. Circuit's decision in Shell Oil voided the mixture rule *ab initio*. Despite the outcome, EPA looks to the divergent reasoning of the board members for support. After first noting that Judge McCallum rejected the "continuing jurisdiction" argument with regard to waste mixtures, it observes that Judges Firestone and Reich suggested, *in dicta*, that hazardous waste which falls within another definition of 40 C.F.R. § 261.3(a) may still be subject to regulation. However, EPA leaves the case at that, without further analysis or relevance to Spang.

EPA also cites to, again with no accompanying analysis, United States v. Ekco Housewares, Inc., 853 F. Supp. 975 (N.D. Ohio 1994), aff'd in part, reversed in part, 62 F.2d 806 (6th Cir.1995);1993 U.S. Dist.Lexis 20236,[9] ("Ekco") as a case in which the court held that the groundwater did not come within the Shell Oil mixture rule and was covered under the "contained in" rule.

Finally, EPA refers the presiding judge to United States v. Marine Shale Processors, (No. 94-30664, 81 F.3d 1329 (5th Cir. 1996); 1996 U.S. App. LEXIS 8666; Cert. denied 1997 U.S. LEXIS 65, ("Marine Shale"). There, the Fifth Circuit distinguished Marine Shale from Bethlehem, finding that while in Bethlehem the addition of other wastewaters so changed the basic composition of the substance that it could no longer be placed within the F006 listing, in Marine Shale the materials added to the K-listed waste did not change its basic composition in some significant way. The Marine Shale Court did not feel its holding was in conflict with the Bethlehem decision, noting that in Bethlehem the F006 waste had been mixed with other kinds of wastewater, which changed the basic character of the F006. EPA Brief at 34.

In its Reply Brief, EPA again refers to the defective final rule, issued on November 19, 1980, stating that the rule made it "abundantly clear that a surface impoundment is subject to RCRA if it either receives or generates a hazardous waste," and that "Region III *has consistently maintained that Spang disposed of a listed hazardous waste, F006, in its impoundment.*" Reply Brief at 2. (emphasis added). EPA maintains that, in contrast to Bethlehem, the wastes disposed of at Spang's facility were "pure" F006. Continuing with the argument it advanced in its Post Hearing Brief, EPA asserts that a critical distinction is the point in time at which the wastewaters were mixed. Attempting to distinguish United States v. GK Technologies Inc., 1997 U.S. Dist. LEXIS 3783 (S.D.Ind. Jan.27, 1997) from Spang, EPA observes that the wastewaters in GK Technologies "were mixed with other wastewaters prior to treatment and disposal..." EPA Reply Brief at 3. (emphasis in original).

Concluding its argument on the issue of whether a violation has been demonstrated, EPA

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[9]EPA's citation to Ekco actually confuses two separately issued decisions. The first is a "Memorandum of Opinion and Order," issued on September 23, 1993 and found at 1993 U.S. Dist. LEXIS 20236, while the second, "Findings of Fact and Conclusions of Law," is found at 853 F.Supp. 975; 1994 U.S. Dist. LEXIS 11861, issued January 28, 1994

maintains that "...it is not a prohibition against the discharge of the hazardous waste F006 that Spang has been cited for ...[i]t is the fact that, once Spang discharged the hazardous waste F006 into its impoundment, it did not fulfill its obligations to put in place an adequate groundwater monitoring program and to obtain financial assurance." *Id.* at 8.

Spang's Position

In its Post-Hearing Brief, Spang challenged Judge Greene's determination that because the listed waste F006 was discharged and stored in Spang's impoundments, the impoundments constituted an 'existing hazardous waste facility' subject to RCRA and the Pennsylvania Hazardous Waste Regulations. Relying upon Bethlehem and Shell Oil Co., Spang notes that these cases vacated the "mixture rule" which rule attempted to provide that mixtures of listed hazardous waste and non-hazardous solid waste were hazardous wastes for purposes of RCRA Subtitle C.

Spang argues that:

> ...prior to April 1984, electroplating process rinse wastewater from the drill pipe plant mixed with wastewater from Spang's other operations en route to or in impoundment A, one of three surface impoundments, thus creating a mixed sludge with other wastes while settling in the impoundments. ... The electroplating wastewater and wastes from the ferrite operations and other plant operations were transported in the same pipe into impoundment A, where settling of suspended solids occurred. (Transcript ("Tr.") Volume ("Vol.") II, 91:12-14, 92:17-19m 93:8-14; ...). In addition to the electroplating wastewater, other wastes that settled in impoundment A included oxides of manganese, zinc and iron, powdered nickel, nickel alloys and residue from the cleaning of nickel steel. (EPA Exhibit ("Ex.") 2, ...)

Respondent's Post-Hearing Brief at 3.

Relying upon Bethlehem, Spang argues that F006, by its terms, applies only to sludge derived purely from electroplating wastewater and does not apply to sludges derived from mixed wastes. As Spang's wastes were mixed wastes, resulting from the settling process in its impoundments, the mixed sludge in the impoundments did not constitute a listed hazardous waste.

In its Reply Brief Spang reiterates that, because the waste at issue here was not purely from electroplating operations, but rather from the mixture of F006 and other, nonhazardous, wastewaters, the holding in Bethlehem Steel is determinative. Spang also notes that EPA recognized that its lagoons received waste streams other than F006. Addressing EPA's argument that the timing of the treatment process distinguishes Spang from the Bethlehem holding, Spang argues that the treatment process relates to both treatment tanks and surface impoundments and

that EPA itself has recognized this, both in its Brief in this case and in the preamble to the RCRA regulations, promulgated in 1980. Spang observes that both facilities allowed solids to settle in their impoundments and that RCRA itself broadly defines the term "treatment" as "any method...designed to change the...character or composition of any hazardous waste." Spang Reply Brief at 8, citing to 40 C.F.R. § 260.10 (1997).

Spang alleges that by failing to properly promulgate the proposed rule, EPA was left with a listing that regulated only those wastes managed in pure form. Spang asserts that it mixed the wastewaters of its electroplating operations, electronic components facility, specialty nickel alloy strip facility and its ferrite manufacturing operations. Spang Reply Brief at 13. Spang also makes the noteworthy observation that "[i]f it were true that a waste became a hazardous waste at its point of generation and remained so when mixed with nonhazardous waste, there would have been no need for the "mixture" rule. EPA, however, was cognizant of the need for the "mixture" rule in order to close a "major loophole" in the Subtitle C management system." *Id* at 14.

Responding to EPA's assertion that Spang can alternatively be found liable under the principle of "continuing jurisdiction," Spang responds that the vacated mixture rule is controlling, again pointing out that if EPA's position were accurate, there would have been no loophole resulting from the vacating of the mixture rule. Spang also notes that the Seventh Circuit observed that with the invalidation of the mixture and derived from rules in Shell Oil, the government's attempt to rely upon the principle of "continuing jurisdiction" constitutes bootstrapping. *Id* at 15. In addition, Spang argues that the "contained-in" rule, which provides that a listed hazardous waste continues to be a hazardous waste until it is delisted, only applies to mixtures of listed wastes and environmental media, such as soil and groundwater. For this reason, Spang argues that EPA's reliance on Ekco is misplaced as it involved a mixture of listed wastes and ***groundwater.*** Similarly, Spang argues that Marine Shale is distinguishable as it involved the mixing of a listed waste and an absorbent material

Discussion

It is fair to state that Bethlehem and Spang share some remarkable similarities. In Bethlehem, EPA's action was brought under RCRA and pertained to solid waste generated by Bethlehem's integrated steel making facility. As pertinent here, EPA's claims in Bethlehem pertained to sludges previously generated from the treatment of electroplating and other wastewaters. These sludges were stored or disposed of in two finishing lagoons and a landfill. Bethlehem's tin and chromium electroplating generated wastewater as a by-product which it treated by mixing it with other kinds of wastewaters and then added a thickener, resulting in solids that settled to the bottom as sludge. The clarified water was then drawn off and sent to two polishing lagoons to allow for further settling. The sludge was filtered and disposed of at a landfill.

EPA considered Bethlehem's landfill and lagoons as "hazardous waste management units" because 40 C.F.R. 261.31 lists "wastewater treatment sludges from electroplating operations" as

F006 hazardous waste. EPA alleged that RCRA was violated by Bethlehem's failure to comply with RCRA's "interim status performance standards" for its landfill and two polishing lagoons. As in this case, EPA charged Bethlehem with failing to comply with closure and post closure requirements, not implementing a groundwater monitoring system, and failure to establish financial assurance for closure.

EPA argues in Spang that the settled sludge at the bottom of the lagoons and the filtered sludge disposed of in its landfill was F006 "listed" waste, in the form of "wastewater treatment sludge from electroplating operations." 40 C.F.R. 261.31. In Bethlehem the Seventh Circuit found it significant that, when promulgated in 1980, the listing for F006 lacked the phrase "mixtures/blends," nor any threshold concentration percentage, while immediately preceding listings promulgated at that time did include such phrases. It noted, as did the Court in Shell Oil that although waste mixtures were not included in the proposed regulations, EPA added the mixture rule to the final rule because, without it, "generators could evade Subtitle C requirements simply by commingling listed wastes with nonhazardous solid waste....leav[ing] a major loophole..." Bethlehem at 869. It also noted that while EPA subsequently amended (in 1985) the spent solvent listings at F1001 through F1005, it did not amend the F006 listing to address electroplating wastewater mixtures[10]. The Seventh Circuit concluded that the sludge was not "listed waste" because:

1. The F006 listing applies only to sludge from pure electroplating wastewaters.

2. The sludge was not pure F006 waste because it has been mixed with other solid wastes[11].

Id. at 868.

Thus, the F006 listing does not include electroplating wastewater mixtures. The Court recognized that EPA ***intended to include waste mixtures*** containing Subpart D listed hazardous waste as hazardous waste in its rulemaking, but that it had failed to do so. Accordingly, it held that Bethlehem's wastewater treatment sludges did not fall within the F006 listing of hazardous waste because the sludges were a mixture of F006 and non-hazardous waste and because EPA did not assert that the sludges were hazardous by virtue of any other sound theory.

In Spang, EPA has conceded the presence of a waste mixture. "EPA is aware that Spang's lagoons received waste streams other than F006." EPA Post-Hearing Brief at 14. This statement, it seems to me, is fatal to EPA's claim.

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[10]50 Fed. Reg.53318 (December 31, 1985)

[11]Under RCRA, the term "solid waste" expressly includes sludges and liquid wastes. 42 U.S.C. 6903(27).

In the face of this concession EPA articulates its theory of liability:

> ...EPA is not claiming that everything that ***was mixed with the F006 in the impoundments*** became hazardous waste. If any one hazardous waste stream enters an impoundment, that impoundment becomes a hazardous waste management facility subject to RCRA regulation. EPA is claiming that ***one*** hazardous waste stream, F006, ***entered Spang's impoundments***.

EPA Post-Hearing Brief at 14-15. (emphasis added).

This theory is squarely at odds with the Shell Oil and Bethlehem holdings. Having made the critical concession that Spang's lagoons contained a mixture of hazardous and nonhazardous waste, EPA proceeds to offer up a variety of theories to support Spang's liability.

First, EPA asserts that the mixture rule does not apply on the theory that the point of generation determines whether pure waste or a mixture is involved. However, EPA offers no express authority for this proposition. It seems to the undersigned that if this theory were accepted the invalidation of the mixture rule would be of no real effect as most hazardous wastes would be in a "pure" form at their point of generation. Consequently, there would have been no need for a mixture rule. Such a construction does not make sense in light of the nearly identical facts in Bethlehem. Indeed, a review of the Seventh Circuit's decision in Bethlehem makes *no* reference to the "point of generation." After all, the lagoons are the focus of EPA's enforcement concerns here, lagoons in which EPA has conceded there exists a mixture of wastes. It is also significant that the alleged violations all deal with the management of the contents of the lagoon, not with the wastes prior to their entering the lagoon. Thus, the regulations cited here deal with creating a plan for monitoring the groundwater quality, monitoring its quality, and assuring the financial wherewithal for closure of the facility, which are all efforts to assure proper monitoring of the entire contents of the mixed wastes in the lagoon.

Similarly, EPA's attempt to focus on whether the F006 wastes traveled directly through one pipe on its way to the lagoon or whether the F006 shared a common pipe with other wastes at some point in time, misses the point. The travel route of the wastes, whether shared or discrete, is irrelevant for purposes of determining whether the invalidation of the mixture rule is applicable. It is the location where the wastes ended up, the lagoon, that matters. Here it is conceded by EPA that the lagoon harbored mixed wastes. Because of the Seventh Circuit's decision in Bethlehem the regulation at issue was left covering the management of F006 waste only in its pure form.

Nor do the cases cited by EPA[12] alter this conclusion.

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[12]EPA's reference to In the Matter of Chem-Met Services, Inc., Docket No. RCRA-V-W-011-92, 1993 RCRA LEXIS 231, (February 23, 1993), requires little comment, as it is simply inapplicable, involving a different subpart, addressing prohibitions on land disposal, and

As stated previously, EPA has cited to Ekco but failed to provide an accompanying analysis for their reliance upon the case. A review of the Ecko decisions reveals that the cases are distinguishable from the case at hand. As set forth in the January 1994 decision, Ecko did not dispute that it discharged hazardous waste to the surface impoundment, and the thrust of that decision deals with Ecko's failure to comply with the terms of a partial consent agreement. The September 1993 Ecko decision addresses a mixture of listed wastes and *groundwater*, holding simply that the "contained in" rule applies, independent of the mixture rule, when listed wastes are contained in groundwater or soil. Neither groundwater nor soil are involved here.

Next, EPA cites to Marine Shale. However, much of this case is not relevant to Spang, as it dealt with Clean Water Act and Clean Air Act violations, as well as RCRA issues. Even the RCRA issue dealt with the discrete issues of a substance's leaching capacity and the method used to collect samples. However, the Court does allude to the decision voiding the mixture rule in Shell Oil. *Id.* at 1341. In rejecting the arguments of Marine Shale that its K001 materials were waste mixtures, the court found that, aside from an absorbent material, all of the other materials were K001 waste. The court held that a substance does not lose its character as a K-listed waste under the mixture rule "unless the materials added to it change its basic composition in some significant way." *Id.* at 1344. Noting that the D.C. Circuit's decision in Chemical Waste Management, Inc. v. Environmental Protection Agency, 869 F.2d 1526, 1539 (D.C. Cir. 1989), upholding the EPA's "contained-in" rule (which provides hazardous waste is not presumed to change its character when it is combined with an environmental medium), the Fifth Circuit held that adding an absorbing agent or other inert debris to a K001 waste does not transform the waste into a new substance covered only by the mixture rule. Marine Shale, 81 F.3d at 1345. Instead, the Court identified what I would describe as the "significant alteration principle" which holds that a listed waste remains as such when there is only an "addition of a substance that results in no significant change in [its] composition. *Id.* Of note to the case at hand, the Fifth Circuit distinguished Bethlehem Steel, finding no conflict with its holding in Marine Shale and pointing out that in Bethlehem the F006 waste had been mixed with other kinds of wastewater and the addition of these wastewaters changed the basic composition of the substance at issue, thereby making a pure F006 designation inappropriate.

In accord with the conclusions I have reached in Spang is GK Technologies, a case involving the manufacturer of coated wire who employed a process which produced wastewaters. These wastewaters were mixed together and treated, forming a sludge and other wastes. Eventually the treated water ended up in a pond owned by the manufacturer. EPA's action against the manufacturer alleged that the wastewater contained listed and characteristic hazardous wastes and that the pond had been used to treat, store, or dispose of them. Among the listed wastes was F006.

The Court, after first noting that EPA can promulgate lists of hazardous wastes, noted that

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referencing the subsequent re-instatement of the invalidated "mixture" and "derived from" rules.

while some listings contain the phrase "mixtures/blends" or provide for a "threshold concentration," others do not, "indicating that mixtures would not be included in these listings." *Id.* By the Court's description, EPA, anticipating this problem, attempted to cure it by inserting the "mixture rule" and the "derived from" rules. Noting that the D.C. Circuit in Shell Oil invalidated these rules because they violated rulemaking procedures, and that the Seventh Circuit in Bethlehem Steel held that since the F006 listing does not contain language about mixtures or concentration thresholds, sludges resulting from the treatment of wastewaters from various sources did not meet the F006 listing, the Court adopted the reasoning of those cases and found that F006 wastes were not produced. The Court also rejected arguments that United States v. Marine Shale Processors, 81 F.3d 1329 (5th Cir. 1996) should be applied, noting that Marine Shale addressed a mixture of "hazardous waste with an absorbent material," as opposed to Bethlehem which involved the "mixture of various wastewaters or the mixture of hazardous and nonhazardous wastes." *Id.*

While EPA also argued in GK Technologies that the Court's focus should be directed towards whether the sludges are primarily from electroplating operations, calling attention to the fact that less than 1% of the wastewaters in Bethlehem were from electroplating operations, while in Marine Shale virtually all of the pond's discharge wastewaters were hazardous wastes, the Court rejected this approach. The Court observed that Bethlehem was not concerned about percentages, but only whether the waste at issue was a mixture, and whether the mixture met the listing. Speaking to the F006 listing, the Court concluded that since the sludges at issue were produced from mixed, not pure, wastewaters, none of the wastewater sludges met the listing.

As mentioned previously, the Environmental Appeals Board has weighed in on this issue in the Hardin County decision. As Judge McCallum observed in his concurring opinion in Hardin County : [I]t is plain beyond peradventure that, by invalidating the mixture rule, **the court was declaring that the Agency had not succeeded in promulgating a rule that would confer jurisdiction over mixtures of hazardous and non-hazardous waste.** The Agency cannot salvage its jurisdiction over waste mixtures through patchwork regulatory interpretation that has exactly the same practical effect as the invalidated rule." *Id.* at 1994 RCRA LEXIS 36, 5 E.A.D. 208. (emphasis added).

Having concluded that Bethlehem is determinative, I also make the observation that, but for the vacating of the mixture rule, I would have agreed with Judge Greene that Spang violated the regulations at issue here. In effect, Spang got a pass as a beneficiary of the rulemaking misstep involving EPA's failed attempt to close a major loophole . Because of EPA's rulemaking error, parties such as Spang, could change a waste's hazardous character by mixing it with non-hazardous waste. Thus, temporarily, until repromulgated on an interim basis on March 3,1992, a major loophole existed for such waste mixtures. See 57 Fed. Reg. 7628. EPA concedes that, because of the effective repromulgation, the impact of Bethlehem Steel has been limited.[13] EPA

[13]Even here, the impact would appear to be limited, as the parties stipulated that as of July 1990 no wastewater was being discharged to any surface impoundment at Spang's facility.

Post-Hearing Brief at 25. Were Spang to be cited today for a similar situation under the same facts, clearly a violation would be upheld. Finally, I note that while Spang was the beneficiary of the rulemaking gaff, EPA must bear some responsibility for the enforcement gap as it was on notice for the ten year period of the Shell Oil litigation that the mixture rule might be vacated due to the procedural defect during its promulgation. As pointed out by the EAB: "[EPA] therefore knew that there was a risk of a potential enforcement gap." Hardin County at 1994 RCRA LEXIS 36, 32; 5 E.A.D. 189, 202.

Thus, I conclude that the Bethlehem Steel holding is outcome determinative in Spang, absent EPA being able to show in a supplemental hearing that all of the waste in the lagoon is hazardous or that under the "no significant alteration principle," the waste was essentially all F006 or that the hazardous F006 waste was mixed only with an absorbent material or other inert debris or environmental media such as groundwater or soil. I note that such facts would be at odds with the record and arguments in the record.[14]

Accordingly, EPA is ordered to submit a statement within 30 days of this Order indicating whether it accepts or declines the opportunity for a supplemental hearing. If it accepts, EPA must include a statement outlining the theory upon which it intends to demonstrate violations that are not in conflict with this holding.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: February 18, 1998
Washington, D.C.

Stipulation No. 7, Stipulations, filed July 19, 1990.

[14]In its Motion for Accelerated Decision as to Liability, EPA identified the hazardous wastes *solely* as F006. Motion at 2. See also EPA's Reply to Spang and Company's Response to EPA's Motion for Accelerated Decision at 2, 3.

IN THE MATTER OF SPANG AND COMPANY, Respondent
Docket No. RCRA-III-169

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Pending Opportunity for Supplemental Hearing,** dated February 18, 1998, was sent in the following manner to the addresses listed below:

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Dated: February 18, 1998
Washington, D.C.