William & Mary Environmental Law and Policy Review

Volume *19 (1994-1995)*
Issue 1

Article 3

October 1994

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Sarah L. Inderbitzin, *Throwing Out the Baby with the Bath Water: The Impact of United States v. Goodner Brothers Aircraft*, 19 Wm. & Mary Envtl. L. & Pol'y Rev. 51 (1994), https://scholarship.law.wm.edu/wmelpr/vol19/iss1/3

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THROWING OUT THE BABY WITH THE BATH WATER: THE IMPACT OF *UNITED STATES V. GOODNER BROTHERS AIRCRAFT*

SARAH L. INDERBITZIN*

I. INTRODUCTION

In 1976, Congress promulgated the Resource Conservation and Recovery Act ("RCRA")[1] to address the problems caused by improper handling of hazardous waste which resulted in thousands of leaking, unregulated sites across the United States.[2] RCRA was designed to create a "cradle to grave" system for handling waste from its generation through its disposal.[3] RCRA covers the management of both solid waste and hazardous waste.[4] Hazardous waste is partly defined as "solid waste" which may "pose a substantial present or potential hazard to human health or the environment when improperly stored, transported, or disposed of, or otherwise managed."[5]

Whether a waste is classified as "hazardous" is critical in determining if the waste is subject to RCRA hazardous waste regulatory

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This paper was written by Ms. Inderbitzin in her private capacity. No official support or endorsement by the Department of the Interior, any person or office within the agency, or any other agency of the Federal government is intended or inferred.

1. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6987 (1988)).
2. James C. Morriss, III & Cheryl L. Coon, *Who's on First, What's on Second, or a Discussion of the Scope and Potential Misuse of the "Mixture" and "Derived-From" Rules and "Contained-In" Policy*, 44 SW. L.J. 1531, 1532 (1991).
3. Shell Oil Co. v. EPA, 950 F.2d 741, 745 (D.C. Cir. 1991).
4. *Id.*
5. 42 U.S.C. § 6903(5) (1988).

requirements.[6] The Environmental Protection Agency ("EPA") defined the following four categories of hazardous waste: (1) the substance is listed by EPA as a hazardous waste,[7] (2) the substance exhibits any of the characteristics of hazardous waste (corrosivity, ignitability, toxicity or reactivity),[8] (3) the substance comes from the treatment, storage or disposal of hazardous waste (the "derived-from" rule)[9] or (4) the substance is a mixture of hazardous and solid waste (the "mixture rule").[10]

Once a substance is identified as a hazardous waste, it must meet the requirements imposed by Subtitle C of RCRA.[11] If a person generates, transports, treats, stores or disposes of a substance which falls into one of the four categories defined as hazardous waste without complying with Subtitle C requirements, it is a violation of Subchapter C and subject to an EPA enforcement action.[12] EPA used the mixture rule as a basis for such RCRA enforcement actions from its promulgation in 1980[13] until it was invalidated on procedural grounds in 1991 by *Shell Oil Co. v. Environmental Protection Agency*.[14] The *Shell Oil* decision was then applied retroactively, rendering the mixture rule void *ab initio* in *United States v. Goodner Brothers Aircraft*.[15]

In an effort to close the regulatory gap left by those decisions, EPA has attempted to utilize state mixture rules in pending enforcement actions based on the mixture rule.[16] However, courts have disallowed EPA from utilizing state mixture rules in federal enforcement proceedings because the scope of the state rules is greater than that of the federal mixture rule.[17]

An additional problem created by *Shell Oil*, *Goodner Brothers Aircraft* and subsequent cases is that parties found liable for RCRA violations in past proceedings based on the mixture rule may now attempt

6. Richard M. Filosa, United States v. Goodner Brothers Aircraft, Inc.: *Environmental Justice or Disaster?*, 28 NEW ENG. L. REV. 133 (1993). *See also* Morriss, *supra* note 2, at 1535.

7. 40 C.F.R. § 261.3(a)(2)(ii) (1993).

8. *Id.* § 261.3(a)(2)(i).

9. *Id.* *See also infra* note 31.

10. 40 C.F.R. § 261.3(a)(2)(iv). *See also infra* note 30 and accompanying text.

11. 42 U.S.C. §§ 6921-6934 .

12. Filosa, *supra* note 6, at 137.

13. *Id.* at 133.

14. 950 F.2d 741 (D.C. Cir. 1991). *See infra* notes 33-61 and accompanying text.

15. 966 F.2d 380 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 967 (1993). *See infra* notes 62-98 and accompanying text.

16. *See infra* notes 99-135 and accompanying text.

17. *See infra* notes 99-135 and accompanying text.

to challenge those outcomes. Because those decisions essentially "threw the baby out" (by retroactive application of the *Shell Oil* decision and cutting off state mixture rules as a source of enforcement) "with the bath water" (invalidation of the mixture rule), it appears EPA has no choice but to revise its litigation strategy in pending cases to rely on other RCRA regulations in order to impose liability.

This paper examines the impact of *Goodner Brothers Aircraft* on the pending mixture rule cases brought by EPA. Part II discusses the regulatory background of the mixture rule. Part III examines the *Shell Oil* decision. Part IV analyzes the *Goodner Brothers Aircraft* decision. Part V contains an exploration of the cases brought after the *Goodner Brothers Aircraft* decision and the implications to EPA's enforcement scheme. Part VI summarizes and concludes the various discussions contained in this paper.

II. REGULATORY BACKGROUND OF THE "MIXTURE RULE"

RCRA required EPA to develop and promulgate criteria for identifying hazardous wastes and to list specific wastes.[18] In addition, EPA was to promulgate regulations governing generators, transporters and operators of treatment, storage and disposal facilities "as may be necessary to protect human health and the environment."[19] Congress gave EPA a statutory deadline of April 21, 1978, to promulgate the regulations.[20]

After publication of a Notice of Intent to Develop Rulemaking,[21] an Advanced Notice of Proposed Rulemaking,[22] and circulation of drafts of regulations for comments,[23] EPA issued proposed regulations which covered most of the standards required by RCRA.[24] However, when EPA failed to meet its April deadline for issuing the final regulations, it was sued to force it to do so.[25] The District Court initially ordered EPA to

18. 42 U.S.C. § 6921(a); *Shell Oil*, 950 F.2d at 745.
19. *Id.* §§ 6922-6924; *Shell Oil*, 950 F.2d at 745-46.
20. *Id.* § 6921(a).
21. 42 Fed. Reg. 9803 (1977) (to be codified at 40 C.F.R. ch. 1) (proposed Feb. 11, 1977).
22. 42 Fed. Reg. 22,332 (1977) (to be codified at 40 C.F.R. pt. 250) (proposed May 2, 1977).
23. *Shell Oil*, 950 F.2d at 746.
24. 42 Fed. Reg. 58,946-59,022 (1978) (to be codified at 40 C.F.R. pt. 250) (proposed Dec. 18, 1978); *Shell Oil*, 950 F.2d at 746.
25. *Shell Oil*, 950 F.2d at 746.

promulgate the final regulations by December 31, 1979.[26] However, the court modified its order to require EPA to "use its best efforts"[27] to issue the regulations by April 1980, due to the complex nature of those regulations.[28]

On May 19, 1980, EPA published the revisions to the final rule and interim final rule for identifying and listing hazardous wastes.[29] Included in the regulations was the so-called "mixture rule" which provides that a waste will be treated as hazardous if "[i]t is a mixture of solid waste and one or more hazardous wastes listed in subpart D of this part and has not been excluded from paragraph (a)(2) of this section under §§ 260.20 and 260.22 of this chapter . . . ."[30]

Following publication, more than fifty petitions were submitted challenging the mixture rule.[31] The challenges were made up of industry and public interest groups and were eventually consolidated as *Shell Oil Co. v. Environmental Protection Agency*.[32]

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26. *Id.*
27. *Id.*
28. *Id.*
29. 45 Fed. Reg. 33,066 (1980); *Shell Oil*, 950 F.2d at 746. The agency noted in the *Federal Register* that, because of the pressures imposed by time and limited information, it "was unable to avoid underregulation and overregulation." *Shell Oil*, 950 F.2d at 746 (citing 45 Fed. Reg. 33,088 (1989)).
30. 40 C.F.R. § 261.3(a)(2)(ii) (1993) (initially promulgated at 45 Fed. Reg. 33,119 (1980)).
31. *Shell Oil*, 950 F.2d at 746. The petitions also challenged the "derived from" rule which automatically defined residues resulting from the treatment of any listed waste as hazardous. 40 C.F.R. § 261.3(c)(2) (1991); *Shell Oil*, 950 F.2d at 745. *See also* Alex S. Karlin, *1991-1992 Legal Developments: Resource Conservation and Recovery Act*, *in* ENVIRONMENTAL LAW UPDATE 1992, at 11-18 (PLI Litig. & Admin. Practice Course Handbook Series No. H-445, Sept.-Oct. 1992) (discussing the legal challenges and court dispositions regarding the "mixture rule" and "derived-from rule"). However, this article will only address the challenges to the mixture rule since the arguments regarding both rules are substantially the same.
32. 950 F.2d at 746. *See* Alan Gates, *Does Arkansas or (Anyone Else) Have a Valid Mixture or Derived-From Rule?*, 15 U. ARK. LITTLE ROCK L.J. 697, 701-02 (1993). The court deferred briefing on the challenges in order to give the parties time to settle the issues. *Shell Oil*, 950 F.2d at 746; Gates, *supra* at 702. Most of the issues were resolved by settlement, amendments to RCRA or EPA regulations or because some petitioners failed to continue their lawsuit. *Shell Oil*, 950 F.2d at 746; *Gates, supra* at 702. In January 1987 EPA finally identified the remaining issues unlikely to be settled. *Shell Oil*, 950 F.2d at 746; Gates, *supra* at 702.

III. INVALIDATION OF THE "MIXTURE RULE": *SHELL OIL CO. V. ENVIRONMENTAL PROTECTION AGENCY*

In *Shell Oil* the consolidated petitioners asserted in their remaining challenge that inclusion of the mixture rule in the final regulations deprived them of the adequate notice and opportunity to comment required by the provisions of the Administrative Procedure Act ("APA")[33] and RCRA.[34] RCRA provides that "the [EPA] Administrator shall, *after notice and opportunity for public hearing, and after consultation with appropriate Federal and State agencies*, develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste . . . ."[35] RCRA also requires EPA to promulgate rules in accordance with APA requirements.[36] The APA requires that notice of a proposed rule be published in the *Federal Register* to allow opportunity for public comment for a specified period, evaluation of comments received, and promulgation of the rule in its final form.[37]

The court in *Shell Oil* discussed the inquiry it must undertake when a final rule is challenged for procedural defects.[38] Whether notice is adequate is determined by "the relationship between the proposed regulations and the final rule."[39] If the final rule is a "logical outgrowth" of the proposed rule, the court will validate the rule in spite of differences between the two.[40] However, if the difference between the final and proposed rules is "too sharp," it will not be considered adequate notice and opportunity for comment.[41]

The court found, and EPA acknowledged, that the final mixture rule lacked a clear antecedent in the proposed rule.[42] However, EPA argued

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33. 5 U.S.C §§ 701-706 (1988).
34. *Shell Oil*, 950 F.2d at 746-47; 42 U.S.C. §§ 6921(a), 6974(b), 6976 (1988). Petitioners also argued that EPA expanded its statutory authority in promulgating the mixture rule as part of the definition of hazardous waste. *Shell Oil*, 950 F.2d at 746. However, the court did not address this substantive argument because the rule was vacated on procedural grounds. *Id.* at 752.
35. 42 U.S.C. § 6921(a) (emphasis added).
36. 42 U.S.C § 6976 (1976) (citing 5 U.S.C. §§ 701-706).
37. 5 U.S.C. § 553 (1988). *See also* Filosa, *supra* note 6, at 139-40.
38. *Shell Oil*, 950 F.2d at 744-45.
39. *Id.* at 747.
40. *Id.*
41. *Id.* (citing American Fed'n of Labor v. Donovan, 757 F.2d 330, 338-39 (D.C. Cir. 1985)).
42. *Id.* at 749.

that it "intended" to include the mixture rule in the proposed regulations and added it to the final rules to "close 'a major loop hole in the Subtitle C management system.'"[43]

The "loop hole" EPA sought to plug was its fear that generators of hazardous waste could avoid hazardous waste requirements by simply mixing Subpart D wastes with nonhazardous solid waste.[44] This mixing would thus create a waste that exhibited none of the testable characteristics of hazardous waste but would still pose an environmental threat for other reasons.[45] EPA argued that the rule "merely clarifi[ed]" its intent that listed wastes remain hazardous until delisted and that generators could not "reasonably assume" that they could remove a waste from the hazardous list by just mixing it with nonhazardous waste.[46] Thus, EPA concluded that industry could not argue that the mixture rule was "a bolt from the blue" since the rule was foreseeable.[47]

The court was "unimpressed" by the "scanty evidence" EPA offered in support of its position.[48] EPA relied on comments from industry and its responses to support its position that the notice was adequate.[49] The court noted that a comment from industry stating that it was unreasonable to make a listed waste hazardous, no matter what its concentration, referred to the initial classification of a waste as hazardous, not to the mixing of wastes.[50] The court also rejected EPA's assertion that its response to a question from the American Mining Congress, that a waste could only be removed from RCRA regulation by delisting, should have alerted industry that delisting was the only way to escape RCRA regulation.[51]

Based on this "scanty evidence" in the proposed rulemaking, the court in *Shell Oil* held that the differences between the proposed and final rules were too substantial to find that the mixture rule was a "logical outgrowth" of the proposed regulation.[52] EPA's "unexpressed intention" was not sufficient to convert the final rule into a logical outgrowth of the

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43. *Id.* (quoting 45 Fed. Reg. 33,095 (1980)).
44. *Id.*
45. *Id.*
46. *Id.* at 749-50.
47. *Id.* at 750 (citing W.J.G. Tel. Co. v. FCC, 675 F.2d 386, 388-90 (D.C. Cir. 1982)).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 752.

proposed rule that the public could have anticipated.[53] The agency did not provide the required notice and thus deprived the public of the "opportunity to anticipate and criticize the rules or to offer alternatives."[54] Accordingly, the mixture rule was "set aside" and "remanded" to EPA.[55]

As noted, the court "set aside" and "remanded" the mixture rule.[56] However, the court created confusion as to the status of the rule by subsequently stating that, since it had "vacate[d]" the rule on procedural grounds, it would not address the substantive issues.[57] EPA, concerned that the *Shell Oil* decision would be applied retroactively in pending enforcement cases, filed a Motion for Clarification.[58] In its motion, EPA specifically requested that the court add language to the *Shell Oil* decision that the mixture rule was vacated prospectively only.[59] The court denied EPA's motion without comment[60] and thus paved the way for the decision in *United States v. Goodner Brothers Aircraft*.[61]

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53. *Id.* at 751.
54. *Id.*
55. *Id.* at 752. However, the court, concerned about the possible "dangers" presented by discontinuity of hazardous waste regulation, suggested that pending full notice and comment, EPA should reenact the mixture rule on an interim basis pursuant to the APA exemption for "good cause." *Id.* (citing 5 U.S.C. § 553(b)(3)(B); Mid-Tex Elec. Coop., Inc. v. FERC, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987)).
56. *Id.*
57. *See* Mary Ellen Henry, *Environmental Law—Retroactive Vacature of the Mixture and Derived-From Rules Under RCRA.* United States v. Goodner Bros. Aircraft, Inc., *966 F.2d 380 (8th Cir. 1992)*, 15 U. ARK. LITTLE ROCK L.J. 727 (1993); Filosa, *supra* note 6, at 141.
58. Appellant's Response to Appellee's Additional Brief at 9, United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992) (No. 91-2466).
59. *Id.*; *see* Filosa, *supra* note 6, at 141; Gates, *supra* note 32, at 704. EPA also stated in the *Federal Register* that it believed the *Shell Oil* decision should not be applied retroactively when it readopted the mixture rule on an interim basis. 57 Fed. Reg. 7628, 7630-31 (1992) (to be codified at 40 C.F.R. pt. 261). *See* Gates, *supra* note 32, at 703-04.
60. Shell Oil Co. v. EPA, No. 80-1532 (D.C. Cir. Mar. 5, 1992) (order denying Motion for Clarification and dismissing Motion for Leave to File as Amicus Curiae).
61. 966 F.2d 380 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 967 (1993). *See, e.g.*, Filosa, *supra* note 6, at 141; Henry, *supra* note 57.

IV. RETROACTIVE VACATURE OF THE MIXTURE RULE: *UNITED STATES V. GOODNER BROTHERS AIRCRAFT*

Goodner Brothers Aircraft, Inc., and Junior Goodner, its owner and operator, were criminally convicted by the district court for violations of section 6928(d)(2)(A) of RCRA.[62] The violations arose from disposal of spent paint remover mixed with removed paint on the Goodner Brothers Farm.[63] The Arkansas Department of Pollution Control and Ecology and EPA discovered the violation when a neighbor reported that she saw "two men dumping creamy beige, toxic-smelling waste into a ravine" on the farm.[64]

Subsequent testing of samples of the waste revealed that it contained up to twenty percent of a listed hazardous waste.[65] The district court sentenced Goodner Brothers Aircraft to five years probation, a $150,000 fine and a $250 special assessment.[66] Junior Goodner was sentenced to a $7,500 fine, fifteen months in prison and a $200 special assessment.[67]

The Eighth Circuit overturned the convictions because they were based partly on the mixture rule invalidated by *Shell Oil*.[68] The district court had instructed the jury that mixtures of listed hazardous waste, as well as listed wastes, are hazardous waste.[69] The court further instructed the jury that one element necessary to prove the RCRA violation was that EPA had either listed or identified the waste at issue as hazardous.[70] Thus,

62. *Goodner Bros. Aircraft*, 966 F.2d at 382-83. Section 6928(d)(2)(A) makes it a crime to "knowingly treat[], store[], or dispose[] of any hazardous waste . . . without a permit . . . ." 42 U.S.C. § 6928(d)(2)(A).

63. *Goodner Bros. Aircraft*, 966 F.2d at 382-83. The Goodner Brothers Aircraft business repainted airplanes. *Id.* at 382. The process involved spraying undiluted paint remover on the planes which caused the paint to dissolve and slide off the planes. *Id.* The planes were then sprayed with high pressure water to remove the dissolved paint and solvent. *Id.* The waste was collected off the ground, put into barrels and disposed of in three pits on the Goodner Brothers Farm. *Id.* at 382-83.

64. *Id.* at 383 (quoting the testimony of the witness).

65. *Id.* ("[T]he samples from the dumpsites were found to contain up to 20% phenol and, in several cases, up to 20% methylene chloride").

66. *Id.*

67. *Id.*

68. *Id.* at 383-85. The Eighth Circuit reversed the counts based upon the mixture rule and remanded them for retrial. *Id.* at 385.

69. *Id.* at 383-84.

70. *Id.* at 383.

the jury could have based the convictions on the Goodner waste being either listed hazardous waste or mixed waste.[71]

When a jury verdict may be supported on two grounds and it is impossible to determine which ground the jury selected, the verdict must be set aside if one ground has been found unconstitutional or illegal.[72] In *Goodner Brothers Aircraft*, the jury verdict could have been based on the mixture rule found to be illegal by the District of Columbia Circuit in *Shell Oil*.[73] Accordingly, the Eighth Circuit set aside the verdict since it was impossible to tell whether the jury found the Goodner waste to be a listed waste or mixed waste.[74]

Unlike the court in *Shell Oil*, the court in *Goodner Brothers Aircraft* chose to address the retroactivity issue when EPA argued that invalidation of the mixture rule did not apply retroactively.[75] EPA asserted that because the court in *Shell Oil* had the authority to leave the mixture rule in place while EPA corrected its procedural shortcomings, "under the same authority . . . it chose to invalidate the rule only prospectively."[76] EPA supported its assertion by pointing to the court's language in *Shell Oil* that promulgation of an interim mixture rule would avoid "*discontinuity* in the regulation of hazardous wastes."[77] EPA thus contended that the *Shell Oil* court intended to invalidate the rule prospectively "because discontinuity would not exist if the rule was void ab initio."[78]

The Eighth Circuit rejected EPA's argument "because it [was] inconsistent with the language in *Shell Oil* that specifically pronounce[d] that the rule [was] 'vacated' and 'set aside.'"[79] The court gave great weight to a prior District of Columbia Circuit decision that defined "vacate" to mean "'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or

71. *Id.* at 384.
72. Griffin v. United States, 112 S. Ct. 466, 474 (1991).
73. *Goodner Bros. Aircraft*, 966 F.2d at 384.
74. *Id.* at 384-85.
75. *Id.* at 384.
76. *Id.*
77. *Id.* (quoting *Shell Oil*, 950 F.2d at 752) (emphasis added). *See also supra* note 55.
78. *Goodner Bros. Aircraft*, 966 F.2d at 384. EPA reasoned that if there never had been a mixture rule, there could be no discontinuity for the court to be concerned about since the rule would never have existed in the first place. *Id.*
79. *Id.* (quoting *Shell Oil*, 950 F.2d at 752).

validity; to set aside.'"[80] Thus, the court concluded that the mixture rule was invalidated retroactively.[81]

The circuit court also found no merit in EPA's "discontinuity" argument since the court's language in *Shell Oil* could have been referring to the practical effect that invalidation of the mixture rule might have on compliance practices of the regulated industries, and not on its legal force.[82]

EPA's final argument was that invalidation of the mixture rule should apply only prospectively pursuant to the *Chevron Oil Co. v. Huson*[83] test. Under the *Chevron Oil* test a rule should not be invalidated retroactively if retroactive application of a decision would: (1) "establish a new principle of law, including overruling clear past precedent,"[84] (2) "further retard the rule's operation,"[85] and (3) impose "inequity . . . by retroactive application."[86] EPA pointed out that retroactive application would overrule clear precedent because it had relied on the mixture rule in enforcement proceedings since its promulgation in 1980.[87] In addition, EPA noted that the rule had a valuable purpose since it plugged a regulatory "loophole"[88] by preventing dilution as a treatment for hazardous waste, and was invalidated on procedural, not substantive, grounds.[89] Finally, retroactive application would be inequitable by rewarding those who had not complied with the mixture rule for the period it was in place and presumptively valid.[90]

The Eighth Circuit rejected EPA's reliance on the *Chevron Oil* test because retroactive application of the decision in *Shell Oil* was "consistent with the Supreme Court's recent decision in . . . which the Court announced that full retroactivity is the normal rule in civil cases and

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80. *Id.* (quoting Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 797 (D.C. Cir. 1983)).
81. *Id.* at 385 ("[W]e find invalidation of the mixture rule applies retroactively.").
82. *Id.* at 384-85.
83. 404 U.S. 97 (1971).
84. *Chevron Oil Co.*, 404 U.S. at 106.
85. *Id.* at 107.
86. *Id.*
87. Additional Brief for Appellee at 9, United States v. Goodner Bros. Aircraft, 966 F.2d 380 (8th Cir. 1992) (No. 91-2466). *See also* Henry, *supra* note 57.
88. *Shell Oil*, 950 F.2d at 749; *see supra* notes 43-45 and accompanying text.
89. Additional Brief for Appellee at 9, *Goodner Bros. Aircraft* (No. 91-2466). *See also* Henry, *supra* note 57.
90. Additional Brief for Appellee at 9, *Goodner Bros. Aircraft* (No. 91-2466). *See also* Henry, *supra* note 57.

limited the applicability of *Chevron Oil*['s] . . . test for prospectivity."[91] *James B. Beam Distilling Co.* held that when a new rule of civil law is applied to the litigants in the case in which it was announced, the new rule must be given full retroactive effect.[92] The court in *Goodner Brothers Aircraft* reasoned that because the court in *Shell Oil* did not reach the substantive merits of the mixture rule, and invalidated the rule on procedural grounds, it applied its decision to the litigants in that case.[93] Otherwise, the *Shell Oil* court would have had to address the substantive issue.[94]

EPA also attempted to avoid reversal by asserting that it could rely on the Arkansas mixture rule rather than the vacated federal rule.[95] The court found reliance on the state rule "inappropriate" because (1) Goodner Brothers Aircraft was convicted under the federal statute and (2) the federal law did not incorporate the Arkansas definitions of hazardous waste.[96]

The court in *Goodner Brothers Aircraft* seems to have incorrectly analyzed the applicability of state mixture rules.[97] EPA regulations specifically adopt state rules into the federal RCRA program as long as they are not more stringent or greater in scope than the federal rules.[98] As a result of the faulty reasoning in *Goodner Brothers Aircraft* regarding the applicability of state mixture rules, the door was left open for subsequent cases to address that issue.

V. IMPACT OF *GOODNER BROTHERS AIRCRAFT*: STATE MIXTURE RULES MAY NOT BE USED IN PENDING FEDERAL PROCEEDINGS

In *Hardin County I*[99] EPA filed a civil complaint alleging that county operations of a municipal solid waste landfill violated RCRA based

91. *Goodner Bros. Aircraft*, 966 F.2d at 385 (quoting Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1074 (8th Cir. 1992), and citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)).

92. *James B. Beam Distilling Co.*, 501 U.S. 529.

93. *Goodner Bros. Aircraft*, 966 F.2d at 385.

94. *Id.*

95. *Id.*

96. *Id.*

97. Filosa, *supra* note 6, at 154-55.

98. *Id.*; 40 C.F.R. §§ 271.1-.26 (1993).

99. *In re* Hardin County, No. RCRA-V-W-89-R-29, 1992 RCRA LEXIS 23 (EAB July 10, 1992).

on the mixture rule.[100] The county argued that vacature of the mixture rule by *Shell Oil* rendered it void *ab initio*.[101] The Administrative Law Judge ("ALJ") agreed that the mixture rule's invalidation applied retroactively and dismissed EPA's complaint.[102] Although the ALJ found *Goodner Brothers Aircraft* distinguishable because it was based on a criminal complaint and thus required "special considerations not applicable in the civil context,"[103] he still found that decision persuasive authority.[104] Thus, the *Goodner Brothers Aircraft* retroactivity ruling applies to both pending civil and criminal cases based on the mixture rule.

EPA appealed the ALJ's decision dismissing its complaint to the Environmental Appeals Board ("EAB") in *Hardin County II*.[105] The EAB remanded the case for further consideration because the record was unclear as to whether the landfill accepted shipments of "hazardous waste."[106] Thus, the EAB could not determine whether the federal or State of Ohio mixture rule applied.[107] The court held, however, that it was error for the ALJ to dismiss the case based on *Shell Oil* because that case would not be applicable "if the federal mixture rule [was] not implicated in [the] case."[108] The EAB reasoned that if the state rule were applicable, it would have been promulgated by procedures different from those of the federal mixture rule and thus would not be invalidated by *Shell Oil*.[109] In addition, in states authorized by EPA to administer their hazardous waste program, EPA may bring an enforcement action for violations of the state program.[110] Thus, the case was remanded to determine if the state was authorized at the time of the violation, thereby making the state mixture rule available for EPA's enforcement proceeding.

On remand in *Hardin County III*,[111] the ALJ again dismissed EPA's complaint based on EPA's prior interpretation of the mixture rule and EPA

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100. *Id.*
101. *Id.* at *8.
102. *Id.* at *15.
103. *Id.* at *11 n.6.
104. *Id.*
105. *In re* of Hardin County, No. RCRA-V-89-29, 1992 RCRA LEXIS 102 (EAB Nov. 6, 1992).
106. *Id.* at *15.
107. *Id.*
108. *Id.* at *12.
109. *Id.* at *14
110. *Id.* at *6-8.
111. *In re* Hardin County, No. RCRA-V-W-89-R-29, 1993 RCRA LEXIS 109 (EAB May 27, 1993).

guidance regarding EPA enforcement of state hazardous waste regulations.[112] Traditionally EPA interpreted section 3009 of RCRA to authorize EPA to enforce state regulations that are more stringent than the federal regulations but not broader in scope.[113] In an internal EPA guidance document, the agency set forth criteria for determining whether a state regulation is broader in scope or more stringent than the federal requirement by asking:

> (1) Does imposition of the State requirement increase the size of the regulated community beyond that of the Federal program?
>
> A State requirement that does increase the size of the regulated community is more "extensive", not more stringent, and is an aspect of the State program which goes beyond the scope of the Federally-approved program. Examples of requirements that are broader in scope include: . . . listing of wastes which are not in the Federal universe of wastes.
>
> If the requirement does not increase the size of the regulated community, the following question should be asked.
>
> (2) Does the requirement in question have a direct counterpart in the Federal regulatory program?
>
> If the State requirement does not have a direct Federal counterpart, the requirement is also beyond the scope of the Federal regulatory program.[114]

EPA argued that the scope of the regulated community is determined by listing the hazardous waste, not by the regulations which

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112. *Id.* at *24-28.

113. *Id.* at *8-9. *See also* EPA Mem., *EPA Enforcement of RCRA-Authorized State Hazardous Waste Laws and Regulation*, Directive No. 9541.01-82x (March 15, 1982).

114. United States v. Reticel Foam Corp., 858 F. Supp. 726, 742 (E.D. Tenn. 1993) (quoting a memorandum prepared by Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response, Doc. 174, Exhibit 4, Source Doc. #9541.04(84) at 2-3 (May 21, 1984)).

determine how long it remains hazardous.[115] Thus, EPA concluded that the state mixture rule only made the program "more stringent" by clarifying how long the waste remained regulated under Subtitle C but did not "expand" the regulated community.[116] The ALJ rejected that argument because, according to EPA's own interpretations at the time the mixture rule was promulgated, it "clearly increased the size of the regulated community."[117]

EPA also asserted that the original listing of the waste as hazardous in the federal program was the direct counterpart to the state mixture rule.[118] EPA concluded that the mixture rule is just a more "stringent" requirement for how to exit RCRA regulation.[119]

This argument was also rejected because invalidation of the mixture rule by the *Shell Oil* decision meant "there is no direct federal counterpart to the Ohio rule."[120] Thus, the Ohio mixture rule was "broader in scope" than the federal rule and could not be enforced under section 271.1[121] of EPA regulations.[122]

The ALJ's decision was affirmed by the EAB in *Hardin County IV*.[123] That case was affirmed based on the same principles announced in *Hardin County III*.[124] The EAB stated:

> It is our view that as a result of the *Shell Oil* decision the size of the regulated community under the Ohio mixture rule is larger than the size of the regulated community under the surviving provisions of the federal hazardous waste program . . . . Consequently, the agency's own guidance dictates dismissal of this proceeding.[125]

115. *Hardin County III*, 1993 RCRA LEXIS at *11.
116. *Id.*
117. *Id.* at *24. The court referenced EPA's statement that the mixture rule was enacted to cover generators who could avoid RCRA by simply mixing listed waste with solid waste. *Id.* (citing 45 Fed. Reg. 33,095 (1980)).
118. *Hardin County III*, 1993 RCRA LEXIS at *11.
119. *Id.* at *11-13.
120. *Id.* at *27.
121. 40 C.F.R. § 271.1 (1993).
122. *Hardin County III*, 1993 RCRA LEXIS at *27.
123. *In re* Harding County, No. RCRA-V-W-89-R-29, 1994 RCRA LEXIS 6 (EAB Apr. 12, 1994).
124. *Appeals Board Rules EPA Cannot Enforce Ohio Mixture Rule, Affecting Pending Cases*, Daily Envtl. Rep. (BNA), at AA-2 (Apr. 13, 1994) [hereinafter *Appeals Board*].
125. *Id.*

Thus, the *Hardin County* series of cases has cumulated into a decision which eliminates use of state mixture rules in federal enforcement proceedings.

Industry representatives in pending mixture rule cases have reacted favorably.[126] An attorney for Bethlehem Steel, while awaiting the Seventh Circuit decision in *United States v. Bethlehem Steel Corp.*,[127] stated that the EAB ruling would be helpful and that he would send notice of the decision to the Seventh Circuit panel to assist them in their decision.[128] In addition, that industry representative indicated that the EAB decision also could have favorably affected *United States v. Reticel Foam Corp.*,[129] wherein the district court magistrate recommended that EPA's complaint be dismissed based on invalidation of the mixture rule.[130]

The *Hardin County IV* decision will also have an impact on the final decision in *In re Amoco Oil Co.*[131] In that case EPA filed actions against Amoco for violations of Virginia's hazardous waste regulations, including the Virginia mixture rule.[132] After the decision in *Shell Oil*, Amoco filed a Motion for Dismissal of the counts which relied on the invalidated federal mixture rule.[133] EPA once again attempted to argue that the state rules were not broader in scope than the federal rules, only more stringent.[134] The ALJ declined to address EPA's arguments regarding the enforceability of the state mixture rule pending the outcome of the *Hardin*

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126. *Id.*

127. United States v. Bethlehem Steel Corp., 1994 U.S. App. LEXIS 26,963 (7th Cir. 1994).

128. *Appeals Board, supra* note 124, at AA-1.

129. 858 F. Supp. 726 (E.D. Tenn. 1993).

130. *Appeals Board, supra* note 124, at AA-1. In *Reticel Foam Corp.*, EPA advanced substantially the same arguments as it had in *Hardin County*: that (1) the Tennessee rule provided authority for the federal government to prosecute the case, (2) RCRA authorizes EPA to prosecute defendants for violations of state rules, (3) the Tennessee rule was properly adopted under state administrative procedures and (4) once a state is "authorized," the applicable state regulations apply "in lieu of" the federal regulations. *Reticel Foam*, 858 F. Supp. at 740-41. Using the same analysis as that adopted by the EAB in *Hardin County IV*, the magistrate recommended that the complaint be dismissed because the state mixture rule did not have a direct federal counterpart and was beyond the scope of the federal regulatory program. *Id.* at 742-43.

131. No. RCRA-III-225, 1993 RCRA LEXIS 116 (U.S. Envtl. Protection Agency Sept. 15, 1993).

132. *Id.* at *1.

133. *Id.* at *8-9.

134. *Id.* at *9.

County case.[135] Given the outcome of *Hardin IV*, it is likely that the ALJ will rule that EPA may not enforce the Virginia mixture rule.

There are, however, two bright spots on the EPA enforcement forefront. First, the *Hardin County IV* case did not decide whether the Ohio mixture rule survives the federal rule because the outcome of the case was determined by EPA's lack of authority to enforce the Ohio rule.[136] In addition, the language in *Hardin County II* indicates that state mixture rules may survive invalidation of the federal mixture rule if properly promulgated pursuant to state procedures.[137] Thus, until a court decides otherwise, *states* may still enforce cases brought by the state based on their own mixture rules. However, this does not assist EPA in its prosecution of pending cases based on state mixture rules and, in all likelihood, will result in dismissal of those cases.

Second, in *In the Matter of Chem-Met Services*,[138] the ALJ found that, in some instances, waste defined as hazardous by the mixture rule could also be covered by other existing regulations.[139] In that case the waste at issue was listed as a hazardous waste in EPA regulations other than the mixture rule,[140] and had not been excluded from listing by other provisions of that rule.[141] In such instances invalidation of the mixture rule would have no effect on the outcome of the case and thus would not relieve the defendant of liability.[142] Thus, if EPA can cite to regulations other than the mixture rule as applicable to the hazardous waste in a pending proceeding, it will be able to pursue enforcement of those cases in spite of invalidation of the mixture rule.

VI. CONCLUSION

Over a decade after promulgating regulations governing hazardous waste, EPA is now faced with an enforcement crisis. The crisis began with invalidation of the mixture rule in *Shell Oil*.[143]

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135. *Id.* at *11-12.
136. *Appeals Board*, *supra* note 124, at AA-2.
137. *See supra* notes 105-110 and accompanying text.
138. No. RCRA-V-W-011-92, 1993 RCRA LEXIS 97 (EAB Feb. 23, 1993).
139. *Id.* at *20.
140. *Id.* at *18. *See* 40 C.F.R. § 261.32 (1993).
141. *In re Chem-Met Services*, 1993 RCRA LEXIS at *20.
142. *See id.* at *20-21.
143. *See supra* notes 33-61 and accompanying text.

The subsequent decision in *Goodner Brothers Aircraft* exacerbated the enforcement problem caused by *Shell Oil* by applying that decision retroactively.[144] As a result EPA is unable to utilize the federal mixture rule in enforcement cases brought during the period between promulgation of the rule in 1980 and the holding in *Shell Oil* in 1992 because, in effect, the rule never existed.

The most recent erosion of EPA's enforcement program came in the decision in *Hardin County IV* which stripped EPA of its ability to utilize state mixture rules in pending enforcement cases.[145] Although no court has addressed the issue of whether states may enforce their own mixture rules, it is likely that, if state mixture rules have been duly promulgated under applicable state administrative procedures, they will remain valid.[146]

Although it seems that these decisions "threw the baby out with the bath water," there may be some water left. EPA's only true recourse at this point is to abandon the argument that state mixture rules are "more stringent," not "broader in scope," than the federal rules because the argument has been repeatedly rejected.[147] Rather EPA should attempt to find other provisions in its hazardous waste regulations which bring substances under the definition of hazardous waste because that course was successful in *Chem-Met Services*.[148]

144. *See supra* notes 62-98 and accompanying text.
145. *See supra* notes 123-25 and accompanying text.
146. *See supra* notes 136-37 and accompanying text.
147. *See supra* notes 99-125 and accompanying text.
148. *See supra* notes 138-42 and accompanying text.