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Environmental Law—Retroactive Vacature of the Mixture and Derived-from Rules under RCRA. United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380 (1992).

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CASENOTES

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).

I. INTRODUCTION

The "mixture" and "derived-from" rules have been two of the Environmental Protection Agency's (EPA) most fundamental hazardous waste management regulations under the Resource Conservation and Recovery Act (RCRA).[1] These rules were promulgated by the EPA under RCRA "to close a potentially major loophole in the hazardous waste management system."[2] The District of Columbia Circuit vacated the mixture and derived-from rules in *Shell*

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1. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-92 (1988) (as amended) [hereinafter RCRA]. The RCRA regulation known as the "mixture rule" is in relevant part: (iv) It 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; 40 C.F.R. § 261.3(a)(2)(iv) (1992). The "derived-from rule" is in relevant part: (2)(i) Except as otherwise provided in paragraph (c)(2)(ii) of this section, any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust, or leachate (but not including precipitation run-off) is a hazardous waste. 40 C.F.R. § 261.3(c)(2)(i) (1992). These rules preempt dilution and inadequate treatment from being used to meet the strict requirements for hazardous waste treatment and disposal.

Opponents have criticized the rules for being too inclusive; that is, the rules can define waste as hazardous even if it contains very low concentrations of hazardous chemicals. However, proponents have supported the rules for preventing abuse of dilution as hazardous waste treatment, for preventing use of inadequate treatment technologies, and for encouraging waste minimization. *See generally* 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 (1991).

2. According to the EPA:

> Without a "mixture" rule, generators of hazardous waste could perhaps evade regulatory requirements by mixing hazardous waste with non-hazardous waste and [claim] that the mixture was no longer hazardous, even though it poses environmental hazards. Without a "derived-from" rule, owners and operators of treatment, storage, and disposal facilities could perhaps evade regulation by minimally processing a hazardous waste and claiming that the residue was no longer hazardous.

57 Fed. Reg. 7628 (1992) (to be codified at 40 C.F.R. pt. 261).

Oil v. EPA[3] because the rules had not been promulgated with sufficient notice and opportunity for comment.[4] The District of Columbia Circuit did not state whether its decision was retroactive or prospective.[5] In *United States v. Goodner Bros. Aircraft, Inc.*,[6] an Arkansas case, the Eighth Circuit applied the District of Columbia Circuit's decision in *Shell Oil v. EPA*[7] retroactively, invalidating convictions for RCRA violations that were partially based on these rules.[8] The Eighth Circuit declined to reach the federal government's argument that Arkansas's own environmental regulations,[9] which incorporate the federal mixture and derived-from rules by reference,[10] would support the invalidated convictions because charges were brought under federal law only.[11] Thus, the Eighth Circuit left open the question of whether the Arkansas rules that adopted by reference the subsequently vacated federal rules are valid, and ultimately, whether generators remain liable for pre-*Shell Oil* enforcement actions based on states' potentially flawed mixture and derived-from rules.

II. Administrative History of the Mixture and Derived-From Rules

In RCRA,[12] subtitle C,[13] Congress required the EPA to promulgate regulations "as may be necessary to protect human health and the environment" covering generators, transporters, treaters, storers, and disposers of hazardous waste,[14] and which would regulate

3. Shell Oil v. EPA, 950 F.2d 741 (D.C. Cir. 1991).

4. *Id.* at 752.

5. *See* United States v. Goodner Bros. Aircraft, 966 F.2d 380 (8th Cir. 1992). *See generally* Jon Hanke, *The Mixture/Derived-From Fallout Begins*, EI Digest, July 1992, at 17.

6. 966 F.2d 380 (8th Cir. 1992).

7. 950 F.2d 741 (D.C. Cir. 1991).

8. *Goodner Bros.*, 966 F.2d at 385. The EPA maintains that the mixture and derived-from rules were vacated prospectively only: "[T]he Agency believes that the *Shell Oil* decision is not intended to be retroactive" because the District of Columbia Circuit's concern about regulatory discontinuity is inconsistent with an interpretation of its decision that retroactively voided the rules. 57 Fed. Reg. 7628, 7630-31 (1992) (to be codified at 40 C.F.R. § 261).

9. Ark. Haz. Waste Man. Code (1980) (promulgated pursuant to the Arkansas Hazardous Waste Management Act, 1979 Ark. Acts 406).

10. *Id.* § 3(a)(2).

11. *Goodner Bros.*, 966 F.2d at 385.

12. Resource Conservation and Recovery Act § 3001, 42 U.S.C. §§ 6901-92 (1988).

13. 42 U.S.C. §§ 6921-34 (1988).

14. 42 U.S.C. §§ 6922-24 (1988). A "generator" is anyone whose act or process produces hazardous waste. *Id.* § 6903(6). "Storage" means containment of hazardous waste in such a manner as to not constitute disposal. *Id.* § 6903(33). "Treatment" includes any activity or process designed to change the physical form or chemical composition of a hazardous waste so as to render it nonhazardous. *Id.* § 6903(34).

hazardous waste from "cradle to grave."[15] Fundamental to this requirement was the EPA's development of "criteria for identifying the characteristics of hazardous waste[16] and for listing hazardous waste . . . taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics."[17]

In 1980, the EPA finalized regulations[18] that defined four categories of hazardous waste: (1) materials that are hazardous by physical characteristic,[19] (2) materials that are specifically listed as hazardous wastes due to their origin,[20] (3) materials that are mixtures of specifically listed hazardous wastes and other solid waste,[21] and (4) materials that are the residues from treatment of specifically listed hazardous wastes.[22] The last two categories are known, re-

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15. "From cradle to grave" is a phrase coined by EPA meaning hazardous waste management regulation is designed to manage hazardous waste from the point of generation to the point of disposal. *See* Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,254, 10,261 (1991).

16. Congress defined hazardous waste as:

> [S]olid waste . . . which, because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . . cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1988).

17. 42 U.S.C. § 6921(a) (1988).

18. 45 Fed. Reg. 33,084, 33,095-96 (1980) (to be codified at 40 C.F.R. pt. 261). *See also* 43 Fed. Reg. 58,946-59,022 (1978) (to be codified at 40 C.F.R. pt. 250) (proposed Dec. 18, 1978).

19. 40 C.F.R. § 261.3(a)(2)(i) (1992). These characteristics are: ignitability (will burn easily and/or spontaneously), reactivity (will chemically and/or physically react spontaneously or when exposed to water or air), corrosivity (aqueous with pH less than or equal to 2 or greater than or equal to 12.5, or will corrode metal under certain conditions), and toxicity (material leaches toxic chemicals above maximum allowable concentrations). *See generally* 40 C.F.R. § 261.20-24, subpart C (1992) which provides the characteristics of hazardous waste.

20. 40 C.F.R. § 261.3(a)(2)(ii) (1992). Listed wastes are grouped in the following ways: Wastes that are chemically similar from nonspecific sources, e.g., chlorinated phenolic organics like pentachlorophenol is F032. *Id.* § 261.31 (hazardous waste from nonspecific sources). Wastes from specific sources, e.g., bottom sediment sludge from treatment of wastewaters from wood preserving processes that use pentachlorophenol is K002. *Id.* § 261.32 (hazardous waste from specific sources). Waste can also be "off-spec" product, or discarded or unused formulations of otherwise "clean" chemical products (P and U listed wastes). *Id.* § 261.33.

21. *Id.* § 261.3(a)(2)(iv).

22. *Id.* § 261.3(c)(2)(i).

spectively, as the "mixture rule" and "derived-from rule."[23] These rules define mixtures including hazardous waste or waste residues derived from treatment of hazardous waste as hazardous wastes, regardless of hazardous constituent concentration.[24]

The EPA promulgated the mixture rule[25] in response to the potential for industry to simply dilute its hazardous wastes with other nonhazardous solid waste to reduce the concentration of toxic materials,[26] thereby avoiding the intent of Congress that generation of hazardous waste be minimized and as much waste as possible be destroyed: "[D]ilution of wastes by the addition of other hazardous wastes or any other materials during waste . . . treatment . . . is not . . . acceptable . . . to reduce the concentration of hazardous constituents."[27]

Similarly, the EPA promulgated the derived-from rule[28] to prevent industry from using inadequate "treatment" processes that would not actually destroy the hazardous chemical or immobilize the hazardous metal, again promoting the complete destruction and minimization of hazardous waste.[29]

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23. 57 Fed. Reg. 7628 (1992) (to be codified at 40 C.F.R. pt. 261).

24. *Id. See generally* Morriss & Coon, *supra* note 1.

25. 45 Fed. Reg. 33,084, 33,095 (1980) (to be codified at 40 C.F.R. pt. 261).

26. *Id.* Regarding the mixture rule specifically, EPA requires wastes to be treated so that only a certain concentration of the chemical remains in the waste before the waste can be disposed of in a hazardous waste landfill (called "landban standards"). The landban concentration-based standard for benzene (as listed waste UO19, 40 C.F.R. § 261.33) (1992) is only thirty-six milligrams of benzene per one kilogram of waste (expressed as thirty-six parts per million or 36 ppm). 40 C.F.R. § 268.43 (1992) (table CCW for non-wastewaters). Thus, after treatment, only thirty-six milligrams of benzene can remain in the one kilogram of waste. If one were allowed to dilute, then one could take thirty-six milligrams of pure benzene and simply add it to one kilogram of dirt. Thus, the landban concentration would be met but no benzene was destroyed. Congress intended for waste to be destroyed. *See* 40 C.F.R. § 268.42 (1992) (listing preferred destruction technologies specific to each listed waste). *See also* Morriss & Coon, *supra* note 1.

27. Chemical Waste Management, Inc. v. EPA, 976 F.2d 2 (D.C. Cir. 1992) (quoting the Senate Committee Report, RCRA 1984 Amendment, at 17).

28. 45 Fed. Reg. 33,084, 33,095-96 (1980) (to be codified at 40 C.F.R. pt. 261).

29. For a comprehensive discussion of the mixture and derived-from rules, see Jeffrey M. Gaba, *The Mixture and Derived-From Rules under RCRA: Once a Hazardous Waste, Always a Hazardous Waste?* 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,033 (1991) (containing a comprehensive discussion of the mixture and derived-from rules). There is an exception to the rule that "once a hazardous waste, always a hazardous waste." Hazardous wastes can be removed from hazardous waste regulation through the regulatory process of "delisting." Hazardous wastes that have been treated properly or that, even without treatment, carry the hazardous waste listing despite its nonhazardous nature, can be removed from subtitle C of RCRA (into subtitle D to be regarded as waste, though no longer hazardous) by the delisting process. *See* 40 C.F.R. §§ 260.20, 260.22 (1992). A generator may obtain reclassification by submitting an acceptable delisting petition to EPA. An

III. Demise of the Mixture and Derived-From Rules: *Shell Oil Co. v. EPA*

A. Introduction

In *Shell Oil*,[30] the District of Columbia Circuit held that the EPA violated the Administrative Procedures Act (APA)[31] by failing to give sufficient notice and opportunity for comment in promulgating the mixture and derived-from rules.[32] The court reasoned that the EPA's mixture and derived-from rules in the final hazardous waste management rules under RCRA were not a "logical outgrowth" of the proposed rules because they had no precursor in the proposed rules.[33] The District of Columbia Circuit found the addition of these rules created a fundamental change, resulting in deviations between the proposed and the final rules that were too sharp.[34] Thus, the public was denied adequate notice and opportunity for comment in violation of APA requirements.[35] For these procedural reasons only, the court vacated and remanded the rules back to the EPA, leaving open the question of whether the ten-year-old rules were void prospectively or retroactively.[36]

B. The Decision: Clarification of Public Comment Requirements Under the APA

The EPA is required to offer adequate opportunity for public comment of proposed regulations prior to promulgating final rules.[37] As the court in *Shell Oil* stated,

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acceptable petition generally requires comprehensive laboratory analysis, descriptions of the source and amount of waste, and a plan to continue testing to ensure waste remains the same as that delisted by EPA. *See* 40 C.F.R. § 260.22 (1992).

30. Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991).

31. 5 U.S.C. § 553(b) (1988). *See also* Solid Waste Disposal Act, § 7004(b), 42 U.S.C. § 6974(b) (1988).

32. *Shell Oil*, 950 F.2d at 752. *See also* 45 Fed. Reg. 33,084, 33,095-96 (1980) (to be codified at 40 C.F.R. § 261.3) (Identification of Hazardous Wastes, Final Rule). Adequate notice and comment under the APA is discussed in text accompanying note 36.

33. 950 F.2d at 752.

34. *Id.* at 751-52.

35. *Id. See* 5 U.S.C. § 553(b) (1988). *See also* Solid Waste Disposal Act, § 7004(b), 42 U.S.C. § 6974(b) (1988).

36. 950 F.2d at 752.

37. 42 U.S.C. § 6921(a) (1988). "[T]he [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." *Id.*

> The relationship between the proposed regulation and the final rule determines the adequacy of notice. A difference between the two will not invalidate the notice so long as the final rule is a "logical outgrowth" of the one proposed. If the deviation from the proposal is too sharp, the affected parties will not have had adequate notice and opportunity for comment.[38]

1. *The Difference Between the Proposed and Final Rules Was Too Sharp*

The District of Columbia Circuit held that there was a fundamental difference between the proposed and final rules that was too sharp. In the proposed regulations,[39] the EPA first attempted to classify hazardous waste by any of nine characteristics, but decided that only four could be practically determined.[40] Thus, waste representing the remaining five characteristics had to be listed specifically, and "any waste once listed [had to be treated] as hazardous until a person managing the waste filed a delisting petition and demonstrated to the EPA that the waste did not pose a hazard."[41]

However, in the final rule, as a response to several comments "concerning waste mixtures and when hazardous wastes become subject to and cease to be subject to the subtitle C hazardous waste management system,"[42] the EPA broadened the definition of hazardous waste by adding two new definitions: A waste was also hazardous if it was "a mixture of solid waste and one or more hazardous wastes listed . . . and [had] not been excluded"[43] or if it was a "solid waste generated from the treatment, storage, or disposal of

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38. 950 F.2d at 747.

39. 43 Fed. Reg. 58,950, 58,955-57 (1978) (to be codified at 40 C.F.R. § 250.11(b)(3)) (proposed Dec. 18, 1978).

40. 950 F.2d at 748 (citing 43 Fed. Reg. 58,950, 58,955-57 (1978) (to be codified at 40 C.F.R. pt. 250) (proposed Dec. 18, 1978)). The EPA intended generators to be given widely available and uncomplicated test methods for determining whether their wastes were characteristic. Only the four characteristics of ignitability, corrosivity, reactivity, and toxicity could be practically determined and so were designated as characteristics. The remaining six characteristics that could not be practically determined included organic toxicity, carcinogenicity, mutagenicity, teratogenicity, bioaccumulation potential, and phytotoxicity. The EPA considered the available technology regarding these characteristics too insufficiently developed or required such skilled personnel as to render them impractical for wide spread use. Thus, these six characteristics were blanketly addressed by the listing process. *See* 45 Fed. Reg. 33,105 (1980) (to be codified at 40 C.F.R. pt. 261).

41. 950 F.2d at 748 (citing 43 Fed. Reg. 58,946, 58,959-60 (1978) (to be codified at 40 C.F.R. pt. 261)) (proposed Dec. 18, 1978).

42. *Id.* at 749 (quoting 45 Fed. Reg. 33,084, 33,095 (1980) (to be codified at 40 C.F.R. pt. 261)).

43. *Id.* (quoting 45 Fed. Reg. 33,119 (1980) (to be codified at 40 C.F.R. § 261.3)).

a hazardous waste."[44] These are the mixture and derived-from rules, respectively.[45]

2. *Clear Intent Does Not Make A Difference*

The District of Columbia Circuit did not endorse the EPA's argument that its intent was clear and that the mixture rule was implicit in the proposed rule.[46] The court responded that an unexpressed intention cannot convert a final rule into a "logical outgrowth" of the proposed regulation that the public should have anticipated, so as to satisfy the notice and comment requirements of the APA.[47] Although the public could have anticipated the potential for evading the regulations by simply mixing nonhazardous waste with hazardous waste, "it [was] the business of the EPA, and not the public, to foresee that possibility and to address it in its proposed regulations."[48] The court then stated that even if the mixture and derived-from rules promulgated by the EPA had been anticipated, comments by members of the public would not in and of themselves constitute adequate notice for purposes of the APA.[49]

The court stated that the addition of the mixture and derived-from rules to the final hazardous waste management rule created a fundamental difference between the proposed and final rule.[50] In the proposed rule, the listing[51] of hazardous waste was only to play a "supplemental function" of increasing the certainty of the process, while in the final rule, the listing was more heavily emphasized.[52] The proposed rule defined waste as hazardous if it exhibited one of nine hazardous characteristics, while the final rule defined hazardous as (1) any waste that exhibited one of four hazardous characteristics; (2) any waste included on a list regardless of hazardous characteristics; or (3) any waste generated from the treatment, storage, or disposal

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44. *Id.* at 750 (quoting 45 Fed. Reg. 33,084, 33,120 (1980) (to be codified at 40 C.F.R. pt. 261)).

45. *See supra* text accompanying note 1.

46. 950 F.2d at 751.

47. *Id.*

48. *Id.*

49. *Id.* "Under the standards of the APA, 'notice necessarily must come — if at all — from the Agency.' " *Id.* (quoting Small Refiner Lead Phase-Down Taskforce v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983)).

50. *Id.* at 751-52.

51. 40 C.F.R. § 261.3(a)(2)(ii) (1992). *See generally* 40 C.F.R. §§ 261.30-35, subpart D (1992) for lists of hazardous wastes.

52. 950 F.2d at 751-52 (citing 45 Fed. Reg. 33,084, 33,106 (1980) (to be codified at 40 C.F.R. pt. 261)).

activities of hazardous waste, regardless of hazardous characteristics.[53] In the proposed rule, the waste was no longer hazardous if it failed to exhibit one of the nine hazardous characteristics, while in the final rule the waste remained hazardous until it was "formally removed from the list" by the delisting process.[54] Thus, the proposed rule required hazardous waste to actually be hazardous, while the final rule did not.[55] The court saw this shift as a fundamental change which prevented the final rule from being a "logical outgrowth" of the proposed rule.[56]

C. Significance in Relation to *Goodner Bros.*

In *Shell Oil*, the District of Columbia Circuit Court did not discuss whether the vacated rules were to be vacated prospectively only or retroactively. This opened the door for any defendant charged with a RCRA violation based on either the mixture rule or derived-from rule to claim the rule void, which would effectively nullify the unlawful act. The Eighth Circuit was the first forum[57] to test

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53. *Id.* at 748-49 (quoting 45 Fed. Reg. 33,119, 33,120 (1980) (to be codified at 40 C.F.R. § 261.3(a)(2))).

54. *Id.* at 752. The greater significance of "listing" under the mixture rule is apparent by the following illustration. Under the final rule's mixture provision, if a drop of a liquid that has been listed as a hazardous waste is mixed with a 20,000 gallon tank filled with water, then the tank of water becomes hazardous waste by rule. In the proposed rule that does not contain this mixture rule, however, the classification of the tank of water with the one drop of listed waste is not known until it is tested and determined analytically that the mixture does not possess one of the nine hazardous characteristics (one drop of hazardous waste in a tank full of clean water would probably not be enough to make the water hazardous, i.e., to cause the mixture to exhibit any of the nine hazardous characteristics; thus, the mixture would probably not be hazardous under the proposed rule). But under the final rule, the mixture is hazardous by rule regardless of the absence of hazardous characteristics. Furthermore, the water would remain "hazardous" under RCRA until it was "delisted." *See generally* Gaba, *supra* note 29. Due to this difference between the proposed and final rules, the court decided that commentators (the public) must have the opportunity to comment on the distinction. 950 F.2d at 752.

55. 950 F.2d at 752.

> As a consequence, the final criteria for listing are considerably expanded and more specific than those proposed. . . . [T]his shift . . . erodes the foundation of the EPA's argument that the mixture rule was implicit in the proposed regulations. A system that would rely primarily on lists of wastes . . . might imply inclusion of a waste until it is formally removed from the list. The proposed regulations, however, did not suggest such a system. Rather, their emphasis on characteristics suggested that if a waste did not exhibit the nine characteristics originally proposed, it need not be regulated as hazardous. We conclude, therefore, that the mixture rule was neither implicit in nor a "logical outgrowth" of the proposed regulations.

Id.

56. *Id.*

57. Hanke, *supra* note 5, at 17.

this argument in *United States v. Goodner Bros. Aircraft*.[58] The Eighth Circuit based its decision to invalidate the convictions for illegal disposal of hazardous waste or waste mixtures on a retroactive application of *Shell Oil*.[59]

IV. Retroactive Application of *Shell Oil* in the Eighth Circuit: *United States v. Goodner Bros. Aircraft*

A. Introduction

The Eighth Circuit's decision in *Goodner Bros.*[60] was the first retroactive application of the District of Columbia Circuit's *Shell Oil* decision to vacate the mixture and derived-from rules.[61] Goodner Brothers was charged with disposing of hazardous waste in violation of RCRA.[62] The waste was designated as hazardous either by its RCRA listing or because it was a hazardous waste mixture.[63] The Eighth Circuit's decision to retroactively apply *Shell Oil* removed the federal mixture rule, which was relied upon as a partial basis for the convictions by the jury in the trial court,[64] even though the RCRA violations took place prior to the *Shell Oil* decision when the original federal mixture rule was in effect. The Eighth Circuit remanded *Goodner Bros.* in part to the trial court to retry these convictions without reliance on the mixture rule.[65] However, the Eighth Circuit did not reach the issue of whether Arkansas mixture and derived-from rules, which adopted the federal rules by reference, were rendered invalid.[66] The decision thus leaves the status of states' mixture and derived-from rules uncertain, possibly removing the basis for state RCRA and perhaps, even Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[67] enforcement actions based on the states' equivalent rules.

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58. United States v. Goodner Bros. Aircraft, 966 F.2d 380 (8th Cir. 1992).
59. *Id.* at 385.
60. *Id.* at 380.
61. Hanke, *supra* note 5, at 17.
62. 966 F.2d at 382-83.
63. *Id.* at 383-84, 386.
64. *Id.* at 385. Only the mixture rule was discussed in *Goodner Bros.*, though this decision retroactively applies *Shell Oil*, which vacated both the mixture and derived-from rules. *See Shell Oil*, 950 F.2d at 752.
65. 966 F.2d at 385.
66. *Id.*
67. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (1988) (as amended).

B. The Facts

Goodner Brothers Aircraft was an aircraft repainting business, owned and operated by Junior Goodner.[68] The operation involved spraying airplanes with pure solvent (paint removers) to dissolve old paint and high pressure water to knock off remaining paint, and then repainting them with fresh paint.[69] The solvents used in this process were approximately fifty to seventy percent methylene chloride, with a smaller amount of phenol.[70] The waste generated from this process was collected and disposed of by dumping it into two ravines and one man-made excavation at the Goodner Brothers Farm.[71] An estimated total amount of twenty-five tons was disposed of in this manner over a period of approximately eight years.[72]

In 1988, a neighbor witnessed one waste-dumping event and reported seeing "two men dumping creamy beige, toxic-smelling waste into a ravine."[73] Junior Goodner reassured the neighbor that there was nothing with which to be concerned. The neighbor, however, reported the incident to the "authorities," resulting in an investigation by both the Arkansas Department of Pollution Control and Ecology (ADPC&E) and the EPA Region Six.[74]

Under a warrant, the EPA seized documents, including an EPA letter dated 1980 and an ADPC&E letter dated 1982, warning Goodner Brothers of potential liability for hazardous substances.[75] The EPA also took direct samples of the waste as it fell from a solvent-sprayed airplane and it also took samples from the dump site.[76] The EPA determined through testing that the dump site samples contained up to twenty percent phenol and twenty percent methylene chloride.[77]

C. The Charges

Junior Goodner and Goodner Brothers Aircraft were charged with violations of both RCRA and CERCLA.[78] The case was tried

68. 966 F.2d at 382.
69. *Id.*
70. *Id.*
71. *Id.* at 383.
72. *Id.* at 382-83. The opinion specifically states that dumping activities occurred in 1988, but also states that Goodner Brothers Aircraft received warning letters dated 1980 and 1982 from the EPA and the Arkansas Department of Pollution Control and Ecology (ADPC&E), respectively. *Id.* at 383.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* These chemicals are both RCRA hazardous substances listed in 40 C.F.R. pt. 261 app. VIII (1992).
78. 966 F.2d at 382.

twice and went to the Eighth Circuit on appeal of the second trial convictions.[79] In the second trial, Goodner Brothers was convicted of RCRA counts one through four, the disposal of hazardous waste without having obtained a permit pursuant to 42 U.S.C. §§ 6925 and 6926 in violation of 42 U.S.C. § 6928(d)(2)(A).[80] Both Goodner Brothers and Junior Goodner were convicted of count nine, the handling of hazardous waste and failing to file an application for a hazardous waste permit in violation of 42 U.S.C. § 6928(d)(4).[81] Junior Goodner was convicted of counts six through eight, CERCLA violations involving the release of hazardous substances into the environment without a permit, in violation of 42 U.S.C. § 9603(b).[82]

The *Goodner Bros.* appellate court date was set for December 11, 1991.[83] The appeal was complicated by the District of Columbia Circuit's *Shell Oil* decision which was handed down on December 6, 1991,[84] because *Shell Oil* vacated the federal mixture rule, which served in part as the basis for the convictions that Goodner Brothers was appealing.[85]

D. The Decision: Presumptive Retroactive Application of *Shell Oil*

In *Goodner Bros.*, the Eighth Circuit applied *Shell Oil* retroactively, thus partially removing the federal mixture rule from

79. *Id.*

80. *Id.* at 383.

81. *Id.*

82. *Id.*

83. *See* Additional Brief for Appellee at 2, United States v. Goodner Bros. Aircraft, 966 F.2d 380 (8th Cir. 1992) (No. 91-2466).

84. *Id.* The briefs for Goodner Brothers Aircraft were filed by November 11, 1991. However, *Shell Oil* was decided on December 6, 1991, five days before the December 11, 1991 trial date, prompting the Eighth Circuit to request additional briefs addressing the effect of *Shell Oil* on the case. *Id.*

85. *Id.* The Government filed a supplemental brief on January 13, 1992, addressing the effect of *Shell Oil* on the *Goodner Bros.* appeal. *Id.* In the supplemental brief, the Government argued that the convictions not relying on the mixture rule should immediately be affirmed and the decision regarding the convictions relying in part on the mixture rule (counts one through four and count nine) should be held in abeyance until the District of Columbia Circuit had been given the opportunity to respond to several motions before it, one of which was by the Government as appellee in *Goodner Bros.* that could have clarified its decision in *Shell Oil*. *Id.* The District of Columbia Circuit denied the Government's appellee motion for clarification without comment on March 5, 1992. Subsequently, the circuit court issued its *Shell Oil* mandate without further elaboration. *Id.* In its supplemental brief, the Government proposed that, in the absence of a District of Columbia Circuit Court clarification of the *Shell Oil* decision, the Eighth Circuit could either remand counts one through four to the district court for initial consideration of the issue or it could itself decide the impact of *Shell Oil*. *Id.* The Government then offered an Additional Brief to clarify the arguments arising from the possibility that the Eighth Circuit would decide this case and not remand it to the trial court. *Id.*

consideration as the basis for the convictions on appeal.[86] The Eighth Circuit then remanded these convictions back to the trial court for retrial without the federal mixture rule.[87] The court specifically declined to reach the question of the validity of the Arkansas mixture rule because the charges were brought under the federal mixture rule only.[88]

1. *The Original Conviction Was Partially Based on the Mixture Rule*

The original conviction was partially based on the mixture rule that had been vacated in *Shell Oil*. If an original conviction is based in part on a rule that is no longer in effect, and it is impossible to determine which basis the jury used to convict, then, as a matter of common law, the conviction cannot stand.[89] Therefore, because the jury may have relied on the mixture rule for convictions one through four and nine, the Eighth Circuit's retroactive application of *Shell Oil* in *Goodner Bros.* invalidated the convictions.[90]

To support the convictions in Goodner Brothers Aircraft's second trial, the jury had to find that the waste dumped by Goodner Brothers was hazardous.[91] Under the instructions provided,[92] the jury could have determined the waste was hazardous either because it was listed waste[93] or because it was a mixture of listed waste and nonhazardous solid waste.[94] Referring to the District of Columbia Circuit's

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86. *Goodner Bros.*, 966 F.2d at 385.
87. *Id.*
88. *Id.*
89. *Id.* at 384 (quoting Griffin v. United States, 112 S. Ct. 466, 474 (1991)).
90. *Id.* at 385.
91. *Id.* Appellants were convicted of "knowingly treat[ing], stor[ing], or dispos[ing] of any hazardous waste identified or listed under [RCRA subchapter D] . . . without . . . a permit." 42 U.S.C. § 6928(d)(2)(A) (1988).
92. 966 F.2d at 383-84. The jury was to determine whether the waste disposed of was hazardous by jury instruction number nine, and further defined in instruction number eleven:

> You are instructed that the [EPA] has listed as hazardous the following wastes:
> The spent halogenated solvent, methylene chloride, and all spent solvent mixture and/or blends containing, before their use, a total of ten percent or more by volume of methylene chloride.
> You are further instructed that pursuant to the regulations of the [EPA] and the [ADPC&E], when a listed hazardous waste is mixed with a solid, liquid, or semisolid material, the resulting mixture is also a hazardous waste.

Id.
93. Under 40 C.F.R. § 261.31 (1992), the waste is listed as F002, "ignitable spent halogenated solvents."
94. Definition (2) is the mixture rule. 40 C.F.R. § 261.3(a)(2)(iv) (1992). *See supra* notes 1-2 and accompanying text.

invalidation of the mixture rule in *Shell Oil*,[95] the Eighth Circuit stated that if a jury verdict were based in part on valid grounds, here the specific waste listing, and in part on grounds that were unconstitutional or illegal, here the mixture rule definition of hazardous waste,[96] and if it is impossible to tell which ground the jury selected, "then the verdict must be set aside."[97] Because it was impossible to determine whether the jury's verdict was based on the EPA's mixture rule or the listing of the waste, the Eighth Circuit set aside convictions one through four and conviction nine.[98]

2. *Despite Apparent Concern of Potential Discontinuity, "Vacate" Means "Vacate!"*

To preserve the mixture rule as a basis for the Goodner Brothers Aircraft convictions (one through four and nine), the Government argued that the District of Columbia Circuit did not intend to vacate the mixture and derived-from rules retroactively, but only prospectively.[99] The Government cited as support the District of Columbia Circuit's expressed concern regarding potential discontinuity in the regulations.[100] The Government claimed that the District of Columbia Circuit's suggestion that the EPA reissue an immediate final replacement for the mixture and derived-from rules under the "good cause" allowance of the APA was inconsistent with a retroactive ruling that would create discontinuity.[101] The Government reasoned

95. 966 F.2d at 384 (citing Shell Oil v. EPA, 950 F.2d 741, 752 (D.C. Cir. 1991)).

96. *Id.* at 384. Even though the jury instructions list both "EPA and the ADPC&E," the Arkansas mixture rule was not the basis for the conviction. *Id.* at 385.

97. *Id.* (quoting Griffin v. United States, 112 S. Ct. 466, 474 (1991)).

98. *Id.*

99. *Id.* at 384.

100. *Id.*

101. *Id.* The Government reasoned that the District of Columbia Circuit Court did not intend for the invalidation of the rules to disrupt RCRA enforcement and that the court was aware of the potential impact on the regulation of hazardous waste caused by the inevitable discontinuity that would result from the invalidation of the mixture rule. Additional Brief for Appellee at 3-4, United States v. Goodner Bros. Aircraft, 966 F.2d 380, 384 (8th Cir. 1992) (No. 91-2466). Thus, the Government argued, the court in *Shell Oil* suggested that the EPA propose reenacting the rules on an interim basis, making it clear that the court intended the EPA's reenactment of the rule to allow the rule's continuous effect. Additional Brief for Appellee at 3-4. The Interim Rules were issued at 57 Fed. Reg. 7628 (1992) under the "good cause" exemption of 5 U.S.C. § 553(b)(3)(8) (1988). *See Shell Oil*, 950 at 752. A retroactive application of *Shell Oil* would have been inconsistent with the court's apparent concern about discontinuity. Thus, if the rules were void "ab initio," as the appellant claimed, then the interim rule would be the first to exist, thus, leading to discontinuity. Therefore, according to the Government, the rule could not have been void ab initio. Additional Brief for Appellee at 3-4.

that the reissuance of the mixture and derived-from rules would not avoid discontinuity in the regulations if the District of Columbia Circuit's decision was retroactive because the reissued rule would be prospective only.[102] In other words, a retroactive application of *Shell Oil* would eliminate the mixture and derived-from rules from 1980 until *Shell Oil*, while the reissuance of the rules would perpetuate the rules after, but not before, *Shell Oil*. The Government argued that the District of Columbia Circuit intended to avoid this discontinuity by first, leaving the previous federal mixture and derived-from rules in place until *Shell Oil*, and second, by allowing the EPA to reissue the mixture and derived-from rules on an interim basis pending full notice and comment prior to actual vacature by the District of Columbia Circuit.[103] The Government argued that the District of Columbia Circuit's intent was for the EPA to cure the procedural inadequacies of the original mixture and derived-from rules' promulgation procedures without the discontinuity that would be caused by a retroactive vacature of the rules.[104]

The Eighth Circuit responded by first clarifying its interpretation of the language used by the District of Columbia Circuit in *Shell Oil*, stating that the words the District of Columbia Circuit used, "vacate" and "remand," were inconsistent with a prospective application of its ruling.[105] The Eighth Circuit cited previous District of Columbia Circuit usage of "vacate" as meaning "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 validity; to set aside."[106]

The Eighth Circuit then discounted the Government's reliance on the District of Columbia Circuit's apparent concern for potential "discontinuity" resulting from the vacature of the rule, stating that the District of Columbia Circuit's choice of language "could easily refer to the practical effect of invalidation of the mixture [sic] with respect to the compliance practices of the regulated industries rather than referring to the legal force of the mixture rule."[107]

3. *Presumption of Retroactivity:* James B. Beam Distilling Co. v. Georgia

In another attempt to avoid the retroactive application of *Shell Oil* and to preserve the mixture rule as the basis for the Goodner

102. Additional Brief for Appellee at 5 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1989)).
103. *Id.* at 4-5.
104. *Id.*
105. *Goodner Bros.*, 966 F.2d at 384-85.
106. *Id.* at 384. (citing Action on Smoking & Health v. C.A.B., 713 F.2d 795, 797 (D.C. Cir. 1983)).
107. *Id.* at 384-85.

Brothers Aircraft convictions, the Government showed how the District of Columbia Circuit could easily have left the rules in place with a solely prospective decision.[108] The Government provided many examples of rules promulgated in violation of the APA that were left in place, of which a significant number concerned the public health and safety.[109]

The Government then applied the three part test of *Chevron Oil Co. v. Huson* to justify its conclusion that *Shell Oil* should be applied prospectively only.[110] Under the *Chevron Oil* test, a decision should be applied prospectively if a retroactive application would: (1) establish a new principle of law, including overruling clear past precedent; (2) further retard the operation of the rule in question; and (3) pose unacceptable inequity.[111] In applying the *Chevron Oil* test, the Government recognized that a retroactive application would overrule ten years of precedent beginning when the mixture rule was promulgated in 1980.[112] The Government next recognized that the rule performed a valuable function in preventing dilution as treatment

108. Additional Brief for Appellee at 6. The District of Columbia Circuit had "equitable power to render such a prospective decision. It is a well-settled principle of administrative law that federal courts have the authority to leave administrative rules or decisions in place even if the agency did not satisfy all of the requirements of the APA, 5 U.S.C. § 553." *Id.* (citing Rodway v. United States Dep't of Agric., 514 F.2d 809, 817-18 (D.C. Cir. 1975)). The Government argued that the practice of allowing rules to remain in effect predates the APA, (*see e.g.*, Addition v. Holly Hill Fruit Prods., 322 U.S. 607, 618-23 (1944)) and that nothing in the APA limits this authority. *Id. See also* 5 U.S.C. § 706 (1988) (judicial review under the APA).

109. Additional Brief for Appellee at 7 (citing among others Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (upholding rule despite no notice and comment); Chemical Mfrs. Ass'n v. EPA, 870 F.2d 177, 236 (5th Cir. 1989) (upholding Clean Water Act standard despite no notice and comment)).

110. *Id.* at 8 (citing Chevron Oil v. Huson, 404 U.S. 97 (1971)). The District of Columbia Circuit "has counseled agencies to consider [this] test when they interpret [D.C. Circuit] court decisions." *Id.* at 8 n.6 (citing American Gas Ass'n v. FERC, 888 F.2d 136, 150 (D.C. Cir. 1990)).

111. *Id.* (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)). "First, the decision to be applied nonretroactively must establish a new principle of law, [for example] overruling clear past precedent." *Id.* (quoting *Chevron Oil*, 404 U.S. at 106). Second, the Court would "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* (quoting *Chevron Oil*, 404 U.S. at 106-07 (citing Linkletter v. Walker, 381 U.S. 618, 629 (1965)) (Fourth Amendment decision not applied retroactively)). Finally, the Court would weigh "the inequity imposed by retroactive application. . . ." *Id.* (quoting *Chevron Oil*, 404 U.S. at 107).

112. *Id.* at 9. Retroactive application of ruling would clearly overrule past precedent because the mixture rule has been a fundamental part of RCRA enforcement since its promulgation. *See generally* 40 C.F.R. § 261.3 (1992).

and had not been struck down for substantive reasons.[113] Finally, the Government argued that gross inequities would arise from a retroactive application.[114]

In response to the Government's application of *Chevron Oil*, the Eighth Circuit cited the more recent Supreme Court decision of *James B. Beam Distilling Co. v. Georgia*.[115] *James B. Beam Distilling Co.* limits the application of the three-part *Chevron Oil* test and provides that full retroactivity is the normal rule in civil cases.[116] The Eighth Circuit interpreted *James B. Beam Distilling Co.* to mean that "full retroactive effect must be given to a new rule of civil law when the new rule is applied to the litigants in the case in which the rule was announced."[117] Further, the Eighth Circuit observed that "the court in *Shell Oil* did not expressly reserve the question of retroactivity or of whether its holding should apply to the parties before it," but instead "declined to reach the substantive arguments . . . regarding the mixture rule because it had vacated [it]."[118] The Eighth Circuit concluded that the court in *Shell Oil* applied the invalidation of the mixture rule to the parties before it because it otherwise would have been required to meet the substantive arguments.[119] Then, "[u]nder *James B. Beam Distilling Co.* and consistent with the meaning of the word 'vacate,' " the Eighth Circuit found that the invalidation of the mixture rule applied retroactively.[120]

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113. Additional Brief for Appellee at 9. The rule performed a valuable function in preventing the indiscriminate dilution of hazardous waste with nonhazardous solid waste in order to reduce concentrations below the treatment standards without treatment by destruction of the waste constituent of concern, thus, "closing a major loophole." *Id.* (quoting 45 Fed. Reg. 33,084, 33,095 (1980) (to be codified at 40 C.F.R. § 261.3)). The Government pointed out that the rule was struck down only on procedural grounds, and no defect was found for substantive reasons. *Id.* at 10. The Government also pointed out that the District of Columbia Circuit had found the mixture rule "eminently reasonable" in Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526 (D.C. Cir. 1989). *Id.*

114. *Id.* The Government argued that a retroactive application of *Shell Oil* would have "rewarded those who did not comply with a presumptively valid regulation that had been in place for ten years. Because law-abiding waste generators have long complied with the mixture rule and conformed their activities to the rule's requirements, no inequities arise from applying the decision prospectively only." *Id.* at 10-11.

115. *Goodner Bros.*, 966 F.2d at 385 (citing James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2445-46 (1991)). *See also* Appellants' Response to Appellee's Additional Brief at 8-10, United States v. Goodner Bros. Aircraft (8th Cir. 1992) (No. 91-2466).

116. 966 F.2d at 385.

117. *Id.* (citing Boudreau v. Deloitte, Haskins & Sells, 942 F.2d 497, 498 n.1 (8th Cir. 1991)).

118. *Id.*

119. *Id.*

120. *Id.*

Finally, due to the possibility of the jury's reliance on the retroactively vacated federal mixture rule, the Eighth Circuit remanded counts one through four and count nine for retrial without the federal mixture rule.[121]

V. *GOODNER'S* EFFECT ON STATES' MIXTURE AND DERIVED-FROM RULES

Under RCRA, EPA is required to assist the states in developing hazardous waste management regulations minimally equivalent to the federal rules and eventually, authorize each state to enforce RCRA within its boundaries.[122] Many states adopted rules equivalent to the federal rules.[123] In adopting the required rules, many states used a streamlined approach that did not provide public notice and comment, relying instead on the adequacy of the federal promulgation procedures.[124] Thus, the vacature of the federal rules due to lack of adequate notice and comment brings into particular question the validity of these state rules that were adopted in this abbreviated manner.[125] Doubts have also been raised about the validity of the state rules that used the resource conserving method of incorporating the federal rules by reference.[126] Because the Eighth Circuit expressly declined to address the Arkansas mixture and derived-from rules in *Goodner Bros.*,[127] the status of the Arkansas rules, and any other state's rules, is debatable. Two issues arise: (1) Did the subsequent vacature and immediate reenactment of the federal rule affect the states' rules that incorporated the federal rules by reference? (2) On the other hand, assuming that the federal rule was void *ab initio*, did the states' adoption of a void rule automatically make void the adopting rule?[128]

A. States' "Incorporation By Reference"

The validity of a state's mixture and derived-from rules may depend on the intent of the legislature or administrative body in

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121. *Id.*
122. RCRA, 42 U.S.C. § 6926(b) (1988).
123. *See* Stephen C. Jones, Shell Oil *May Tie Enforcers' Hands*, NAT'L L.J., October 19, 1992, at 18.
124. Jones, *supra* note 123, at 20.
125. Jones, *supra* note 123, at 20, 22.
126. Jones, *supra* note 123, at 18.
127. 966 F.2d at 385.
128. This discussion assumes that statutes and regulations are treated analogously for the purposes of administrative procedure regarding adoption and incorporation by reference.

adopting the regulations and on whether or not the administrative body fulfilled all the standard state notice and comment requirements in adopting the regulations.

Generally, the effect of a subsequent modification or appeal of an adopted statute on the adopting statute is a matter of legislative intent.[129] In the absence of any language indicating a different legislative intent, a statute adopting a general law is modified by subsequent modifications of the adopted law.[130] A statute adopting a specific provision of a general law is not affected by subsequent modifications of the adopted provision.[131]

Analogously, regulations are adopted by reference. "Incorporation by reference" is utilized by the EPA in order to comply fully with the publication requirements of the APA[132] without wasting valuable space.[133] The effect of incorporating a regulation by reference is exactly the same as if that regulation had been printed in full. States have followed the EPA's lead in adopting regulations by reference, including their adoption of the EPA's Hazardous Waste Management Regulations.

The states have adopted the federal RCRA regulations in different ways and with varying intent. Because the states could promulgate regulations no less stringent than the federal regulations,[134] the states could either adopt the federal regulations as they existed at that time, they could adopt the federal regulations as they existed at that time and could add specific state restrictions, or the states could completely defer to the federal program. To avoid potential conflict

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129. Though each state can set its own precedent,

> [t]he general rule of construction . . . is that a statute adopting and referring to another statute or to some of its provisions adopts and incorporates the provisions of the earlier statute as they existed at the time of the adoption, but not subsequent additions or modifications of the statute adopted, with the result that the operation of the adopting statute will not be enlarged, limited, or otherwise affected by the subsequent modification or repeal of the adopted statute . . . .

R.J. Fox, Annotation, *Effect of Modification or Repeal of Constitutional or Statutory Provision Adopted by Reference in Another Provision*, 168 A.L.R. 627, 628 (1947).

130. *Id.* at 632-34.

131. *Id.* at 632.

132. 5 U.S.C. § 552(a) (1988).

133. As it states in the front cover of every volume of the *Code of Federal Regulations*, "[t]he legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register [in accordance with] [the publication requirements of the Administrative Procedures Act codified in 5 U.S.C. § 552(a)]." The purpose of incorporation by reference is to "substantially reduce the volume of material published in the Federal Register."

134. 42 U.S.C. § 6926(b) (1988) concerns authorization of state programs.

or confusion due to differing state and federal rules, some states chose to defer to the EPA by adopting regulations identical to the EPA's and expressly stating their intent to defer to the EPA.[135] Other states customized the federal rules prior to adoption.[136] If the state simply wanted equivalent regulations, then the state's mixture and derived-from rules could be vacated as were the federal rules.[137] If the state wanted its own rules, then the state's mixture and derived-from rules may not be affected.[138] Thus, the effect of the vacated federal mixture and derived-from rules will probably vary with the type of adoption language and procedures used by each state.[139]

Assuming that the effect of a regulation "incorporated by reference" is exactly the same as if the regulation had been printed on the page, the states basically adopted the federal rules in one of three ways:[140] (1) the state rewrote the federal rules, composing significant portions on its own, then promulgated them in accordance with standard administrative procedure;[141] (2) the state simply adopted the federal rules then promulgated them in accordance with standard administrative procedures;[142] or (3) the state, believing the federal notice and comment would suffice, deferred to the federal rules, then promulgated them without the state's standard administrative procedures.[143]

States falling into the first group seem to have the most defensible mixture and derived-from rules because the states clearly had the intent to create their own rules apart from the federal rules and because these states did not bypass standard notice and comment procedures. States closer to the second group seem to be more vulnerable because, even though these states restricted their incorporation to specific versions of the federal regulations, the apparent legislative intent seems closer to creating a state program

135. Jones, *supra* note 123, at 20, 22.
136. Jones, *supra* note 123, at 20, 22.
137. Jones, *supra* note 123, at 20, 22.
138. Jones, *supra* note 123, at 20, 22.
139. Jones, *supra* note 123, at 20, 22.
140. Jones, *supra* note 123, at 20, 22.
141. *See, e.g.*, ALASKA STAT. § 46 (1971), ALASKA ADMIN. CODE tit. 18, § 62 (July 1987) (adopting the federal rules by reference, then adding redundant mixture rule). *See also* FLA. STAT. ch. 29.403 (1974), FLA. HAZ. WASTE RULES tit. 17 (1981).
142. *See, e.g.*, 62 Del. Laws 412 (1980), DEL. CODE ANN. tit. 7, § 63 (1980) (reprinting federal rules exactly and limiting incorporation to particular modifications of the rule). *See also* GA. COMP. R. & REGS. 391-3-11.01 to -.016 (1980) (adopting specific portions of 40 C.F.R. (1990) and specific pages of the Federal Register (1991)).
143. *See, e.g.*, ILL. REV. STAT. ch. 111 1/2, para. 1003.15 (1986 & Supp. 1992), ILL. ADMIN. CODE tit. 35, § 700 (1981) (deferring completely to the federal program).

equivalent to the federal program. However, the second group of states still completed standard notice and comment procedures. The third group appears to have the least defensible position in that these states appeared to want no part in developing their own rules. Because the federal rules were vacated due to insufficient comment and these states did not complete standard state notice and comment procedures, these states' rules must also be invalid for the same reason.

B. Adoption of Voided Rules

The second issue is whether or not the state could have adopted a federal rule that was void *ab initio*. A state's right to incorporate a federal statute by reference is well established. The rules of incorporation by reference allow the incorporation of invalid or "void" laws.[144] "A statute which in part attempts to incorporate by reference a void statute, although ineffective to revive such statute, may be effective in so far as the provisions of such reference statute are new and sound."[145] Therefore, even if the federal mixture and derived-from rules were void when the states adopted them, the state's mixture and derived-from rules are "new and sound."[146]

C. *Goodner's* Effect on Arkansas's Mixture and Derived-From Rules

In analyzing the current status of Arkansas's mixture and derived-from rules, one must again consider both sub-issues raised in the previous section. First, did the subsequent vacature and immediate reenactment of the federal rule affect Arkansas rules incorporating the federal rules by reference? Second, assuming that the rule was void *ab initio*, does the adoption by Arkansas of a void rule automatically make the adopting rule void?

Arkansas adopted the federal rules specifically and followed standard ADPC&E administrative procedures in finalizing the state rules.[147] Therefore, assuming that the Arkansas rules existed prior

144. *See generally* 82 C.J.S. *Statutes* § 70 (1953).

145. *Id.* at 124 (citing Miggins v. Mallot, 182 A. 333 (Md. 1936)).

146. *Id.*

147. ADPC&E Regulation 8 (1984). The ADPC&E administrative procedures codified in Regulation 8 regarding notice and comment differ from the Arkansas Administrative Procedures Act, 1967 Ark. Acts 434, though insignificantly. *Compare* ADPC&E Regulation 8 (1984) *with* ARK. CODE ANN. § 25-15-201 (Michie 1987). For the purposes of this discussion, the procedures will be treated as equivalent. In any case, the Arkansas Poultry Federation supported a bill before the Arkansas

to *Shell Oil*, the rules should exist after *Shell Oil* because Arkansas precedent is that the adopting statute is unaffected in absence of contrary legislative intent.[148] However, if the Arkansas rules were not valid before *Shell Oil*, then the EPA's reenactment of the federal rules would not affect the Arkansas rules any more than the *Shell Oil* decision would affect the Arkansas rules. Thus, assuming that Arkansas intended to create its own rules and not defer to the federal regulations, the question becomes whether the Arkansas rules were valid before *Shell Oil*. In this case, the Arkansas rules may have been valid before *Shell Oil* because nothing appears to bar the adoption of void rules.

The Arkansas Hazardous Waste Management Act[149] contains language requiring express action to repeal or otherwise modify existing rules and regulations.[150] The *Arkansas Hazardous Waste Management Code*'s language adopted the federal rules very specifically,[151] and though expressing the requirement of maintaining a state program equivalent to the federal system, recognized that the EPA regulations would serve merely as "minimum guidelines."[152]

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legislature (Senate Bill 22) that requires ADPC&E to follow procedures virtually the same as those required by the Arkansas Administrative Procedures Act in adopting and changing rules and regulations. *See Coalition Wins 1st Fight to Revamp PC&E*, ARKANSAS DEMOCRAT-GAZETTE, January 13, 1993, at 1A. Senate Bill 22 became Act 165 of 1993. *See* Act of Feb. 18, 1993, No. 165 (or companion bill 163) (codified at ARK. CODE ANN. §§ 8-1-101 to -106, 8-1-201 to -203, 8-2-205, 8-4-102 to -103, 8-4-201 to -205, 8-4-207 to -208, 8-4-213, 8-4-221 to -222 (amending same sections of ARK. CODE ANN. (Michie 1987)) (Michie Supp. 1993)).

148. *See* Bolar v. Cavaness, 271 Ark. 69, 607 S.W.2d 367 (1980). *See also* Howard v. State, 223 Ark. 634, 267 S.W.2d 763 (1954); McLeod v. Commercial Nat'l Bank, 206 Ark. 1086, 178 S.W.2d 496 (1944).

149. 1979 Ark. Acts 406.

150. The Arkansas code emphatically requires that:

> [a]ll existing rules and regulations of the department not inconsistent with the provisions of this subchapter relating to subjects embraced within this subchapter shall remain in full force and effect until expressly repealed, amended, or superseded by the commission, insofar as the rules and regulations do not conflict with the provisions of this subchapter.

ARK. CODE ANN. § 8-7-210(a) (Michie Supp. 1991).

151. ARK. HAZ. WASTE MAN. CODE § 3(a) (1980) (codifying Arkansas Hazardous Waste Management Act, 1979 Ark. Acts 407). "The following regulations promulgated by the [EPA] are hereby adopted as provisions of this Chapter as though set forth herein line for line and word for word." *Id.*

152. *Id.* at § 3(c).

> The Director, annually, after the date of promulgation of any new or revised federal hazardous waste regulations shall conduct rule making procedures with reference to this Chapter necessary to maintain a State Hazardous Waste Management Program equivalent to the federal program. Such new or revised federal regulations upon the date of their publication is final rules of the [EPA] shall constitute minimum guidelines to the Director in formulating rule making proposals to this Chapter, shall not

The code states expressly that subsequent amendment or modification of a previously adopted federal rule can only be included as a result of valid rule-making procedures.[153] Thus, it appears that Arkansas did not intend to establish state rules that would remain equivalent to the federal rules, at least not without positive action.[154]

The ADPC&E maintains[155] that Arkansas's mixture and derived-from rules were not vacated with the *Shell Oil* decision because the ADPC&E adopted the federal rules by reference under its standard administrative procedures. By promulgating the regulations under the standard ADPC&E administrative procedures that provide for standard public notice and comment, the ADPC&E made up for the EPA's lack of notice and comment in its promulgation of the federal mixture and derived-from rules.[156]

In contrast, others[157] argue that the similarity between the Arkansas and federal rules constitutes evidence that Arkansas intended to defer to the federal program, meaning that Arkansas rules could be automatically amended with the federal rules to maintain equivalence with the federal rules. However, Arkansas did specify that the federal rules would serve only as "minimum guidelines" for the "Director's rule making proposals" in addition to incorporating specific provisions of the adopted rules with language prohibiting automatic incorporation of modifications to the federal rules.[158] Thus, there appears little support for the argument that Arkansas intended to defer to the federal program. On the other hand, if Arkansas intended to adopt only the specific provisions named in the state regulations, and there were no federal rules to adopt when Arkansas adopted its rules by reference because the federal rules were vacated *ab initio*, despite the authority allowing adoption of void rules, then

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be construed to limit or interfere with the adoption of provisions more stringent than federal regulations.

Id.

153. *Id.*

154. *Id.* Section 3(a) incorporates the definition of hazardous waste contained in 40 C.F.R. part 261, subparts A, B, C, and D and appendices I, II, III, VII, VIII, and X of part 261 which includes the federal mixture and derived-from rules at 40 C.F.R. § 261.3.

155. Telephone Interview with Steve Weaver, General Counsel, ADPC&E (Oct. 15, 1992).

156. *Id.* ADPC&E agrees with the EPA that the District of Columbia Circuit meant to apply *Shell Oil* prospectively only and that the EPA promulgated the interim rule before the vacated rules were officially invalidated. *Id.*

157. *See* Allan Gates, *Introduction to the Mixture and Derived-From Rules*, Address Before the Silver Anniversary Meeting of the Arkansas Environmental Federation (October 21, 1992) (transcript available in Arkansas Environmental Federation Library).

158. ARK. HAZ. WASTE MAN. CODE § 3(c) (1980).

Arkansas precedent says that the immediate reissuance of the federal rule will have no effect on the Arkansas rules, and the Arkansas rules could be void altogether.[159]

Oklahoma adopted its federal rules in substantially the same manner as Arkansas.[160] In a recent Oklahoma case, *Equidae Partners v. Oklahoma State Department of Health*,[161] a state district court judge also applied *Shell Oil* retroactively, but extrapolated *Shell Oil* to the state's rules that adopted by reference the federal rules to also invalidate the state's rules retroactively.[162] The court gave summary judgment for Equidae, dismissing charges supported by the Oklahoma derived-from rule based on the retroactive application of *Shell Oil*.[163] The Oklahoma State Department of Health (OSDH) argued that the state rules were not invalidated because Oklahoma incorporated the rules according to the standard state administrative procedures and because the EPA rules were invalidated on procedural grounds only.[164] However, Equidae argued that the state "ha[d] not added its own agency expertise to the issue and therefore depends solely on the federal regulations for its validity."[165] The case is currently on appeal to the Oklahoma Supreme Court.[166]

VI. Current Status of Federal Mixture and Derived-From Rules

After *Shell Oil*, the EPA reinstated the mixture and derived-from rules.[167] However, the Office of Management and Budget, with the support of the Competitiveness Council,[168] required that the EPA

159. *Id.* at § 4(b).

160. *Compare* Okla. Haz. Waste Man. Reg. (Okla. Admin. Code) 310-270 (1992) *with* Ark. Haz. Waste Man. Code § 3(a) (1980) (regarding "Incorporation by Reference").

161. No. C-91-532 (Dist. Ct. Washington County, Okla., Jan. 21, 1992), *appeal pending*, No. 79124 (Okla.).

162. Jones, *supra* note 123, at 22.

163. Jones, *supra* note 123, at 22.

164. Jones, *supra* note 123, at 22.

165. Jones, *supra* note 123, at 22 (quoting Plaintiff Equidae Partners Reply Memorandum in Support of Its Motion for Summary Judgment at 3, Equidae Partners v. OSDH, No. C-91-532 (Dist. Ct. Okla. Jan. 16, 1992)).

166. No. C-91-532 (Dist. Ct. Washington County, Okla., decided Jan. 21, 1992), *appeal pending*, No. 79124 (Okla.). *See also* Allan Gates, *Environmental Case Law Update*, 1993 Environmental Law Seminar, Arkansas Bar Association, Feb. 26, 1993.

167. 57 Fed. Reg. 7628 (1992) (to be codified at 40 C.F.R. pt. 261).

168. *See* Rudy Abramson, *EPA Drops Overhaul of Toxic Rules*, Wash. Ed./ L.A. Times, September 29, 1992, at A8. *See also* Keith Schneider, *Campaign Concerns Prompt White House to Drop Waste Plan*, N.Y. Times, September 29, 1992, at A1. The Competitiveness Council, working with the Office of Management

include a "sunset" provision that eliminated the rules if the EPA had not promulgated replacement rules by April 28, 1993.[169]

In response to the reenacted rules' sunset provision, the EPA proposed a Hazardous Waste Identification Rule on May 20, 1992[170] as a replacement for the current method of defining hazardous waste.[171] This rule was met with overwhelming opposition by the states[172] and was not supported competely by industry. The negative response prompted Congress to pass a measure that removed the sunset provision and provided the EPA with more time to develop a response to *Shell Oil*.[173] Then, on September 28, 1992, the day

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and Budget, routinely modified regulations after they were proposed or finalized by the various administrative agencies with no congressional review or public comment opportunity given. These activities were first significantly exposed with the promulgation of the regulations implementing the Clean Air Act Amendments of 1990. The Competitiveness Council activities were challenged. *See Quayle Hunt*, 14 HAZARDOUS WASTE NEWS, 295 (Aug. 11, 1992).

169. *See* Env't Rep. (BNA), Aug. 21, 1992, at 1247. *See also* Env't Rep. (BNA), Sept. 11, 1992, at 1382. Reportedly, the Office of Management and Budget (OMB), with the support of the Competitiveness Council led by Dan Quayle, pressured the EPA to insert a "sunset" provision into the interim rule, requiring the permanent abdication of the mixture and derived-from rules by April 23, 1993, if the EPA had not proposed an acceptable new hazardous waste identification rule. Depiste OMB's finest efforts, the EPA withdrew the sunset provision in an exclusive Final Rule on October 30, 1992. 57 Fed. Reg. 49,278 (1992) (to be codified at 40 C.F.R. § 261.3).

170. *See* 57 Fed. Reg. 21,450 (1992) (to be codified at 40 C.F.R. pt. 261) (proposed May 20, 1992).

171. *See generally* Schneider, *supra* note 168, at A1. The Competitiveness Council and the Office of Management and Budget "heavily influenced" (a euphemism for "authored") a fundamental part of the rule—the ECHO or "Characteristic Option." Schneider, *supra* note 168, at A1.

172. 57 Fed. Reg. 21,450 (1992) (to be codified at 40 C.F.R. pt. 261) (proposed May 20, 1992) (EPA Comment Docket #F-92-MDFP-FFFF "The HWIR presents an unwarranted radical change from a preventative program to a reactionary program." Arkansas Department of Pollution Control and Ecology, #F-92-HWEP-00229, July 23, 1992. "The solution to pollution is not dilution, yet HWIR would not adequately control dilution, and opens avenues for gross abuses and severe environmental damage." Connecticut Department of Environmental Protection, #F-92-HWEP-00250, July 20, 1992. "After careful review, the Commonwealth of Kentucky concludes that the proposed rule is ill conceived and lacks even the appearance of sound scientific judgment." Kentucky Department of Environmental Protection, #F-92-HWEP-00195, July 17, 1992. "It is unlikely New Jersey will adopt a RCRA change at the state level in which one in seven drinking water wells near facilities accepting exempted hazardous waste would become contaminated." New Jersey Department of Environmental Protection and Energy, #F-92-HWEP-00174, July 17, 1992. "[W]e would suggest that the proposed approaches . . . constitute throwing the baby out with the bathwater." Rhode Island Department of Environmental Management, #F-92-HWEP-00003, June 8, 1992. "Where does one begin in explaining why Pinocchio is not a real boy? The difficulty of maintaining nerve synapses in a pointed wooden head?" Hazardous Waste Treatment Council, #F-92-HWEP-00377, July 24, 1992.).

173. Departments of Veterans Affairs and Housing and Urban Development,

before what appeared might be an extremely embarrassing press conference planned by opponents of the rule,[174] the EPA issued a press release stating that they would completely withdraw the proposed rule.[175] The EPA promised to "convene a group of interested parties from environmental groups, industry, and the states to solicit their input" in order to develop a more adequate rule.[176] However, the EPA did not withdraw the proposed rule until October 30, 1992.[177] On that day, the EPA finally issued its deletion of the "sunset" provision that required the replacement rule to be finalized by April 1993, in response to the law passed by Congress.[178]

VII. CONCLUSION

The Eighth Circuit's decision in *United States v. Goodner Bros. Aircraft*[179] was the first retroactive application of the District of Columbia Circuit's decision to vacate the mixture and derived-from rules in *Shell Oil*.[180] The effect of the Eighth Circuit's decision was

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and Independent Agencies Appropriations Act of 1993, Pub. L. 102-389, 106 Stat. 1571, 1602-03 (1992). On September 8, 1992, members of the United States Senate (led by John Chafee, (R-R.I.), ranking minority member of the Senate Environment and Public Works Committee, Max Baucus (D-S.D.), chair of the Environment and Public Works Subcommittee on the Environment, and David Durenburger (R-Minn.)) passed by voice vote an amendment to the HUD and Independent Agencies Appropriations Bill that addressed the April 1993 "sunset" provision inserted by OMB in the reinstatement of the mixture and derived-from rules. With this vote, the Senate agreed to eliminate the sunset provision; prohibited the EPA from acting on the proposed unpopular replacement to the mixture and derived-from rules, the Hazardous Waste Identification Rule (HWIR), until October 1, 1993; and moved the OMB's April 23, 1993, deadline for HWIR back to October 1, 1994. *Id.*

174. *See* Schneider, *supra* note 168, at A1. *See also* Abramson, *supra* note 168, at A8; *Groups Say EPA Withdrew Waste Rule To Avoid Election-Year Criticism*, BNA, Sept. 30, 1992, at 190.

175. EPA Press Release, *EPA Withdraws Hazardous Waste Identification Proposal*, ENVTL. NEWS, Sept. 28, 1992.

176. *Id.* The EPA has followed through with its "roundtable discussion" concerning modification of the hazardous waste and derived-from rules. The first such discussion occurred on January 5, 1993, in Washington, D.C. Well over one hundred parties attended. The group determined that the first priorities to be addressed included contaminated media (as opposed to process waste) and treatment residues. The group met again on February 4 and 5, 1993. Telephone Interview with David Case, Chief Counsel, Hazardous Waste Treatment Council (Jan. 12, 1993). *See also* Meeting Notice, 57 Fed. Reg. 61,376 (1992) and Meeting Notice, 58 Fed. Reg. 6,121 (1993).

177. 57 Fed. Reg. 49,280 (1992) (notice of withdrawal of proposed rule).

178. 57 Fed. Reg. 49,278 (1992) (to be codified at 40 C.F.R. § 261.3). Newly elected President William Jefferson Clinton abolished the Competitiveness Council as one of his first acts of his first term as President. *See* Martha L. Noble, *Clinton-Gore Administration Environmental Strategies*, 1993 Environmental Law Seminar, Arkansas Bar Association, Feb. 26, 1993.

179. 966 F.2d 380 (8th Cir. 1992).

180. 950 F.2d 741 (D.C. Cir. 1991). *See* Hanke, *supra* note 1, at 17.

to remove the mixture rule that served as the basis in part for convictions relied on by the jury in the trial court, as if the mixture rule never existed.[181] The case was remanded in part to the trial court to retry these convictions without reliance on the mixture rule.[182] The Eighth Circuit did not reach the issue of whether Arkansas mixture and derived-from rules, adopted by referencing the federal rules, were rendered invalid.[183] The decision thus leaves the status of states' mixture and derived-from rules uncertain.

In general, the states' rules may or may not be affected by the vacature of the federal rules depending on the intent of the states in adopting their rules and the procedures used to adopt them. States that adopted a modified or more strict version of the federal rules with standard notice and comment procedures seem to have the most defensible mixture and derived-from rules because the states clearly had the intent to create their own rules apart from the federal rules, and they also complied with the requirements of the APA. States that adopted only specific amendments of the federal rules did indeed limit the incorporated rules to the rules that existed at that time, but the states did not individualize the rules, thereby leaving an opening for the argument that the state actually deferred to the federal program. States that adopted the equivalent federal rules intending to maintain equivalent federal and state programs, but then failing to satisfy the states' standard notice and comment procedures in finalizing the rules, do not appear to currently have mixture and derived-from rules to enforce.[184]

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181. *See Goodner Bros.*, 966 F.2d at 385.
182. *Id.*
183. *Id.*
184. *See* Jones, *supra* note 123, at 20, 22.