University of Arkansas at Little Rock Law Review

Volume 15 | Issue 4 Article 4

1993

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# THE "MIXTURE" AND "DERIVED-FROM" RULES ARE ALIVE AND WELL IN ARKANSAS

*Steve Weaver**

Did the District of Columbia Circuit's decision in *Shell Oil v. Environmental Protection Agency*[1] leave the State of Arkansas literally lawless concerning the proper management of wastes mixed with or derived from hazardous wastes? That is what some industry apologists have suggested at various trade meetings in the last year. Admittedly, their position has some simplistic logic. After all, the State of Arkansas, along with several other states, adopted verbatim the federal mixture and derived-from rules as a part of their programs for regulating hazardous wastes. If the original federal rules are declared void, are not identical state rules also automatically void?

PC&E[2] has bluntly answered, "No," since the decision in *Shell Oil* raised questions about the validity of state laws patterned after vacated federal regulations. The Eighth Circuit's decision in *United States v. Goodner Bros. Aircraft* (hereinafter *Goodner Bros.*)[3] reinforces PC&E's position and presages the legal analysis that preserves the state's mixture and derived-from rules even after *Shell Oil*.

Ms. Henry's casenote *Environmental Law—Retroactive Vacature of the Mixture and Derived-From Rules Under RCRA*, printed in this issue, provides a fine analysis of the *Shell Oil* and *Goodner Bros.* decisions, the Resource Conservation and Recovery Act[4] mixture and derived-from rules, and the basic principles of incorporation by reference. This article will not retread the same

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1. 950 F.2d 741 (D.C. Cir. 1992).

2. Throughout this article, reference to "PC&E" includes both the Arkansas Department of Pollution Control & Ecology and the Arkansas Pollution Control & Ecology Commission. For a description of the respective duties and responsibilities of the Department and Commission, see ARK. CODE ANN. §§ 8-1-201 to -203 (Michie 1991 & Supp. 1991). It should be noted that the Commission through its rulemaking authority adopted the state's mixture and derived-from rules, but has not been involved in the controversy generated by the decision in *Shell Oil*. The agency position discussed in this article is that consistently advanced by the Department staff since the *Shell Oil* decision.

3. 966 F.2d 380 (8th Cir. 1992).

4. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 to 6992 (1988) [hereinafter RCRA].

ground. Instead, the casenote is used as the foundation for explaining PC&E's position on the status of the state's mixture and derived-from rules. As will be shown, PC&E anticipated the *Shell Oil* debacle and built in procedural safeguards to prevent the inadvertent repeal of its hazardous waste regulations through unforeseen developments at the federal level. This article reviews the governing state law and demonstrates the continuing viability of PC&E's mixture and derived-from rules.

## I. THE STATE LAW IMPLICATION OF *GOODNER BROS.*

In *Goodner Bros.*, the Eighth Circuit could have facilely concluded that the Arkansas mixture and derived-from rules were also vacated by the *Shell Oil* decision. Instead, the Eighth Circuit's discussion of this issue strongly implies that state law offered independent legal authority that was not properly employed below. In response to the United States' argument that the state mixture rule provided alternative grounds for upholding the convictions, the Eighth Circuit stated:

> Goodner Brothers Aircraft was convicted of a federal statute, 42 U.S.C. § 6928(d)(2)(A), which is defined by federal law. *The federal law did not incorporate state law definitions of hazardous waste.*[5]

The Eighth Circuit's emphasis on the federal statutes is important. The federal criminal statute—42 U.S.C. § 6928(d)(2)(A)—is substantially different from its state counterpart—*Arkansas Code Annotated* section 8-7-204.[6] And, as discussed *infra*, there are significant differences between the state and federal definitions of hazardous waste[7] and the statutory mandates assigned to EPA and PC&E.[8]

Nevertheless, as described in the Henry casenote, the state and federal mixture rules at issue in *Goodner Bros.* were identical because the state had adopted by reference those portions of title 40, section 261.3 of the *Code of Federal Regulations* that included the mixture and derived-from rules. The crucial question concerning the contin-

5. *Goodner Bros.*, 966 F.2d at 385 (emphasis added). *See* 42 U.S.C. §§ 6903(5), 6921(b) (1988).

6. This is true of both the state criminal provisions in effect at the time of Goodner's alleged violations and the current criminal provisions. *Cf.* ARK. CODE ANN. § 8-7-204 (Michie 1991) with the same statute in the 1991 Pocket Part Supplement.

7. *Cf.* 42 U.S.C. § 6903(5) and ARK. CODE ANN. § 8-7-203(6) (Michie 1991).

8. *Cf.* 42 U.S.C. § 6921(b) and ARK. CODE ANN. §§ 8-7-203(6), 8-7-209(a)(4) (Michie 1991), discussed *infra* at nn.20-22 and accompanying text.

uing validity of Arkansas's rule turns on the legal effect of PC&E's incorporation of federal regulations by reference. Thus, before examining in detail the state hazardous waste rules, some discussion of the state law of incorporation by reference is in order.

## II. Arkansas Law Governing Incorporation by Reference

Incorporation by reference is generally recognized as a legitimate tool for the often gruelling legislative task of building comprehensive and consistent regulatory programs in highly regulated fields.[9] It is a particularly appropriate mechanism for legislatures, such as Arkansas's, that are constitutionally restricted to short, infrequent sessions.[10]

The general rule is stated in *Howard v. State ex rel. Stuckey*:[11] "[W]hen a statute adopts a part or all of another statute by a specific and descriptive reference thereto, such adoption takes the statute as it exists at the time, unaffected by any subsequent modification of the statute adopted, unless a contrary intention is clearly manifested."[12] *Howard* also recognizes an alternative means of incorporation by reference:

> [W]here the reference in an adopting statute is to the law generally which governs a particular subject, and not to any specific statute or part thereof, the reference in such case includes not only the law in force at the date of the adopting act but also all subsequent amendments or laws in force on the subject at the time it is invoked.[13]

Indiscriminate use of this alternative in Arkansas may lead to constitutional problems. In certain circumstances, the Arkansas Su-

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9. *See* Morrell E. Mullins, Handbook For Legislative Drafters, 130 (1986) (Arkansas Edition): "As a tool in certain types of situations where a specific provision, or the general 'law' on a subject, is incorporated by reference for legitimate reasons, incorporation by reference is perfectly appropriate, although a gamble." *Id.* at 134-35.

10. Ark. Const. art. V, § 17. *See infra* notes 17 and 18 and accompanying text.

The common practice of incorporation by reference has also survived challenges based upon article 5, § 23 of the Arkansas Constitution, which prohibits extension of a statute by reference to its title only. Byrd v. Short, 228 Ark. 369, 307 S.W.2d 871, 872-73 (1958); State v. McKinley, 120 Ark. 165, 179 S.W. 181 (1915).

11. 223 Ark. 634, 267 S.W.2d 763 (1954).

12. *Id.* at 636, 267 S.W.2d at 764. *See also* Bolar v. Cavaness, 271 Ark. 69, 70, 607 S.W.2d 367, 368 (1980). "[W]here one statute specifically adopts the provisions of another statute as distinguished from adopting the law generally in force on the subject, the operation of the adopting statute will not be affected by a later repeal of the adopted statute. *Id.*

13. 223 Ark. at 636, 227 S.W.2d at 764. *See also* Sutherland Stat. Const. §§ 51.07, 51.08 (5th Ed. 1992).

preme Court has found that an attempt to adopt the "general" law through incorporation by reference constitutes an unconstitutional delegation of legislative authority. In *Cheney v. St. Louis Southwestern Railway Company*[14] and *Crowly v. Thornbrough*,[15] the Arkansas Supreme Court struck down administrative actions based upon a wholesale application of federal law as state law. In both cases, the Supreme Court found that a regulatory scheme that cedes legislative authority to an unaccountable official of the federal government constitutes an unconstitutional delegation of legislative authority.

It is tempting to attribute the holdings in *Cheney* and *Crowly* to a nondelegation doctrine which has since become a legal anachronism.[16] In fact, in the more recent case of *Curry v. State*,[17] the Arkansas Supreme Court adopted the modern view of delegation, acknowledging the necessity of allowing expert administrative agencies the authority to exercise quasi-legislative authority.[18] Nevertheless, the *Curry* Court distinguished *Cheney* and *Crowly* rather than overruling those earlier cases, and upheld the statutory scheme only because the administrative official had the authority to modify or reject any federal finding concerning controlled substances.[19]

Thus, for the time being, administrative agencies in Arkansas must recognize the nondelegation doctrine as a legal hurdle that must be surmounted if incorporation of federal regulations is a significant part of their regulatory programs. Fortunately, attention

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14. 239 Ark. 870, 394 S.W.2d 731 (1965).

15. 226 Ark. 768, 294 S.W.2d 62 (1956).

16. *See* 1 KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 1.22: "Most admit that the nondelegation doctrine as a practical force in the law is dead and perhaps was never really the law. The [U.S.] Supreme Court has not since 1935 invalidated a statute on delegation grounds." *Id.* But Koch acknowledges that the "nondelegation doctrine seems to have more impact at the state level than at the federal level," *Id.* at § 1.22 (Supp. 1992), and cites Turner v. Woodruff, 286 Ark. 66, 689 S.W.2d 527 (1985) for the principle applied in some states that no legislative powers may be delegated. *Id.*

17. 279 Ark. 153, 649 S.W.2d 833 (1983).

18. *Id.* at 159-60, 649 S.W.2d at 837.

> The General Assembly meets in regular session only 60 days every other year. This infrequency of sessions does not offer timeliness to the amorphous and ubiquitous problems associated with the manufacture and distribution of illicit drugs. In addition, even if the members of the General Assembly were all trained chemists and pharmacists, which they are not, it would be impossible for them to keep abreast of the constantly changing drugs and their dangers. A Commissioner with specialized knowledge of these changes can schedule substances in a timely manner.

*Id.* The Arkansas Supreme Court acknowledged a similar deference to PC&E's environmental expertise in Bryant v. Mathis, 310 Ark. 737, 839 S.W.2d 528 (1992).

19. 279 Ark. at 158, 649 S.W.2d at 836.

to this issue—anachronistic or not—imposes some discipline upon state administrative rulemaking processes that clarifies how federal regulations incorporated by reference will be construed in the event of a procedural "snafu" at the federal level.

## III. The State Mixture and Derived-from Rules

The Arkansas Supreme Court recently reviewed the state's statutory definition of "hazardous waste" in *Bryant v. Mathis*.[20] The court first quoted the relevant portion of *Arkansas Code Annotated* section 8-7-203(6),[21] and concluded from this definition that the general assembly had vested the crucial call of what is a hazardous waste to the expertise of PC&E.[22]

PC&E used its rulemaking authority to satisfy this statutory mandate. The current state definition of "hazardous waste" was first adopted in the 1980 version of the Arkansas Hazardous Waste Management Code [hereinafter Hazardous Waste Code]. Section 2(a)(5) defines "hazardous waste," in part, as follows: " 'Hazardous Waste' means a hazardous waste as defined in 40 C.F.R. § 261.3."[23]

The *Code of Federal Regulations* section cited contains, *inter alia*, the mixture and derived-from rules that were voided in *Shell Oil*. The state regulation, however, proceeds beyond the text of title 40, section 261.3, of the *Code of Federal Regulations*, and includes polychlorinated biphenyls (PCBs) as hazardous wastes under Arkansas law. The crucial point is this: the state did not adopt the

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20. 310 Ark. 737, 839 S.W.2d 528 (1992).

21. "Hazardous waste" means any waste or combination of wastes of a solid, liquid, contained gaseous, or semisolid form which, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may *in the judgment of the department*:

(A) Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness;

(B) Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise improperly managed . . . .

*Id.* (emphasis added by court) (quoting Ark. Code Ann. § 8-7-203(6) (Michie 1991)). Note that the state definition of "hazardous waste" is essentially identical to the RCRA definition at 42 U.S.C. § 6903(5), with the significant exception of the phrase "in the judgment of the department." Ark. Code Ann. § 8-7-203(b) (Michie 1991 & Supp. 1991).

22. Bryant v. Mathis, 310 Ark. at 742, 839 S.W.2d at 531: "The crucial factor here is that the legislature has stated that it is 'in the judgment of the department' as to what substances would cause particular harm to the populace or environment and therefore, be 'hazardous.' " *Id.*

23. Ark. Haz. Waste Man. Code, Regulation No. 23, § 2(a)(5) (1980).

EPA definition of "hazardous waste" verbatim.[24] Instead, using its own judgment, PC&E augmented the federal definition to fit circumstances peculiar to the state's regulatory needs.

The documented legislative history of the Hazardous Waste Code proves that the discussion in Section II of this article concerning the state law principles of incorporation by reference and delegation of legislative authority is not a *post hoc* analysis contrived for the occasion of the holding in *Shell Oil v. EPA*. These issues were addressed when PC&E was applying for delegation of a RCRA-equivalent state program in 1984.

One of the prerequisites of delegation of the RCRA program to a state is the submission of an Attorney General's Statement certifying that state law will not hinder the implementation of a program at least as stringent as required by federal law.[25] In satisfaction of this requirement and in answer to specific questions raised by EPA, then Attorney General Steve Clark corresponded with the EPA Regional Administrator on issues concerning incorporation of federal regulations by reference and delegation of legislative authority.[26] After discussing at length the holdings of *Curry, Cheney*, and *Crowly*, Clark's letter states:

> [PC&E's rulemaking] procedures do not surrender any responsibilities for managing a hazardous waste program in Arkansas to the federal government. The changes made by EPA in the federal regulations adopted in [the Arkansas Hazardous Waste Management Code] are not automatically incorporated into the Code. The Department has the ability to approve or reject any proposed changes and consequently, our situation is more like that presented in *Curry* which was not found to be unlawful delegation of legislative power.[27]

Attorney General Clark's conclusion was based upon rulemaking procedures prescribed in chapter 2, section 3 of the Hazardous Waste Code. Section 3 lists those portions of the *Code of Federal Regulations* that are adopted by reference and, most importantly,

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24. *Id.* at § 2(a). These definitions are adopted "[i]n lieu of the definitions of the following terms set forth in 40 C.F.R. §§ 260.10, 40 C.F.R. 261.3, and 40 C.F.R. 270.2 (*sic*);" section 3(a)(1) adopts 40 C.F.R. Part 260, Subpart A by reference with the exception of, *inter alia*, the definition of "Hazardous Waste." *Id.*

25. 40 C.F.R. § 271.7 (1992).

26. Letter from Steve Clark, Arkansas Attorney General, to Dick Whittington, EPA Region 6 Administrator (July 9, 1984) (on file with PC&E). This correspondence is included in the package of background documentation, available from PC&E, supporting delegation of an equivalent RCRA program by EPA to PC&E.

27. *Id.* at 2-12.

establishes the process by which PC&E assures minimum compliance with RCRA program requirements. For instance, section 3(c) declares that the Department must institute rulemaking procedures annually to assure equivalence with RCRA program requirements.[28] Section 3(a) expressly spells out the quasi-legislative intent and the effect of PC&E's adoption by reference. Referenced federal regulations are adopted "as though set forth [in the Hazardous Waste Code] line for line and word for word." A reference to the federal regulations "constitute[s] a reference to the regulation as adopted [in the Hazardous Waste Code]." The effective date for federal regulations adopted by reference is the date of enactment by the PC&E Commission, not EPA.[29]

Clearly, PC&E's adoption of these federal regulations was not an attempt to blithely follow the federal lead on any definition of hazardous waste that EPA might utter in the *Federal Register*. If reviewed in terms of the *Howard* criteria,[30] the PC&E incorporation is a "specific and descriptive reference" to identified EPA regulations, not an attempt to adopt the evolving "general law" in the area of defining what is a "hazardous waste." Also, PC&E's legislative intent is clearly pronounced: the agency reserves the right to review an EPA regulation prior to its adoption as state law. Thus, the state adopts a federal regulation by reference only after

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28. Section 3(c) states:

> 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 as final rules of the U.S. Environmental Protection Agency *shall constitute minimum guidelines to the Director in formulating rule making proposals to this Chapter*, shall not be construed to limit or interfere with the adoption of provisions more stringent than federal regulations.

ARK. HAZ. WASTE MAN. CODE, REGULATION NO. 23, Chapter 2, § 3(c) (1991) (emphasis added).

29. Hazardous Waste Code § 3(a) reads, in relevant part, as follows:

> The following regulations promulgated by the U.S. Environmental Protection Agency are hereby adopted as provisions of this Chapter as though set forth herein line for line and word for word. . . . All references elsewhere in this Chapter to any of the following [federal] regulations shall constitute a reference to the regulation as herein adopted; and provided that the effective date of provisions adopted herein by reference as provisions of this Code shall be the date such provisions are specified as being effective by the [PC&E] Commission in its rulemaking and the effective date of the federal regulations adopted herein shall have no bearing on the effective date of any provisions of this Code.

*Id.* § 3(a).

30. *See supra* text accompanying notes 12 and 13.

what must be presumed as due deliberation.[31] Under the state rules of incorporation by "specific and descriptive reference" set out in *Howard*, PC&E's mixture and derived-from rules must be construed as legitimately continuing to define "hazardous waste" as including those wastes subsumed within the scope of title 40, section 261.3, of the *Code of Federal Regulations* as it existed prior to the District of Columbia Circuit's decision in *Shell Oil Company v. EPA*.[32]

*Shell Oil* struck down the mixture and derived-from rules on procedural, not substantive, grounds.[33] In all likelihood, those rules would have withstood judicial scrutiny if EPA had honored proper notice and comment procedures. In fact, the District of Columbia Circuit suggested to EPA a mechanism to preserve the rules pending proper notice and comment.[34]

Thus arises the crowning irony of the current debate over the validity of state mixture and derived-from rules. While the court that vacated the federal rules on procedural grounds offered EPA the latitude to preserve their effectiveness, state rules that are in no way procedurally flawed are said to be void without recourse. Proponents of this position see it as an inexorable conclusion of law, even though no states were parties in the *Shell Oil* litigation and the decision says nothing about its effects on state laws.

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31. *See* ARK. CODE ANN. § 8-4-229(a) (Michie 1991):

> In any appeal or other proceeding involving any . . . regulation . . . of the Arkansas Pollution Control & Ecology Commission, the action of the commission shall be prima facie evidence (*sic*) reasonable and valid, and it shall be presumed that all requirements of the law pertaining to the taking thereof have been complied with.

32. 950 F.2d 741 (D.C. Cir. 1991). Allan Gates suggests that there is confusion as to "which version of the federal rules Arkansas law now incorporates." Allan Gates, *Does Arkansas (or Anyone Else) Have a Valid Mixture and Derived-From Rule?*, 15 U. ARK. LITTLE ROCK L.J. 697 (1993). The crux of this argument is based on the assumption that the annual adoption of the Hazardous Waste Code amounts to a wholesale re-adoption of all federal regulations adopted by reference. PC&E has never construed its rulemaking function in this way. PC&E considers each round of its annual rulemaking review restricted to those amendments proposed by the staff; the whole regulation is not re-adopted on an annual basis for the same practical reason that the entire *Arkansas Code Annotated* is not re-enacted by the General Assembly in its biennial sessions.

33. 950 F.2d at 752.

34. *See* 950 F.2d at 752:

> Because the EPA has not provided adequate notice and opportunity to comment, we conclude that the mixture and derived-from rules must be set aside and remanded to the EPA. In light of the dangers that may be posed by a discontinuity in the regulation of hazardous waste, however, the agency may wish to consider reenacting the rules, in whole or in part, on an interim basis under the "good cause" exemption of 5 U.S.C. § 553(b)(3)(B) pending full notice and opportunity for comment.

This irrational and inequitable result is foiled by one of the fundamental precepts of American government: the principle of federalism.

## IV. THE FEDERALISM PERSPECTIVE

The United States Supreme Court has described the relationship between state and federal governments under statutory schemes such as RCRA as "a program of cooperative federalism."[35] RCRA itself preserves the autonomy of states to construct hazardous waste management programs that fit their particular needs.[36] Consistent with this scheme, courts have held that when a state has been authorized by EPA to administer a RCRA-equivalent regulatory program, it is state law, not RCRA itself, that the courts must implement.[37]

Once the states' co-equal role in a federal regulatory program such as RCRA is appreciated, the argument against federal repeal by implication of state regulations immediately follows. As the Supreme Court observed in *New York v. United States*:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the federal government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to

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35. New York v. United States, 112 S.Ct. 2408, 2424 (1992) (citing United States Dept. of Energy v. Ohio, 112 S.Ct. 1627 (1992)). In Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981), the Supreme Court described "cooperative federalism" as a program that "allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs structured to meet their own particular needs." *Id.* at 289.

36. *See* 42 U.S.C. § 6929 (1988):

> Upon the effective date of regulations under this subtitle no state or political subdivision may impose any requirement less stringent than those authorized under this subtitle respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subtitle is *postponed or enjoined by the action of any court, no state or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect.* Nothing in this title shall be construed to prohibit any state or political subdivision thereof from imposing any requirements . . . which are more stringent than those imposed by such regulations.

*Id.* (emphasis added).

37. Williamsburgh-Around-the-Bridge Block Ass'n v. New York Dep't of Environmental Conservation, 30 Env't Rep. Cas. (BNA) 1188 (1989); Thompson v. Thomas, 680 F. Supp. 1 (D.D.C. 1987); Luckie v. Gorsuch, 13 Envtl. L. Rep. (Envtl. L. Inst.) (D. Ariz. 1983). *See also* United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

> the several States a residuary and inviolable sovereignty" reserved explicitly to the States by the Tenth Amendment.[38]

Incorporation of federal regulations by reference is a common legislative technique for states seeking to participate in a regulatory program of cooperative federalism.[39] Claims that the state law is vulnerable to unanticipated developments at the federal level should be viewed with extreme skepticism, particularly when, as here, a state diligently seeks to maintain its Tenth Amendment autonomy when incorporating federal regulations.[40] This is true even in the face of arguments that the RCRA regulatory scheme proffers a "take it or leave it" proposition to the states that is really no choice at all.[41] The United States Supreme Court has rejected this argument and held that a state's agreement to join in a cooperative regulatory program with the federal government is the product of the state's own legislative initiative, presumed to be in response to the desires of its own electorate.[42]

Within this perspective, resort to the common practice of incorporation of federal regulations by reference does not in any way reduce PC&E to a mere shill for a federal regulatory initiative. Instead, Tenth Amendment jurisprudence forces the presumption that the regulation is an autonomous sovereign act, due all of the presumptions of validity and judicial deference generally extended to state statutes and regulations.

With these principles in mind, Mr. Gates's substantive objections to the state mixture and derived-from rules can be answered.[43]

## V. Answers To Specific Attacks On The Continuity of the State Rules

### A. The Void *Ab Initio* Argument.

Mr. Gates first suggests that state regulations must be considered void when their federal predicate has been declared void *ab initio*.

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38. 112 S.Ct. at 2434 (citations omitted).

39. *See* Gates, *supra* note 32 and accompanying text.

40. *See supra* notes 28-29 and accompanying text.

41. *See, e.g.*, Gates, *supra* note 32.

42. *New York*, 112 S.Ct. at 2427; *Hodel*, 452 U.S. at 288.

43. Of the four doubts about the state regulations raised by Mr. Gates, one has already been answered. *See* Gates, *supra* note 32, at 703.

As for the authority of the Oklahoma case, Equidae Partners v. Oklahoma Dep't of Health, (Dist. Ct. Washington County, Okla., decided Jan. 21, 1992) *appeal pending*, No. 79124 (Okla.), PC&E refuses to abandon one of the cornerstones of its regulatory program based upon an inscrutable one-line opinion that is on appeal to the Oklahoma Supreme Court. *See* Mary Ellen Henry, Note, *Retroactive Vacature of the Mixture and Derived-From Rules Under RCRA*, 15 U. Ark. Little Rock L.J. 749, nn.162-167 and accompanying text.

This analysis might be valid if, for instance, a federal law adopted by reference was declared to be an unconstitutional infringement of fundamental rights. This kind of legalistic algebra breaks down, however, when the federal regulation is vacated on procedural grounds.

First, the void *ab initio* argument fails to account for the legislative intent embodied in the specific provisions of the Hazardous Waste Code concerning incorporation by reference. PC&E treats EPA final regulations as mere "minimum guidelines" for framing state regulations. If an EPA regulation is accepted, it is adopted "as though set forth [in the code] line for line and word for word."[44] These and other provisions of the code demonstrate PC&E's quasi-legislative intent to avoid repeal of state regulations because of unanticipated developments at the federal level, the very implication that the void *ab initio* argument insists is inexorable. When interpreting statutes or regulations, however, the primary purpose is to discern and implement legislative intent, not impose a pleasing but artificial symmetry on the legislative process. Thus, clearly stated legislative intent should prevail over the unintended consequences forced by a void *ab initio* analysis.[45]

The most obvious flaw in the *ab initio* equation, however, is its total disregard for the Tenth Amendment authority reserved by the states in the context of cooperative federalism. As shown above, when a state adopts a federal regulatory program, it is presumed to be acting at its own sovereign initiative. It follows that the state's enactments will be judged by state, not federal, substantive and procedural standards. Within this perspective, a state may adopt by specific and descriptive reference a federal regulation subsequently declared void *ab initio*, and legitimize it with the imprimatur of its own proper procedures and police powers.

In essence, the void *ab initio* theory exalts mechanistic legal logic over a common sense understanding of how modern American government works, insisting upon rigid adherence to a legal solipsism

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44. *See supra* notes 12-13, 29 and accompanying text.

45. Remarkably similar principles were at stake in State v. Corbett, 61 Ark. 226, 32 S.W. 686 (1895). There, in dicta, the Arkansas Supreme Court rejected an argument that a legislative attempt to amend a provision subsequently declared unconstitutional was also void:

> This amendment, it is contended, is void for the reason that, the original section being void, there is nothing to amend to. Such is a rule applicable to pleadings in court, but by what authority we are compelled to apply it to the law-making department in enacting laws we are not advised. The rule for the guidance of the courts is to ascertain the intention of the legislature, and not the mistakes of legislature, either of law or fact.

61 Ark. at 240, 32 S.W. at 689.

at the expense of the principles of federalism and state legislative intent. Roscoe Pound warned against relying on such hollow logic: "The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions."[46]

PC&E contends that the void *ab initio* equation is itself flawed *ab initio* by failing to recognize the clout of the states' Tenth Amendment police powers.

B. Lack of an Independent Rationale.

The other substantive argument raised by Mr. Gates against the validity of PC&E's mixture and derived-from rules is that the state has failed to produce a record supporting the rules independent of that supplied by EPA.

One aspect of this argument can be dealt with in short order. Mr. Gates suggests that the inclusion of the phrase "in the judgment of the Department" in the state definition of hazardous waste limits the agency's authority to rely upon incorporation of federal rules. Acts 162 and 165 of 1993 dispel this implication. These Acts require PC&E to provide an articulated basis for its rulemaking decisions, but explicitly state that reference to EPA regulations suffices as an independent basis for state regulations.[47]

Mr. Gates also suggests that because PC&E has not generated an independent record supporting the state regulations, PC&E has failed "to demonstrate a factual basis for the Department's independent determination."[48] Apparently, Mr. Gates is claiming that the state mixture and derived-from rules could not withstand substantial evidence review if challenged in court. In a very recent decision, however, the Arkansas Supreme Court rejected the suggestion that PC&E rulemaking decisions must survive a substantial evidence—i.e., quantum of evidence—test. Instead the court held that PC&E's rulemaking decisions were to be judged by the less stringent arbitrary and capricious standard.[49]

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46. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620-21 (1908).

47. *See, e.g.*, Act 165 of 1993 at § 12, amending ARK. CODE ANN. § 8-4-202(d)(4)(A) to read, in relevant part, as follows: "For any standard or regulation that is identical to a regulation promulgated by the United States Environmental Protection Agency, this portion of the [rulemaking] record may be satisfied by reference to the Code of Federal Regulations." *Id.*

48. Gates, *supra* note 32, at 712.

49. Gurley v. Mathis, 313 Ark. 412, 856 S.W.2d 616 (1993).

Under arbitrary and capricious review of rulemaking decisions, the agency action will be upheld unless "it is not supportable on any rational basis."[50] Such an analysis would initially focus upon what prompted the promulgation of the regulation in the first place. It is inconceivable that a court would find PC&E's efforts in 1984 to participate in a federally mandated regulatory program to be arbitrary and capricious or in excess of statutory authority. Thus, judicial review would ultimately turn on whether it is arbitrary and capricious for PC&E to remain faithful to its own mixture and derived-from rules after the decision in *Shell Oil*.

PC&E contends it is both rational and practical to maintain the effectiveness of the long-standing state regulations until a national consensus is reached on a viable substitute for the mixture and derived-from rules. As the Arkansas Supreme Court noted in *Department of Human Services v. Berry*,[51] a rule is not arbitrary and capricious simply because it may work a hardship, create inconveniences, or because an evil intended to be regulated does not exist in a particular case.[52] In light of these principles, PC&E's refusal to voluntarily abrogate its mixture and derived-from rules before alternatives are available can hardly be characterized as arbitrary and capricious.

## VI. Conclusion: For the Time Being Nothing Has Changed

Both Mr. Gates and Ms. Henry note the disenchantment of many states with the current mixture and derived-from rules.[53] In official comments to current rulemaking proceedings before EPA, PC&E states that "improvements can and should be made to the way listed hazardous wastes and especially waste residuals and contaminated media are regulated."[54]

EPA's hurriedly prepared Hazardous Waste Identification Rule (HWIR), however, is not a viable remedy to the states' misgivings.[55] Exercising poetic license, state regulatory officials have pegged the

50. Baxter v. Arkansas State Bd. of Dental Examiners, 269 Ark. 67, 77, 598 S.W.2d 412, 417 (1980) (quoting First Nat'l Bank of Fayetteville v. Smith, 508 F.2d 1371 (8th Cir. 1974)).

51. 297 Ark. 607, 764 S.W.2d 437 (1989).

52. *Id.* at 609, 764 S.W.2d at 438.

53. *See* Gates, *supra* note 32, at 707 n.42; Henry, *supra* note 43, at 750 n.172.

54. Letter from Randall Mathis, PC&E Director, to Environmental Protection Agency (July 23, 1992) (on file at EPA RCRA Docket S-212). This letter transmits PC&E's comments on EPA's proposed Hazardous Waste Identification Rule.

55. *See* Henry, *supra* note 43, at 750 n.172.

acronym "HWIR" with the descriptive pronunciation, "Haywire."[56] The near universal opposition by the states has sent EPA back to the drawing board.

Hopefully, the demise of the Council on Competitiveness and a muted Office of Management and Budget will allow EPA the latitude to promulgate an environmentally protective and reasonable alternative to the current mixture and derived-from rules. EPA's leadership is essential to prevent a chaotic array of state definitions with no national standard.

In the meantime, the long-standing and familiar mixture and derived-from rules remain the controlling law, both at the federal level and in Arkansas. Notably, since the *Shell Oil* decision, no industry interest has petitioned PC&E to amend its current rules through prevailing administrative procedures,[57] even though PC&E has publicly pronounced that its mixture and derived-from rules are "alive and well." In light of the premises discussed in this article, the regulated community in Arkansas would be well advised to not rely upon the risky assumption that *Shell Oil* vacated the Arkansas rules by implication.

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56. For the occasion of a July 1992 meeting between EPA officials and a task force assembled by the Association of State and Territorial Solid Waste Management Officials, state participants prepared and presented the following ditty:

"The Haywire Hokie Pokie"

You put your right waste in!
You take your wrong waste out!
You put your right waste in and dilute it all about.
You do the Haywire Hokie Pokie and you mix it all around.
That's what Quayle's all about!

57. Regulation No. 8: Administrative Procedures, provides at Part II, § 3 that "any person may file with the Secretary [of the Commission] a written request to issue, amend, or repeal any rule or regulation. . . . The Commission shall either deny the request or approve the initiation of rulemaking procedures." A similar procedure will be available under the administrative rulemaking provisions adopted by the General Assembly in § 12 of Acts 162 and 165 of 1993, effective August 13, 1993.