

**Indiana Department of Environmental Management v.
KS Bearings, Inc, Greensburg, Decatur County, Indiana.
2000 OEA 10 (00-S-E-2547)**

TOPICS:

summary judgment
RCRA
post-closure
treatment lagoons
diesel and gasoline engines
electroplating
waste stream
wastewater
sludge
hazardous waste
solid waste
mixture rule
nonhazardous
listing description
F006
commingled wastewater
precursor
ambiguous
interpret regulation
regulatory intent
human health hazard
environmental threat

PRESIDING JUDGE:

Lasley

PARTY REPRESENTATIVES:

Petitioner: Marcie Horowitz, Esq.
IDEM: Catherine Gibbs, Esq.

ORDER ISSUED:

October 18, 2000

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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4. 329 IAC 3-6-2 and 40 C.F.R. §261.3 1 regulate only electroplating sludge, and not electroplating wastewater.
5. Two court decisions, considering challenges raised by two Indiana manufacturing companies, declined to apply Indiana's mixture rule.

III. Discussion:

KS Bearings argues it should not be treated differently than other Indiana manufacturers. Specifically, it points to decisions in United States v. Bethlehem Steel Corp., 38 F.3d 862 (7th Cir. 1994) and United States v. GK Technologies, Inc. et al., 1997 U.S. Dist. LEXIS 3783, 44 ERC 1651 (S.D. Ind, 1997). In those cases, the courts held that neither company produced F006 sludge because neither had sludge produced from pure electroplating wastewater. In other words, because the companies combined its electroplating wastewater with other process wastewater, the resultant sludge cannot be characterized as electroplating sludge. Furthermore, KS Bearings also contends its electroplating wastewater does not meet the definition of a hazardous waste. Thus, Indiana's mixture rule does not apply because KS Bearings only mixed nonhazardous wastewater.

IDEM responds to KS Bearings' arguments with the contention that the Indiana mixture rule was valid, during the relevant time period, because Indiana was operating its own hazardous waste program. Since KS Bearings admits at least two of its processes produce electroplating wastewater, it cannot avoid RCRA regulations by mixing that wastewater with other nonhazardous wastewater. Furthermore, while IDEM admits the electroplating wastewater may not be hazardous, it points to an EPA interpretation indicating the intent of the F006 listing was to regulate precursor wastewater.

For the following reasons, KS Bearings' motion must be granted. KS Bearings presented undisputed evidence that it does not mix a listed hazardous waste with a solid waste. Thus, the mixture rule has no bearing. Even if it did, two courts have interpreted the Indiana rule as being essentially invalid.

A. There was no mixture of a listed hazardous waste and a solid waste

KS Bearings relies heavily on the argument that none of the waste streams it combines were hazardous. In support of its argument, KS Bearings offers the affidavit of Dale Bertelson. Mr. Bertelson stated that, after testing, neither the wastewater nor the sludge meet any definition of a hazardous waste. See Exhibit C, Petitioner's Supplemental Brief. In response, while not refuting the Bertelson affidavit, IDEM urges this tribunal to follow the interpretation contained in an EPA memorandum. See Exhibit A, Respondent's Supplemental Brief. The memo states, in part, that "it has always been EPA's interpretation that sludge from wastewater mixtures of [F0061 are covered by the listing description." Furthermore, the EPA also alleges the F006 listing "is not modified in any way to suggest that it does not apply to sludge derived from combined wastewater streams." But, the memo recognizes that "some, but not all, of these rinsewaters/wastewaters are precursor wastestreams." What is more, the EPA also notes "that

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2000 OEA 10 (00-S-E-2547)**

only mixed treatment sludges that are separated and removed from the wastewater treatment plant/system are actually covered by the listing, *but not the commingled wastewater themselves.*” (Emphasis added). This certainly supports KS Bearings’ point of view.

Even so, it is hard to imagine why the EPA favors applying the mixture rule when:

- (1) the wastewater is not a listed hazardous waste,
- (2) the wastewater may or may not be a precursor, and
- (3) the resultant sludge is not hazardous.

Injecting those variables into a mixture rule analysis serves only to weaken the very purpose of the mixture rule. If the rule’s purpose is to prevent a responsible party from avoiding regulation by mixing a hazardous waste with a solid waste, then what is the rule’s purpose when it attempts to regulate the mixture of solid wastes that do not result in a hazardous waste? A more counseled approach is to confine the application of the mixture rule to the mixture of hazardous wastes and solid wastes. That way, responsible parties are clear regarding their duties when handling a hazardous waste. In other words, there is no question the mixture rule would apply if electroplating wastewater tested hazardous. Since that is not the case, KS Bearings is entitled to summary judgment as a matter of law.

i. The plain language of the regulation must be given effect

While the EPA memorandum suggests the F006 listing is not modified to limit it only to “pure” electroplating wastewater, the plain language of the listing does not provide as much. The F006 listing includes only “wastewater treatment sludges from electroplating operations.. . 329 IAC 3-6-2 (1989 Supplement). Because the regulation is unambiguous, it is unnecessary and inappropriate to interpret the regulation or consider regulatory intent. *See Indiana Department of Natural Resources v. Peabody Coal Co.*, 654 N.E.2d 289, 295 (Ind.Ct.App. 1995) (“when a statute is clear and unambiguous, on its face, the court need not, and indeed must not interpret the statute.”).

For the sake of argument, however, if the rule was ambiguous, it would be appropriate to consider the consequences of a particular construction. *Economy Oil Corporation v. Indiana Department of State Revenue*, 321 N.E.2d 215, 219 (Ind.Ct.App. 1974) *reh’g denied*. Under EPA’s construction of the F006 listing, the regulated community is left uncertain as to whether its electroplating wastewater will invoke RCRA controls. This is true even though the wastewater has tested nonhazardous. Hence, under the EPA approach, uniformity and consistency could be seriously compromised. Under the decision today, the regulated community knows its nonhazardous electroplating wastewater does not come within the ambit of the F006 listing when it is mixed with other nonhazardous wastewater. Furthermore, the integrity of the mixture rule, as set out in 329 IAC 3-3-3 (1989 Supp.), is maintained because it still regulates the mixture of a listed hazardous waste with a solid waste. And, IDEM has not pointed to a single human health hazard or environmental threat the electroplating wastewater poses, which might require a different result. Indeed, even the EPA memorandum admits “that electroplating rinsewater is not specifically listed under 40 C.F.R. 261 Subpart D. . . .”

**Indiana Department of Environmental Management v.
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2000 OEA 10 (00-S-E-2547)**

B. Two courts have failed to recognize the validity of Indiana's mixture rule

IDEM hopes to interject a new wrinkle in the debate regarding Indiana's mixture rule. It contends that since Indiana had its own mixture rule, during the relevant time period, its rule remained intact even though the courts invalidated EPA's mixture rule. This position, however, ignores the fact that both decisions regarding the mixture rule stem from suits by Indiana companies in Indiana. Both the Bethlehem Steel and GK Technologies courts concluded the mixed wastewater sludge was not an F006 listed hazardous waste. Neither court even acknowledged Indiana's mixture rule even though Indiana's hazardous waste program was operating "in lieu" of the federal program since 1986. In any event, IDEM's argument is moot because KS Bearings did not mix a listed hazardous waste with a solid waste.

IV. Conclusion of Law:

The Environmental Law Judge concludes as a matter of law, based on the foregoing Undisputed Facts and Discussion, that KS Bearings did not generate wastewater treatment sludge from electroplating operations pursuant to 329 JAG 3-6-2 and, therefore, 329IAC 3-3 -3 (a)(2)(D) does not apply because KS Bearings did not mix a listed hazardous waste with a solid waste.

V. Order:

KS Bearings' Motion for Summary Judgment is hereby **GRANTED** and IDEM's decision requiring KS Bearings to obtain a RCRA post-closure permit is hereby **REVERSED** and **REMANDED** to the agency for proceedings consistent with this decision.

You are further notified that pursuant to IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of IDEM. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5-5 et seq. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 18th day of October, 2000.

Linda C. Lasley
Environmental Law Judge