IN THE SUPREME COURT
OF THE STATE OF OREGON

OIL RE-REFINING COMPANY,	)	
	)	OAH Case No. 1001690
Petitioner on Review,	)	
	)	CA A149365
v.	)	
	)	SC 063590
ENVIRONMENTAL QUALITY COMMISSION, DEPARTMENT OF ENVIRONMENTAL QUALITY FOR THE STATE OF OREGON	)	
Respondent on Review.	)	

PETITIONER ON REVIEW'S REPLY BRIEF ON THE MERITS
OIL RE-REFINING COMPANY

On Review of the decision of the Court of Appeals, on appeal from a proposed and final order of the Environmental Quality Commission.

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I. SUMMARY OF THE ARGUMENT

In Respondent Environmental Quality Commission ("EQC") attempts to undermine the applicability of one of the most important DOT provisions applicable to this case, 49 CFR § 171.2(f), by incorrectly asserting that the sets of United States Environmental Protection Agency ("EPA") and United States Department of Transportation ("DOT") hazardous waste transportation regulations are "separate and distinct." 49 CFR § 171.2(f) is the provision that allows transporters who exercise reasonable care to rely upon information supplied by waste generators. In actuality, Congress "fully interlocked" these two sets of hazardous waste transportation regulations and by federal statute, the Resource Conservation and Recovery Act ("RCRA"), must be consistent. Therefore, 49 CFR § 171.2(f) is fully applicable to Petitioner Oil Re-Refining Company ("ORRCO") which EQC admits exercised reasonable care when it accepted the water and methanol mixture from the generator, Absorbent Technologies, Inc. ("ATI").

A state rule that is inconsistent with Hazardous Materials Transportation Act ("HMTA") is preempted. In this context, EQC's strict liability standard is inconsistent with the reasonable care standard in 49 CFR § 171.2(f).

The reasonable care standard in 49 CFR § 171.2(f), designed by DOT to protect the "truly innocent," encourages transporters to exercise due diligence. A strict liability standard does not. A strict liability standard unjustly punishes

transporters for generators' mistaken or intentional mischaracterization even when, as in this case, that characterization of waste is beyond a generator's knowledge or control.

Contrary to EQC's assertion, 49 CFR § 171.2(f) does not encourage willful blindness. The reasonable care standard in 49 CFR § 171.2(f) is incompatible with willful blindness.

EQC states that "[a]though RCRA does not *require* transporters to second-guess a generator's waste characterization, its [strict liability] manifest requirement nonetheless provides incentives for transporters to do so * * *." (Resp. Br page 27). EQC's apparent purpose in encouraging second-guessing is to induce transporters to err on the safe side and classify a material as hazardous when the generator does not. However, this exposes transporters to civil and criminal liability because misclassification violates HMTA regulations. EQC's position creates another inconsistency between Oregon's rule and HMTA regulations.

The court in *Crockett v. Uniroyal, Inc.,* 772 F2d 1524, 1534 (11th Cir 1985), correctly concluded that "EPA and DOT regulations do not impose upon a transporter a duty to determine if a hazardous waste is present when the generator states that it is not." Whether such a duty exists is precisely the issue in this appeal.

II. ARGUMENT

A. *Regulations Promulgated by DOT Apply to Transportation of Hazardous Waste and Hazardous Waste Manifests.*

If 40 CFR § 262.20(a)(1) were the only regulatory provision that was at issue in this case, EQC's position concerning strict liability would be stronger. However, this provision must be analyzed in the context of the HMTA, several relevant HMTA regulations promulgated by DOT and the regulatory history of EPA's rules governing the transportation of hazardous waste. In its brief EQC attempts to minimize the importance and/or applicability of the relevant HMTA regulations. For example, EQC asserts that 49 CFR § 171.2(f) is not relevant and "has nothing to do with RCRA's manifest requirement" because this provision "applies to HMTA safety rules, not RCRA's manifest requirement." (Resp. Br. Pages 27, 28). EQC cites no authority for this assertion and it paraphrases this same conclusion by stating that "[t]hose rules set forth HMTA's transportation safety standards – i.e., requirements regarding 'shipping papers, marking, labeling, transport vehicle placarding and packaging of hazardous materials' * * *. They do not apply to RCRA manifests." (Resp. Br. pages 28-29). EQC also claims that "[n]one of the sources cited by ORRCO relate to RCRA manifests; all of those sources discuss shipping papers * * *." (Resp. Br. page 29). Thus, EQC attempts to persuade this Court that "shipping papers" do not include manifests. However, DOT's definition of "shipping

paper," set forth at 49 CFR § 171.8, clearly states that "*Shipping paper* means a shipping order, bill of lading, *manifest* or other shipping document serving a similar purpose and prepared in accordance with subpart C of part 172 of this chapter" (emphasis added). Moreover, the HMTA regulations also state: "A hazardous waste manifest required by 40 CFR part 262, containing all of the information required by this subpart, may be used as the shipping paper required by this subpart." 49 CFR § 172.205(h).

More importantly, DOT's rule, set forth at 49 CFR § 171.3 (titled "Hazardous waste."), provides: "(a) No person may offer for transportation or transport a hazardous waste (as defined in §171.8 of this subchapter) in interstate or intrastate commerce except in accordance with the requirements of this subchapter." Of course, "this subchapter" includes 49 CFR § 171.2(f) which confirms that:

> "[e]ach carrier [transporter] who transports a hazardous material in commerce may rely on information provided by the offeror [generator] of the hazardous material or prior carrier, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect."

EQC is obviously uncomfortable with the existence of 49 CFR § 171.2(f). EQC asserts that RCRA and HMTA are "two separate statutory schemes" and are "separate and distinct." (Resp. Br. page 27). According to EQC, HMTA "governs the safety aspects of transportation" while "RCRA's transportation

requirements focus on the tracking of [hazardous] wastes to assure that they reach their proper destination." (Resp. Br. page 27). This distinction ignores 49 CFR § 172.205(b-e) which establish that HMTA's regulations governing transportation of *hazardous waste* also focus on the tracking of hazardous wastes to assure they reach their proper destination.[1] In other words, as the

[1] Subsections (b) through (e) provide:

> "(b) The shipper (generator) shall prepare the manifest in accordance with 40 CFR part 262.
>
> (c) The original copy of the manifest must be dated by, and bear the handwritten signature of, the person representing:
>
> (1) The shipper (generator) of the waste at the time it is offered for transportation, and
>
> (2) The initial carrier accepting the waste for transportation.
>
> (d) A copy of the manifest must be dated by, and bear the handwritten signature of the person representing:
>
> (1) Each subsequent carrier accepting the waste for transportation, at the time of acceptance, and
>
> (2) The designated facility receiving the waste, upon receipt.
>
> (e) A copy of the manifest bearing all required dates and signatures must be:
>
> (1) Given to a person representing each carrier accepting the waste for transportation,
>
> (2) Carried during transportation in the same manner as required by this subchapter for shipping papers,
>
> (3) Given to a person representing the designated facility receiving the waste,
>
> (4) Returned to the shipper (generator) by the carrier that transported the waste from the United States to a foreign destination with a notation of the date of departure from the United States, and
>
> (5) Retained by the shipper (generator) and by the initial and each subsequent carrier for three years from the date the waste was accepted by the initial carrier. Each retained copy must bear all required signatures and dates up to and including those entered by the next person who received the waste."

HMTA regulations make clear, the hazardous waste manifest is not the exclusive province of EPA and RCRA. Likewise, the HMTA regulations are not confined to "safety aspects."

As ORRCO's opening brief demonstrates, when Congress enacted RCRA it was emphatic that "[a]ll regulations promulgated by the Administrator shall be consistent with the requirements of the Hazardous Materials Transportation Act." HR Rep No 94-1491(I), 94th Cong, 2d Sess, *reprinted in* 1976 USCCAN 6238, 6265. EQC's position has merit only if it is allowed to disregard EPA's explicit description of the "interlocking" nature of the RCRA and HMTA hazardous waste transportation regulations.[2] According to EPA, "[u]pon adoption of DOT's regulations, these two sets of regulations will be fully interlocked * * *." 45 Fed. Reg. 12,737, 12,740 (February 28, 1980).

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[2]

> "*Transporters of hazardous waste* are cautioned that *DOT's regulations are fully applicable* to their activities and enforceable by DOT. These DOT regulations are codified in title 49, Code of Federal Regulations, subchapter C. EPA and DOT worked together to develop standards for transporters of hazardous waste *in order to avoid conflicting requirements*. * * * *a transporter who meets all applicable requirements of 49 CFR parts 171 through 179 and the requirements of 40 CFR 263.11 and 263.31 will be deemed in compliance with this part.*"

40 CFR § 263.10 (emphasis added). *See* 45 Fed Reg 12,737, 12,743 (February 26, 1980).

RCRA and HMTA regulations are "fully interlocked" and "consistent," not "separate" and "distinct." Consequently, EQC's assertion is wrong.

EQC also argues that EPA "deleted its reference to 49 CFR 171." (Resp. Br. page 29). Apparently, the "deletion" removed the inconvenient language which provides that a transporter who exercises reasonable care may rely on the information supplied by the generator. However, EPA had no intention to excise any provision of the HMTA regulations. EPA provided the following explanation about the relationship between DOT's and EPA's hazardous materials transportation regulations: "section 3003(b) of the [RCRA] requires that the regulations promulgated pursuant to section 3003 be consistent with the requirements of the Hazardous Materials Transportation Act and DOT's regulations implementing that statute." 45 Fed Reg 12,737, 12,740 (February 26, 1980). "Therefore, in developing its regulatory system for transporters of hazardous waste, EPA decided to rely upon DOT's existing system to the fullest extent possible." 45 Fed Reg 12,737, 12,741 (February 26, 1980) (emphasis added).

EPA unambiguously confirmed that

> "[b]ecause of DOT's adoption of these regulations, incorporation by reference of the entire body of DOT's regulations is unnecessary. In the final regulation, the incorporation by reference has been replaced by a note which explains the coordination of DOT and EPA regulations and which cautions transporters that both sets of regulations apply to their activity."

45 Fed Reg 12,737, 12,740.

Thus, instead of "deleting" any provision of DOT's regulations (including section 171), EPA expressly embraced them. Consequently, because both sets of regulations apply to transporters such as ORRCO, then a transporter may rely on information provided by the waste generator so long as the transporter's due diligence conditions set forth in 49 CFR § 171.2(f) are met.

Significantly, EQC failed to address the decision in *New York v. United States Department of Transportation*, 37 F Supp 2d 152 (NDNY 1999), in which the court analyzed a state's authority to adopt a more stringent hazardous waste transportation requirement than is set forth in the HMTA regulations.

> "*The Court agrees that DOT does have primary jurisdiction over the regulation of the transportation of hazardous waste* as hazardous 'material' includes that of 'waste.' *See* 49 C.F.R. § 171.8 (definition of 'hazardous material' includes 'hazardous substances, hazardous wastes'). While EPA has jurisdiction over the regulation of hazardous waste management, including some aspects of transportation, EPA is statutorily obligated to coordinate its RCRA regulations applicable to transporters of hazardous waste with DOT regulations applicable to transporters of all hazardous material. *See* 42 U.S.C. § 6923(b); H.R. Rep. No. 1491, 94th Cong., 2d Sess. 1976, reprinted in 1976 U.S.C.C.A.N. 6238, 1976 WL 14072; *see also* 40 C.F.R. § 263.10 (noting that 'EPA and DOT worked together to develop standards for transporters of hazardous waste in order to avoid conflicting requirements.'). Furthermore, despite the RCRA's recognition that states are permitted to establish requirements which are 'more stringent' than EPA regulations, see 42 U.S.C. § 6929, when dealing with transporters of hazardous wastes, *this general state empowerment must be read in conjunction with the statutory mandate that EPA regulations be consistent with the HMTA. See 42 U.S.C. § 6923(b)*."

Id. at 156-57 (footnotes omitted) (emphasis added).

Consequently, a state's hazardous waste transportation requirement that is inconsistent with a HMTA regulation is preempted because DOT has primary jurisdiction over the transportation of hazardous waste. EPA agrees that preemption is proper in this context. In a published guidance letter dated March 7, 1996, Michael Shapiro, Director of EPA's Office of Solid Waste, informed Charles Dickhut (Association of Waste Hazardous Materials Transporters) that:

> "[T]he federal hazardous materials transportation laws include express authority under which the DOT may preempt State laws which touch upon the preparation, content and use of shipping papers used in conjunction with the transportation of hazardous materials in commerce, unless the State laws are 'substantively the same' as the federal requirements. 49 USC 5125(b)(1)."

RO 11953. Obviously, a state requirement that a transporter *may not rely* on a waste characterization by a generator is not substantively the same as the longstanding HMTA regulation that holds that a transporter *may rely* on a generator's waste characterization. While an inconsistent state regulation would be preempted, ORRCO explained in its opening brief that 40 CFR § 262.20(a)(1) can, and should, be harmonized with 49 CFR § 171.2(f).

EQC also ignored the discussion of preemption set forth in ORRCO's opening brief, claiming that 49 CFR § 171.2(f) was "entirely consistent" with 40 CFR § 262.20(a)(1). (Resp. Br. page 30). EQC asserted that "transporters of hazardous waste may rely on information provided by shippers for compliance with HMTA's transportation-safety standards, but they are strictly liable for violations of RCRA's separate manifest requirements." *Id.* That argument is

difficult to comprehend because (1) RCRA's manifest requirements are not separate (*see* 49 CFR § 172.205 which governs hazardous waste manifests); and (2) the EPA and DOT hazardous waste transportation regulations are "fully interlocked" and must be consistent as required by 42 USC § 6923(b).

B. *49 CFR § 171.2(f) Encourages Transporters to Exercise Reasonable Care; Strict Liability Does Not.*

EQC also argues that:

> "ORRCO's actions in this case illustrate the positive effect that strict liability has on transporters. ORRCO did not merely rely on ATI's waste characterization * * *. Before ORRCO agreed to transport the methanol and water waste, ORRCO's compliance manager (1) met with the generator; (2) received an explanation of the generator's manufacturing process; (3) asked whether the methanol and water waste had been used as a solvent; (4) made inquiries regarding the generator's conditionally exempt status; and received a sample of the waste. (ER-34)."

(Resp. Br. page 31). However, EQC is mistaken about how cause and effect actually play out in this context. Contrary to EQC's view, strict liability does not "induce" precaution because due diligence is neither recognized nor rewarded. Under EQC's strict liability regime, transporters will be penalized even when compliance is beyond their control or knowledge. Furthermore, ORRCO did not then, and does not now, believe that RCRA creates a strict liability framework for those who rely on the generator's waste characterization. Therefore, its good-faith due diligence efforts could not have been induced by such a threat. ECQ's application of strict liability in the context of the facts of this case is unprecedented. So, if a motivation is to be attributed to ORRCO's

due diligence, other than good business practice, it is far more likely that the source of such motivation was DOT's longstanding "reasonable care" rules.[3]

Due diligence is fostered by 49 CFR § 171.2(f) because:

> "[e]ach [transporter] who transports a hazardous material in commerce may rely on information provided by the offeror [generator] of the hazardous material or prior carrier, *unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect."*

(emphasis added). EQC does not dispute that ORRCO exercised reasonable care. Nevertheless, EQC argues that using the 49 CFR § 171.2(f) standard, "transporters would be induced to maintain their ignorance of a waste's true classification, in order to avoid knowing or having reason to know that the waste was hazardous." (Resp. Br. page 32). That argument is nonsensical because the standard does not allow the kind of willful blindness EQC fears. The standard explicitly requires a transporter act like a reasonable person "exercising reasonable care."

EQC warns that "[a]bsolving transporters from liability based on mistaken characterization by generators would remove any incentive for

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[3] In promulgating 49 CFR §171.2(f), DOT reaffirmed its earlier policy statement that "[t]o the extent that any carrier, regardless of the mode of transportation, is truly 'innocent' in accepting an undeclared or hidden shipment of hazardous materials, it lacks the knowledge required for assessment of a civil penalty." 70 Fed Reg 43,639, 43,640 (July 28, 2005) *citing* 63 Fed Reg 30,411, 30,412 (June 4, 1998)[3].

transporters to make appropriate inquiries[4] and adequately test materials prior to transport." (Resp. Br. page 32). Actually, 49 CFR § 171.2(f) does not remove incentives to make appropriate inquiries because the "reasonable care" standard *requires* such inquires. Similarly, in circumstances where adequate testing will determine whether a material constitutes a hazardous waste, the "reasonable care" standard would require such testing. Implicit in the reasonable care standard articulated in 49 CFR § 171.2(f) is that punishment is not warranted where the transporter, acting as a reasonable person taking reasonable care, does not contradict the classification identified by the generator.[5] In this case, for example, ATI explicitly informed ORRCO that the methanol was never used as a solvent. (ER-34). The factor that made the methanol/water mixture hazardous (its alleged use as a solvent) was known only to the generator (and perhaps not even by the generator[6]). Despite ORRCO's reasonable diligence, it

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[4] The government's witness, Special Agent Eric Martenson, admitted that EPA's inquiry in this case lasted up to five years and involved "tens of thousands of documents." (Dec. 14 Tr page 102).

[5] DOT designed the reasonable care standard in 49 CFR § 171.2(f) to preclude the assessment of civil penalties against the "truly 'innocent' [who accept] undeclared or hidden shipment[s] of hazardous materials * * *" 70 Fed Reg 43,638, 43,640 (July 28, 2005) *citing* 63 Fed Reg 30,411, 30,412 (June 4, 1998).

[6] The standard dictionary definition of "solvent" is "a liquid capable of dissolving another substance." The *American Heritage Dictionary of the English Language*, p 1230 (New College ed). The methanol in question was used as a drying agent that EPA apparently classifies as a solvent.

did not determine the generator's classification was incorrect. In fact, because of the factor that made the mixture hazardous, no reasonable person acting with reasonable care in those circumstances could have contradicted the generator. That is not a circumstance that warrants the punishment the EQC has pursued.

Additionally, EQC states that "[a]though RCRA does not *require* transporters to second-guess a generator's waste characterization, its [strict liability] manifest requirement nonetheless provides incentives for transporters to do so * * *." (Resp. Br. page 27) (emphasis in original). Presumably, EQC's intent in encouraging second-guessing is to have transporters err on the safe side and classify a material as hazardous when the generator does not.

EQC chooses to ignore the fact that DOT is adamantly opposed to second-guessing. According to DOT,

> "[A] material that is not a hazardous material according to this sub-chapter may not be offered for transportation or transported when its description on a shipping paper includes a hazard class or an identification number specified in 49 CFR §172.101. This provision is most frequently violated[7] when the shipments involve non-RCRA Waste, which is not considered DOT hazardous materials."

Federal Motor Carrier Safety Administration, *How To Comply With Federal Hazardous Materials Regulations*,

[7] EQC's recommendation for transporters to second-guess the generators' decision on waste classification may avoid a penalty under RCRA but it exposes transporters to civil and criminal penalties under HMTA. *See* 49 USC § 5123 (civil penalties) and 49 USC § 5124 (criminal penalties).

https://www.fmcsa.dot.gov/regulations/hazardous-materials/how-comply-federal-hazardous-materials-regulations.

In addition, Special Agent Martenson, testified that it was *not* appropriate for a transporter to substitute his judgment for the judgment of the generator with respect to waste characterization. (Dec. 14 Tr pages 99-100).

Even second-guessing does not eliminate a transporter's exposure to liability under the EQC's strict liability standard. Transporters would be safer if they merely classified all material as "hazardous." Not only is this poor public policy, it creates another inconsistency with HMTA regulations which by statute must preempt inconsistent state requirements.

C. *The Eleventh Circuit's Decision in Crockett v. Uniroyal is Directly Relevant to the Fundamental Issue in this Appeal.*

EQC asserts that a decision ORRCO relies on, *Crockett v. Uniroyal, Inc.*, 772 F2d 1524 (11th Cir 1985), "has no bearing here." (Resp. Br. page 32). While this decision is not binding on this Court, it is directly on point and persuasive.[8] The basic issue in *Crockett* is identical to the basic issue in the instant case: whether a transporter has a regulatory duty to substitute its waste characterization assessment in place of the generator's assessment when the waste material is not accompanied by a manifest. The court in *Crockett*

[8] Persuasive authority is "[a] precedent that is not binding on a court, but that is entitled to respect and careful consideration. For example, if the case was decided in a neighboring jurisdiction, the court might evaluate the earlier court's reasoning without being bound to decide the same way." Black's Law Dictionary (9th ed 2009).

reviewed most of the regulatory provisions that are relevant in the instant case and observed:

> "EPA regulation 40 C.F.R. § 263.20 governs the record keeping required by the EPA for the transportation of hazardous waste. That section provides that, for certain designated waste materials, a transporter may not accept those materials for transportation unless they are accompanied by a hazardous waste manifest in accordance with the provisions of 40 C.F.R. § 262.
>
> "The regulations then go on to allot the burden for making the determination that a solid waste is hazardous within the meaning of the regulations. Under 40 C.F.R. § 262.11, that determination must be made by the person who generates the waste. The DOT regulation at issue, 49 C.F.R. § 172.205, directs preparation of a hazardous waste manifest in accordance with 40 C.F.R. § 262. 49 C.F.R. § 172.205(b) (1984). Under D.O.T. regulation also, then, the initial responsibility for determining whether hazardous waste is present rests with the generator."

772 F2d at 1534 (footnotes omitted). Having considered these regulatory provisions, the court in *Crockett* held:

> "We find no duty under EPA or DOT regulations which would require the carrier to verify such a representation [that the railcar containing the hazardous waste was empty]. Accordingly, we agree with the district court that *EPA and DOT regulations do not impose upon a transporter a duty to determine if a hazardous waste is present when the generator states that it is not."*

Crockett, 772 F2d at 1534 (emphasis added). Whether such a duty exists is precisely the issue in this appeal. EQC is entitled to disagree with the Eleventh Circuit's reasoned conclusion – but to dismiss it as irrelevant is somewhat disingenuous.

In summary, the holding in *Crockett* (as well as the holding in *Borger v. CSX Transportation, Inc.*)[9] combined with the explicit terms of 49 CFR § 171.2(f) confirms that, in the absence of discrepancies or contrary information, a transporter may rely on the information provided by the generator.

III. CONCLUSION

For the reasons stated above, ORRCO respectfully requests that this Court to grant the relief requested in the Conclusion of its Opening Brief on the Merits.

DATED: April 15, 2016.

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[9] 571 F3d 559, 565 (6th Cir 2009). In *Borger*, the court observed: "The Department of Transportation has long interpreted this regulation [49 CFR §174.3] to entitle carriers to rely on a shipper's certification that the material offered is in accordance with the Hazardous Material Regulations unless it has 'reason to know of discrepancies.'" 571 F3d 559, 565 (6th Cir 2009) *citing* 63 Fed Reg 30,411 (June 4, 1998). 49 CFR § 174.3 provides: "No person may accept for transportation or transport by rail any shipment of hazardous material that is not in conformance with the requirements of this subchapter." This provision is similar to 40 CFR § 263.20(a)(1): "A transporter may not accept hazardous waste from a generator unless the transporter is also provided with a manifest * * *."

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DATED: April 15, 2016.

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PROOF OF SERVICE

I hereby certify that on the date set forth below, I electronically filed PETITIONER'S REPLY BRIEF using the State of Oregon Appellate eFile System;

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