D.C. Circuit Declares Materials Stored for Later Recycling Are Not Solid Waste

The United States Court of Appeals for the District of Columbia Circuit has decided that materials that are reused within an ongoing manufacturing process are not solid wastes, even if they are first stored or treated prior to recycling. According to the court, new United States Environmental Protection Agency (EPA) rules that consider materials destined for reuse as part of a continuous industrial process to be solid wastes are against Congress's intent under the Resource Conservation and Recovery Act (RCRA).

The Association of Battery Recyclers, Inc. and several other trade organizations (the "petitioners") asked the court to cancel new RCRA hazardous waste rules restricting management of certain mineral processing wastes and hazardous soils promulgated by EPA in 1998. *Land Disposal Restrictions Phase IV*, 63 Fed. Reg. 28556 (final rule, May 26, 1998). These rules changed EPA's definition of solid waste so that recycling certain mineral processing wastes would require compliance with hazardous waste rules. In addition, the rules impose treatment standards that must be used before certain metal bearing wastes may be disposed of in the ground.

EPA Treats Materials as Wastes Even Before they are "Discarded"

EPA's RCRA rules describe how to determine whether a material is a solid waste or a hazardous waste. A waste cannot be a hazardous waste unless it is a solid waste as well. A solid waste is considered hazardous waste if it possess one of four characteristics, 1) ignitability; 2) corrosivity; 3) reactivity; or 4) toxicity), or if EPA lists the waste as a hazardous waste. But to determine whether a material is a hazardous waste subject to the hazardous waste rules, one must first determine that the material is a solid waste.

Under the RCRA rules, the definition of solid waste begins by stating that a "solid waste" is any "discarded material" unless certain exclusion apply. 40 C.F.R. § 261.2(a)(1). The rules then go on to describe what EPA means by "discarded." Certain "recycled" materials are considered to be discarded, and, thus, to fall within the category of solid wastes. Among the recycled materials considered to be solid wastes are materials that are processed to recover a usable product.

For example, a manufacturer may generate an off-specification product or byproduct that requires additional processing before it can be turned into finished product. The manufacturer may first put the byproduct into storage for later processing ("reclaiming"). Then, after the off-specification byproduct is reclaimed, the manufacturer recycles it to the original manufacturing process. Thus, the manufacturer has first stored, then reclaimed and finally recycled the byproduct or off-specification product into final product. The new rule would consider such byproducts "solid wastes," and therefore, potential hazardous wastes.

The definition of "solid waste" includes recycled materials among those materials termed "discarded." The RCRA rules also exclude certain materials from being defined as solid wastes. Prior to the rule change, RCRA rules did not exclude certain reclaimed metal-bearing sludges,

byproducts, and spent materials generated from manufacturing processes ("secondary materials") from the definition of solid waste. The new rule provided that such secondary materials were excluded only if they are stored in certain acceptable ways.

When EPA finalized the new rule, the agency explained that no matter how briefly the materials are stored - even if placed on the ground momentarily before being recycled to a manufacturing process - EPA considers those materials, because they are not stored in accordance with the rule, to be solid waste, and hence, potential hazardous wastes. In the rule, certain sludges or byproducts from minerals processes that are destined for recycling and are stored on the ground or in tanks, containers, or buildings that do meet the design requirements, are defined as solid waste. 40 C.F.R § 261.4(a)(17).

The petitioners argued that, if a material is being returned to a manufacturing process, even if there is an intermediate processing step or intermediate storage, that material cannot be considered "discarded" and should not be considered a solid waste. The Court of Appeals agreed.

Flawed Definition of Solid Waste

Referring to a prior decision by the same court, *American Mining Congress v. EPA*, 824 F.2d. 1177 (D.C. Cir. 1987) (*AMC I*), the trade groups argued that Congress intended that "solid waste" be limited to discarded materials that are "disposed of, abandoned, or thrown away." How could EPA possibly infer from RCRA that the agency has the authority to consider materials recycled to an ongoing industrial process to have been "discarded?"

EPA replied that *AMC I* only applies to materials that are recycled immediately or continuously, because the *AMC I* court used the term "immediate reuse" in reference to materials that are not discarded. The court strongly disagreed, accusing EPA of thoroughly ignoring the court's words in *AMC I*, in which the court required that "material must be thrown away or abandoned before EPA may consider it a 'waste.'" The court continued:

> [T]he AMC I court stressed, again and again, that it was interpreting "discarded" to mean what it ordinarily means. To say that when something is saved [for recycling] it is thrown away is an extraordinary distortion of the English language.

In addition, the court found that the term "immediate" reuse did not mean reuse "at once," but, rather, it meant "direct" reuse. Thus, in the court's view, Congress clearly intended "to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned . . . We are persuaded that by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent." The court was adamant that secondary materials that are treated first before recycling "cannot be considered discarded if they are 'reused within an ongoing industrial process.'"

The court concluded that, as in AMC I, in the new rule EPA had ignored Congress' intent in RCRA because EPA based its regulations on an improper interpretation of "discarded." Thus,

materials slated for recycling in a manufacturing process, even if subjected to storage and intermediate processing steps, are not to be considered part of the national waste disposal problem that RCRA was intended to address. Such materials are not considered "discarded" unless managed in certain ways that clearly cast doubt on the intent to recycle them, such as by "speculative accumulation" without a clear intent to recycle the materials soon. Materials cannot be considered solid wastes or hazardous wastes if they are still part of the manufacturing process. Consequently, the Court of Appeals "set aside" the EPA rule defining certain recycled materials to be solid wastes.

Alternative Treatment Standards for Certain Wastes Are Lawful

The petitioners also complained that the new rule established unfair hazardous waste treatment standards for contaminated soil. Under RCRA rules, a hazardous waste may not be disposed of in the ground unless it is first treated to reduce the waste's hazardous nature. Normally, EPA rules specify which hazardous waste treatment methods must be used.

The new rule announced alternative treatment standards for contaminated soils. Instead of requiring use of a specified treatment technology before disposing of contaminated soils in the ground, the new rule accepts treatment to remove 90% of the soil's hazardous constituents. But the rule restricts the use of this alternative to treated soils that will be landfilled. It makes no provision for recycling the contaminated soils into products such as asphalt, brick, or cement, which may be placed on the ground in construction projects. The industries complained that the rule was unfair because EPA's proposal would have allowed such recycling.

The court replied that just because EPA originally proposed a rule that the industries wanted doesn't mean that EPA must finalize the rule. In the proposed rule, EPA had considered allowing a recycling method that had previously been prohibited. The public commented extensively on the proposal. Whether or not to promulgate the rule was up to EPA, according to the court, as long as notice and an opportunity to comment was given to the public. Therefore, the court concluded, the alternative treatment standard was properly promulgated by EPA.

Association of Battery Recyclers, Inc. v. EPA, 2000 WL 365306 (D.C. Cir. April 21, 2000).

This article was prepared by Stuart J. Weiss, an associate in our Environmental Department, and previously appeared in the July, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.