UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:		
Howmet Corporation,	)	RCRA 02-2004-7102
Respondent	)	RCRA 06-2003-0912

ORDER ON MOTIONS

In these consolidated actions[1] under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA" or "Act"), fundamental questions involving the scope of EPA's enforcement authority to regulate waste have been raised. Respondent Howmet contends that EPA has interpreted the term "discarded" waste in a manner at odds with the plain meaning of that word under the Act.

Background

A brief overview of the facts which gave rise to these actions follows.[2] For Docket No. RCRA 06-2003-0912 the Complaint alleges that the Respondent, Howmet, as the owner/operator of a facility in Wichita Falls, Texas, which produces aluminum investment castings,[3] is a large quantity generator of hazardous waste. Howmet uses liquid potassium hydroxide ("KOH") as a cleaning agent for its metal castings. Eventually, the KOH cannot be used further as a cleaner.

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[1]The Complaint in RCRA 06-2003-0912 was filed on September 26, 2003, and an unopposed motion to amend that complaint was filed on August 26, 2004. The Complaint in RCRA 02-2004-7102 was filed on October 31, 2003. The cases were consolidated on September 16, 2004. Although for convenience this Order references EPA regulations, both Texas and New Jersey have authorized hazardous waste programs. The state provisions cited in each Complaint are hereby incorporated by reference.

[2]In connection with the motions the parties filed joint stipulations for each docket. Those stipulations and matters conceded in Howmet's answers form the basis for the facts listed in this section.

[3]"Investment castings" refer to a process, also known as the "lost wax process," for making castings. The process begins by creating wax replicas of desired castings and then a ceramic form is created into which molten metal is poured.

At that point, the KOH is sent either to a permitted hazardous waste facility or to Royster-Clark, Inc., a fertilizer manufacturer. ("Royster"). The alleged violations arose out of the KOH deliveries to Royster. Three violations are alleged from this activity, which occurred during the period from about March 1999 through September 2000. First, in shipping the KOH to Royster, Howmet shipped to a facility that did not have an EPA identification number. Second, Howmet did not prepare a hazardous waste manifest for the KOH shipments to Royster. Third, Howmet did not send the notice to Royster informing it that the waste did not meet a treatment standard, and that the waste was subject to land disposal restrictions. In addition Howmet did not identify the hazardous constituents of the waste and it failed to keep a copy of such notice in its files. The Complaint seeks a compliance order, directing that Howmet comply with the provisions cited as well as that it comply with all other applicable hazardous waste management requirements, and proposes a civil penalty of $255,601.

For Docket No. RCRA 02-2004-7102 the complaint alleges again that Howmet manufactures aluminum investment castings, this time at its Dover, New Jersey facility, and that a KOH solution is similarly employed to clean the castings. As with the Wichita Falls facility, when the KOH can no longer be used for cleaning, Howmet either sends it to a hazardous waste disposal facility or to the same fertilizer manufacturer listed above, Royster-Clark, Inc.. Four counts derive from this activity, for which a total civil penalty of $180,021 is sought. The first count alleges that in sending the KOH to Royster, Howmet was sending the waste to a facility with no EPA identification number authorizing its storage, treatment or disposal. The second count alleges the same problem but it is directed at Howmet's use of a transporter of such hazardous waste that lacked an EPA identification number for such activity. The third count deals with Howmet's related failure to have a manifest for such hazardous shipments to Royster, while the last count deals with Howmet's failure to send a land ban notification[4] to Royster and its related failure to keep a copy of this notice at its facility. EPA proposes a civil penalty of $180,021 for the cited violations. As with the other complaint, EPA seeks a compliance order regarding these activities.

In sum, for both docket numbers the alleged violations consisted of sending the used KOH solution to a facility which did not have an EPA identification number and was not authorized by EPA to receive or manage such waste. In shipping the waste, Howmet did not use hazardous waste manifests which inform the transporter and receiver of the hazardous characteristics – in this case alleged corrosivity and possible chromium contamination. In addition, Howmet did not notify the receiver as to whether the waste was too contaminated for land application without prior treatment and the transporter Howmet used was not authorized by EPA to ship such waste.

[4]The land ban notification requires the generator to determine if the waste needs to be treated before its land disposal along with a determination as to whether the waste meets the appropriate treatment standards. 40 C.F.R. § 268.7(a), 268.48, 268.40.2

The Motions before the Court

EPA's memoranda[5] in support of its motions for partial accelerated decision in RCRA Dkt. No. 02-2004-7102 and Dkt. No. 06-2003-0912.

As stated, EPA maintains that the liquid potassium hydroxide and water ("KOH") solution involved here was a solid and characteristic hazardous waste, in that it was corrosive and potentially contaminated with chromium and, as such, subject to RCRA jurisdiction. To begin, EPA notes RCRA Section 1004(27), 42 U.S.C. § 6903(27), defines "solid waste" to include any discarded material, and that, by regulation, EPA has articulated that this includes spent materials which are or will be used in a manner constituting disposal. *See* 40 C.F.R.§ 261.1(c)(1).

EPA observes that RCRA required the Administrator to develop regulations for identifying and listing hazardous waste and to develop regulations addressing the legitimate use, reuse, and recycling of such waste. RCRA Section 3001, 42 U.S.C. § 6921. Regulations were promulgated and they define which secondary materials are solid and hazardous wastes subject to RCRA jurisdiction when they are recycled.[6] EPA looks to these regulations, which include 40 C.F.R. § 261.2, (Definition of solid waste), to support its position that Howmet's KOH solution is a solid waste. EPA asserts that the plain meaning of these regulations clearly sets forth the terms "solid waste" and "spent material." The EPA regulations define "solid waste" as any discarded material, including materials that are recycled or accumulated, stored or treated before recycling. 40 C.F.R. §261.2(a)(1), (a)(2) and (c). "Secondary material," that is used material that potentially can be solid and hazardous waste when recycled, and which includes "spent materials," is considered to be solid waste if it is used in a manner constituting disposal or used to produce products that are applied to, or placed on, land. The 1985 regulations defined "spent materials" as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. § 261.1. Thus, EPA asserts that the land application of material as fertilizer constitutes a "use in a manner constituting disposal." Here, the use in a "manner constituting disposal" was the KOH's land application as a fertilizer. EPA notes that it has expressly stated that "[u]ses that constitute disposal include ... the use of waste-derived fertilizer placed on the land." 53 Fed. Reg. 519,521 (Jan. 8, 1988).

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[5]Owing to the substantial similarity of the facts alleged in both dockets, a consideration which led both parties to agree that the cases should be consolidated, the Court, having read and considered each memorandum associated with the respective dockets, draws from both in a single summarization of EPA's position.

[6] 42 U.S.C.A. §6921(a) and (b). These regulations were promulgated in 1980 and 1985. 45 Fed. Reg. 33,073, (May 19, 1980) and 50 Fed.Reg. 614, (January 4, 1985).

Alternatively, if there is doubt as to the regulations' plain meaning, EPA observes that deference is due to its interpretation of its own regulations and it notes the substantial body of case law supporting that principle. One source of the Agency's interpretation of its regulations is found in the preamble to the rulemaking. EPA restated in that rulemaking that the term "spent materials" applied to materials that have been used and are no longer fit for use without being regenerated, reclaimed or otherwise re-processed. EPA notes that in the preamble to the final rule, it included the example of a solvent which was deemed 'spent' when it could no longer be used for that purpose. 50 Fed. Reg. at 624 (January 4, 1985 Final Rule). The definition had been modified from its proposed rule form to make clear that material could be reused for a similar, although not identical purpose, without being considered "spent" under RCRA. It asserts that the preamble to the final rule for these regulations supports this construction because it makes clear that once a material ceases its utility for its original use, it is considered "spent." *Id.* Thus, the KOH here, having been used and, due to contamination, no longer usable for the purpose for which it was produced, is properly considered spent material under 40 C.F.R.§ 261.1(c)(1).

EPA notes that "solid wastes," are further classified to include the subset of "hazardous wastes," when such wastes meet specified criteria, including exhibiting the hazardous characteristics identified in 40 C.F.R. §261.3. Corrosivity and toxicity are among the characteristics of hazardous waste.[7] Corrosivity is deemed present if the waste is aqueous and has a pH of less than or equal to 2 or greater than or equal to 12.5. Toxicity is deemed present for chromium if a toxic characteristic leaching extract contains a concentration equal to or greater than 5.0 mg/l, which is equivalent to 5 ppm of chromium. Here, EPA asserts that the KOH, is a hazardous waste because it exhibited the characteristic of corrosivity and, as a second basis, because of possible toxicity attributable to the presence of chromium.[8] With respect to corrosivity, that issue has been conceded by Howmet by virtue of the admission in its answer that the used KOH was aqueous and had a pH greater than 12.5.

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[7]EPA has assigned waste with the corrosivity characteristic the waste number D002, while characteristically toxic chromium has the waste number D007.

[8]While the evidence in support of EPA's claim regarding corrosivity is clear, its basis for the claim of toxicity is less certain. The evidence to support the toxicity claim is derived from results of material sampled *at Royster's* facility, which showed a chromium concentration of 6.4 ppm, based on the toxic characteristic leaching procedure, a value which arguably demonstrates that some Howmet-supplied KOH was characteristically toxic. It also mentions that test results of Howmet KOH sent to a permitted waste facility (i.e. Howmet KOH that was *not* sent to Royster) during the time period involved in the Complaint reflect that the hazardous waste facility receiving this Howmet KOH recorded chromium concentrations up to 51.5 ppm. However EPA itself discounts the evidentiary value of these results, because it concedes that since it was derived using a gross metals analysis it is not sufficient to show that the material was characteristically toxic. EPA A.D.Mem. 7102 at 19, n. 14.

Respondent's Brief in Opposition to Complainant's Motion for Partial Accelerated Decision and Complainant's Motion to Strike Howmet's Affirmative Defenses, and Respondent's Brief in support of its Motion to Dismiss.

Respondent, Howmet, believes that there is a fundamental preliminary question which must be resolved before one can address whether the particular regulations cited in the complaints have been violated. That question, as framed by Howmet, is "Did Congress grant EPA the authority to regulate, as solid wastes, materials that are not 'discarded.'?" Respondent's Opposition at 2.

The resolution of that question is not as simple as it may appear, because a determination that EPA may only regulate waste that has been discarded, does not answer when it is legitimate to conclude that waste has been discarded and who has the authority to make that determination. Thus, the pertinent question under the facts here is: When is waste properly deemed to be "discarded" and therefore regulated?

Howmet sees the resolution of this question as simple and straightforward: Congress did not grant EPA authority to regulate, as solid wastes, materials that are not discarded. According to Howmet this question has been resolved "time and again" by the Courts, each time denying EPA's attempts to regulate undiscarded material. Howmet contends that EPA has attempted to circumvent the Courts' determinations by trying to apply its RCRA authority to materials that have not been disposed of, abandoned or thrown away. *American Mining Congress v. EPA*, 824 F.2d 1177, (D.C. Cir. 1987)("*AMC I*"), *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d, 1047 (D.C. Cir. 2000)("*Battery Recyclers*"). Howmet believes that EPA has attempted to ignore this limitation upon its regulatory authority by employing tortured interpretations of the term "discarded," which "ignore the word's plain meaning[9], and [place] conditions on the legitimate use and reuse of materials." Respondent's Opposition at 2. As an example, Howmet points to the *Battery Recyclers* decision which criticized EPA for claiming that something that was, in fact, "saved" nevertheless could be categorized as "thrown away." *Id*. at 3. Thus, Howmet sees the matter as simple to resolve – one must merely determine if the "materials [have been] disposed of, abandoned or thrown away." *Id*. If the answer is "no," the inquiry is over, as EPA has no jurisdiction over the materials. For Howmet, as the KOH was "legitimately used in Royster's fertilizer manufacturing process" and its use of the KOH was typical for that manufacturing process, such facts demonstrate that it was not discarded. Further, Howmet believes that EPA's observation that some KOH was not sent to Royster, but instead was disposed of as hazardous waste, advances Howment's argument by demonstrating that *when the KOH was discarded as waste*, the RCRA requirements were followed but that when the KOH was simply reused in the manufacturing process, and therefore *not discarded*, it was outside of

[9]Howmet's "plain meaning" argument asserts that because the regulation defining "spent material" is unambiguous, one should not look beyond its words. Restated, there is no need to interpret what is clear on its face. Respondent's Opposition at 8.

the RCRA regulations.[10]

Howmet also addresses EPA's claim that the KOH is "spent material," and that such a designation categorizes the material as discarded, solid waste, covered by the regulations. As with Howmet's position that EPA has ignored the plain meaning of "discarded"under the statute, it contends that EPA's construction of "spent material" is "plainly erroneous and inconsistent" with the regulatory definition of that term.[11] Thus, Howmet contends that EPA has acted at odds with the plain meaning its own regulatory definition of that term. Howmet notes that the EPA definition of "spent material" describes it as material that has been used and can no longer serve "*the purpose for which it was produced* without processing." *Id.* at 5 (emphasis in Howmet's brief). Howmet asserts that EPA's mistake is with its construction of the "*purpose for which it was produced*" phrase. The EPA approach mistakenly looks to whether Howmet and Royster employed the KOH for *different purposes.* As such, the EPA inquires only as to a product's *first* use.[12] The correct interpretation, according to Howmet, lies in determining whether Royster's manufacturing process continued to use the material for a purpose for which it was produced. Thus, Howmet contends that one looks to *any* of the purposes for which KOH could be produced

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[10] Howmet also takes the position that EPA errs by focusing on the *production of used KOH by the Respondent.* Howmet points out that it does not produce KOH, it only uses KOH in its manufacturing process and, "when the strength of the KOH solution [becomes] no longer suitable for Howmet's use, it [is then] used by Royster in its manufacturing process." *Id*. at 6, 7.

[11]In support of this principle, Howmet cites cases standing for the general proposition that an agency must adhere to its own regulations. *Jefferson Univ. v. Shalala.*, 512 US 504, 512 (1994), *Stinson v. U.S.*, 508 US 36, 45 (1993) and *Brock v. Cathedral Bluffs*, 796 F2d 533, 536 (D.C. Cir. 1986). Of course EPA is not disputing this. The question to be resolved by this Court is whether EPA is adhering to its regulations and the applicable case law interpreting the provisions. Beyond this observation, *Jefferson University*, for example, is a case which provides support for EPA's point that "where the agency's interpretation of [its regulation] is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction." *Jefferson* at 519, quoting *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993).

[12]According to Howmet, the effect of EPA's interpretation is to take the phrase defining "spent material" as that which *can no longer serve a purpose for which it was produced without processing* and rewording it to cover material that *has been used and can no longer serve the purpose for which it was used.* Thus, Howmet's focus is upon the potential legitimate uses of a material at the time it is first produced. Under this approach, one would consult the list of a product's potential uses, and then determine if it matches one of the uses being employed in the particular case. Examination of the commercial uses of KOH reveals that it can be used as cleaner, the use to which Howmet put it, and that it can be used "as a source of potassium and neutralizing agent in the manufacture of fertilizer," which is the use employed by Royster. Thus, as applied here under Howmet's construction, since KOH can be used as fertilizer when it is first produced, and Royster so employed the KOH for that purpose, authority for RCRA solid waste management does not come into play.

and if, for example, one concluded that KOH could, at the outset of its creation, be used for making fertilizer, then it would not be regulated under RCRA as solid waste because it is being used for one of the purposes for which it was produced.

Since Howmet contends that the plain meaning of "spent materials" requires no further regulatory interpretation, it objects to EPA's attempt, when it promulgated the proposed rule for this regulation, to expand that term. It observes that the proposed rule defined "spent material" as "any material that has been used and has served its *original purpose*" but that, in the final rule the definition provided that it was "any material that has been used and as a result of contamination can no longer serve the *purpose for which it was produced*." As Howmet views it, this change to the definition for the final rule squarely places this case outside of the definition of "spent material" by permitting further use of material, even though such further use is not identical to the initial use, as long as the further use is one for which the material could be produced. As KOH can be used for fertilizer manufacture, that use is one for which the material could be produced, and accordingly outside the definition of "spent material." Cementing this view, from Howmet's perspective, is the explanation EPA set forth for the change in its final rule, where it stated:

> We are continuing to define spent materials as those which have been used an[d] are *no longer fit for use* without being regenerated, reclaimed, or otherwise reprocessed ... The Agency's reference to original purpose was ambiguous when applied to situations where a material can be further used without being reclaimed, but the further use *is not identical to the initial use*.

Respondent's Opposition at 9, quoting, with emphasis added by Respondent, from the Federal Register at 50 Fed. Reg. 624 (Jan. 4, 1985).

Howmet believes that, contrary to the final rule, EPA is attempting to require that the reuse be for its original or a similar use, an interpretation which flies in the face of its preamble, which, Howmet contends, allows reuse "for any purpose for which the material was *produced*." Respondent's Opposition at 9. Nor is Howmet impressed with the example EPA included in the preamble, along with its explanation involving a circuit board solvent being reused for metal degreasing. Howmet notes that EPA did not declare that this one example represented the only situation when a material can be reused without being considered as spent. For Howmet, all of this comes back to its fundamental point that a material may be reused for any purpose for which it could be produced.[13]

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[13]Howmet sees consistency in its view because it allows that if a material is produced solely for *one* purpose, (in Howmet's terms a "single-purpose product scenario"), it is fair to consider it "spent" if one later attempts to use it for some other purpose. It contends this case is "multiple-purpose product scenario." In contrast, it argues that EPA's approach operates to bar any reuse other than its original use, and Howmet asserts that this view ignores whether the material is still fit for any of the other purposes for which it could be produced.

Howmet, again looking to the preamble of the final rule, asserts that EPA's own words show that it understood that "continued use" was a broad term. It points to EPA's expression that "continued use" is "analogous to using/reusing a secondary material as an effective substitute for commercial products." Respondent's Opposition at 11, quoting 50 Fed. Reg. at 624. It believes that such use of "effective substitutes" does not imply that only uses which are identical or similar to the initial use are allowed. Howmet also asserts that even if, institutionally, EPA's erroneous interpretation has become entrenched over time, an erroneous interpretation, no matter how longstanding, can never acquire legitimacy on that basis. The plain words of the regulation will always trump an erroneous interpretation, even if years have elapsed, and this is true regardless of whether such interpretation comes from guidance letters, administrative materials or administrative decisions.[14] **Thus, it is Howmet's central argument that a material may be reused for any purpose for which it could have been produced without being deemed discarded.**[15]

As an alternative argument, Howmet asserts that, even if the Court does not agree with its interpretation, in any event it has not been given fair notice of EPA's interpretation. It argues that "neither the preamble to the regulation or the administrative materials relied upon by Complainants, provide[] an authoritative an authoritative interpretation of the regulation that accords with the one put forth by Complainants in this matter." Respondent's Opposition at 13.

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[14]For example, Howmet dismisses EPA's reliance on *Brenntag Great Lakes, LLC*, Dkt. No. RCRA 5-2002-0001, 2002 WL 31926407 (Dec. 19, 2002), because the material there had to be reprocessed before it could be reused. In contrast, Howmet notes that EPA does not allege that Royster does anything to the KOH. It is not alleged that the KOH was processed or treated in any way before Royster used it in its manufacturing process. Respondent's Opposition at 11, n. 7. However, while the facts are distinguishable, the principles pertaining to the designation of "spent materials" are the same. This is so because in both cases EPA has applied "spent solvent" as referring to a solvent which can no longer be used for the process employed by that particular operation. In *Brenntag* the material, anhydrous isopropyl alcohol, could no longer perform its function as a solvent for its original user, a function which involved removing water from glass fibers in the manufacture of an adhesive product. This process caused the anhydrous alcohol to become 'spent' in that it became aqueous isopropyl alcohol, and in that state it could no longer remove water from the fibers. Unable to employ the spent alcohol further, the original user, like Howmet in this instance, disposed of the product by selling it.

[15]Although Howmet has routinely described the test for determining whether material is spent as "whether the material is still fit for use for one or more of the other purposes for which it *was produced*," the Court rewords Howmet's claim of this critical language which it relies upon for its argument because if Howmet's description were followed literally, it would defeat its own argument. This is because, as expressed, its test focuses upon the purpose *for which the material was produced*. Accordingly, to clarify Howmet's obvious intent, the Court re-describes Howmet's test as "whether the material is still fit for use for one or more of the other purposes *for which it could have been produced*."

Maintaining that EPA's "interpretation has never been adequately expressed by EPA in any public forum ...[it] cannot be applied [here] to levy penalties against Respondent." *Id.*, citing *Hoechst Celanese Corp*., 964 F. Supp. 967, 979 (D.S.C. 1996).[16] It is on this same basis that Respondent argues that its due process claim, set forth as an affirmative defense, should be affirmed.

In deciding these issues, Respondent asserts that the Court should only consider the undisputed material facts, as set forth in the parties' joint stipulations. While the Respondent asserts that EPA has expressly agreed that such stipulations are the only facts the Court should employ in making its rulings, it believes that EPA has effectively tried to circumvent these stipulations by adding "factual allegations contained in various declarations attached to Complainant EPA Region 2's memorandum of law." Respondent's Opposition at 14. Simply put, Respondent asserts that these declarations should not be included within the undisputed facts. Based on this contention, Respondent objects to EPA's use of the declaration of Mr. Simmons as providing undisputed material facts regarding whether KOH is characteristically hazardous due to its toxicity.[17]

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[16]The Court does not view *Hoechst Celanese* to be applicable. As set forth *infra* this Court does not subscribe to Respondent's alternative argument that the requirements were not "'ascertainably certain' from the regulatory language." *Id.* at 967. The case is also distinguishable because the regulated party in *Hoechst Celanese* asked for and received confirmation of its interpretation from EPA.

[17]Respondent disputes the issue of the KOH in question being "characteristically hazardous due to its toxicity." Instead, Respondent points to EPA descriptions describing KOH as potentially characteristically toxic and to EPA's acknowledgment that a toxic characteristic leaching procedure ("TCLP") needs to be employed for such a determination. As it notes, since the KOH alleged to have been tested by Simmons was described as *likely* an aggregate from Howmet facilities, such a description itself evidences a fact in dispute. EPA, in its Reply, asserts that in motions' practice it is appropriate to consider affidavits and declarations, but that, in any event, the stipulations and admissions are sufficient by themselves for a ruling on the issues before the Court. It maintains that, as a motion for accelerated decision is the equivalent of a motion for summary judgment, such affidavits are legitimate, noting that Howmet is free to counter such factual assertions with affidavits of its own, and thereby create material issues of fact. As to one of these statements, the declaration by EPA's Simmons regarding whether the KOH sent to Royster was characteristically hazardous for corrosivity, EPA's position is unclear. While on one hand it agrees that Simmons' declaration is not evidence of the facts contained within it, on the other hand EPA also maintains that the declaration may be considered and is relevant. Thus, while EPA believes that other evidence amply demonstrates that the subject KOH has been shown to be characteristically hazardous for corrosivity, it adds that hearsay is admissible in these administrative proceedings and that, as Simmons' declaration was based on information he obtained during an inspection of Royster's facility, it is also reliable. The 'other evidence' showing the material was characteristic for corrosivity consists of the shipments of

EPA's Reply to Respondent's Brief in Opposition to Complainant's Motions for Partial Accelerated Decision; and Respondent's Brief Opposing the striking of its affirmative defenses; and EPA's Response to Respondent's Motion to Dismiss.

EPA characterizes Respondent's claim that the Agency exceeded its statutory authority regarding discarded solid waste as a nothing more than a late challenge to its 1985 rulemaking proceeding. The presumption of nonreviewability operates to insulate technical and policy matter determinations outside of the rulemaking.[18] As such, EPA asserts that, absent a compelling reason, such a challenge is both too late and in the wrong forum.[19]

Apart from this bar to reviewing the type of challenge that the Respondent has raised here, EPA asserts that, on the merits, Howmet's "plain reading" of the regulation does not add up.[20] It notes that Howmet focuses on how the material, *in its virgin state*, could be used, in order to determine whether the KOH is deemed "spent." This runs contrary to the regulation's very definition of "spent material," which classifies used material as that which can no longer

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used KOH generated at Howmet's Texas facility which were manifested as toxic for chromium, and manifests from its New Jersey facility reflecting "concentrations of chromium." EPA also takes the Simmons' declaration a step further by inferring that Howmet's failure to send land ban notifications to Royster, which notifications must include whether the waste meets appropriate treatment standards, increased the risk that Royster's use of that fertilizer exceeded the allowable standards. As explained within, the Court does not agree with Howmet that it can not consider the affidavits. EPA correctly notes that such affidavits may be considered and that a party opposing such statements has a duty to present conflicting issues of fact when this occurs. One may not simply continue to deny the facts asserted in such affidavits. However, while the Court could have considered the affidavits, it concluded that it was unnecessary to do so as it reached the conclusions in this Order based on the stipulations and admissions as applied to the statutory and regulatory provisions and the case law.

[18]EPA cites to *Woodkiln Inc*., 7 E.A.D. 254, 269 (EAB 1997), *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994), and *In re B.J. Carney Industries*, 7 E.A.D. 171, 194 (EAB 1994) in support of this principle. Conversely, it points out that the cases cited by the Respondent, *AMC I* and *Battery Recyclers*, *were* cases where respondents properly challenged rulemaking proceedings by making timely appeals before the appropriate forum.

[19]The Court does not view Howmet's challenge as exclusively a late challenge to EPA's rulemaking. Rather, as discussed herein, Howmet's challenge is viewed as a challenge to EPA's statutory authority and Howmet's view that decisions issued by the Court of Appeals for the District of Columbia support its construction of discarded material.

[20]EPA also notes that if the Respondent's interpretation can be described as going beyond a "plain meaning" argument, a challenge to the clarity of the regulation itself requires deference to *the Agency's* interpretation of its own regulation. EPA Reply at 3, citing *General Electric Co. v. EPA*, 53 F.3d 1324, 1327.

serve *the purpose for which it was produced.* Thus, the rule does not speak in terms of the original purposes for which a material could be used. Rather, it is a reality-based determination, not a hypothetical, *potential uses*, assessment. From a practical perspective, EPA notes that its construction, applying to "spent material," not material in its virgin state, takes into account that such used material is often contaminated and therefore unlike the material in its virgin state. This possibility was recognized in the agreement between Howmet and Royster which limited the KOH it would receive to that which was "environmentally sound to use."[21] However, EPA points out that this is not simply a matter for Howmet and Royster to resolve. Rather, it is the RCRA regulations which speak to the appropriate management of hazardous waste. EPA offers a practical example to demonstrate the hollowness of the Respondent's construction, by noting that under Howmet's view, a brass foundry which used virgin sand as an abrasive, could then turn around and offer that sand for children's sand boxes, because sand box use would be one of the original purposes for which such sand *could* be used. Under Howmet's interpretation, EPA's involvement, through RCRA, would be precluded in such matters because the Howmet approach looks to the potential myriad of original uses for a material, not to how the material is, in fact, first used.

EPA also takes issue with Howmet's assertion that it prohibits any secondary use of material, noting that the matter is a more complex determination. Spent material must also be a solid waste and a hazardous solid waste. Further it must be used in a manner constituting disposal. In this case, each of those elements were present, with the last element satisfied by the material being land applied as a fertilizer.[22] In addition, EPA contends that it is not accurate to suggest that the material cannot be reused. Rather, as long as EPA's hazardous waste regulations are followed, which regulations are intended to protect human health and the environment, reuse is permitted.[23]

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[21]Region 2 Memorandum, n.7, n.10 and associated text. EPA Reply at 5 and n. 8.

[22]Citing 40 C.F.R. § 261.2(a)(2)(c), EPA draws a distinction between fertilizer end use and the example of utilizing used KOH in the production of horse feed, which use, it declares, would not constitute a solid waste and consequently is outside of the reach of RCRA. Unfortunately, there is no Section 261.2(a)(2)(c) and the Court was unable to determine through research the basis for EPA's horse feed claim. Fortunately for EPA the case does not turn on that issue.

[23]EPA believes that its 'advisory letters' are consistent with the views expressed in this case. For example, it views the 1986 letters, advising that phosphoric acid that is purer and no more contaminated than it would be in its virgin state would not be classified as 'secondary material' as consistent because such material is effectively still in a virgin state. EPA Reply at 7. Similarly, it contends that, rather than help the Respondent, the decision in *Brenntag Great Lakes, LLC*, Docket No. RCRA-5-2002-001, (ALJ, June 2004) reinforces EPA's position because the judge found that the material was spent and a hazardous waste when it left 3M and that the receiver of such waste was no different than Royster. EPA Reply at 7-8. As noted *supra* the Court agrees with EPA's view that *Brenntag* is consistent.

Beyond these contentions, EPA alternatively asserts that if this matter were to be considered as an agency interpretation of its regulations, Howmet received adequate notice of EPA's views.[24]

Discussion.

Although Howmet maintains that EPA may not regulate materials which have not, in the literal sense, been discarded, in a manner not unlike homeowners placing refuse out for a trash pickup, this Court finds that such a construction is at odds with case law as well as with the design of RCRA and the regulations which EPA has promulgated for managing hazardous waste. While Howmet has relied upon *AMC I* and *Battery Recyclers*, the Court does not agree that those cases in fact support its position.

By virtue of joint stipulations for each docket number, the parties have agreed that Howmet utilizes a liquid potassium hydroxide and water solution to clean ceramic core from metal castings during manufacturing operations at its Dover, New Jersey facility and that it continually uses or re-uses the KOH/H20 solution to clean metal castings until the solution can no longer be effectively employed for this purpose without being reclaimed or otherwise processed. At that point the KOH is considered "used KOH." During the time period of August 6, 1999 through September 27, 2000, Howmet accumulated used KOH in a storage tank at its New Jersey facility and then either discarded the used KOH as a hazardous waste by sending it to an off-site authorized hazardous waste disposal facility or sent its used KOH off-site to Royster-Clark (Royster"), a fertilizer manufacturer. Howmet's decision on whether to send the used KOH off-site to an authorized treatment storage or disposal facility or to fertilizer manufacturer Royster was entirely contingent upon Royster's need for the KOH in its fertilizer manufacturing process. The used KOH was generated using the same ingredients and process regardless whether Howmet sent the used KOH off site as a hazardous waste or to Royster. The used KOH generated at the New Jersey facility is aqueous with a pH equal to or greater than 12.5 and was used by Royster fertilizer manufacturing facilities in the production of land applied tobacco fertilizer. During the period of time of August 26, 1999 through February 24, 2000, the New Jersey facility sent thirteen (13) shipments of used KOH off-site for disposal as hazardous waste at an authorized treatment, storage or disposal facility. Each shipment manifest classified the waste as exhibiting RCRA hazardous waste characteristics of corrosivity (D002). These shipments of used KOH were aqueous with a pH greater than 12.5 and contained concentrations of chromium ranging from .92 to 51.5 parts per million using a gross metals analysis.

In all important aspects, the same facts obtained with respect to Howmet's Wichita Falls, Texas facility, which pertains to docket number RCRA 02-2004-7102, as those for its Dover, New Jersey facility. Thus the KOH was used for the same purpose and, when it could no longer

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[24]In support of the contention that Howmet received adequate notice of EPA's interpretation of its regulations, EPA cites to *General Electric v. E.P.A.* , 53 F.3d 1324, 1328-1329, (D.C. Cir. 1995) and to *General Motors v. E.P.A.*, 363 F.3d 442, 451 (D.C.Cir. 2004).

be used for that cleaning purpose, Howmet accumulated the used KOH in a storage tank at the Facility and then either discarded the used KOH as a hazardous waste by sending it to an off-site, authorized hazardous waste disposal facility or sent its used KOH off-site to Royster. As with the Dover facility, Howmet's decision as to whether to send the used KOH off-site to an authorized hazardous waste treatment, storage or disposal facility or to Royster was entirely contingent upon Royster's need for the KOH in its fertilizer manufacturing process. The used KOH was generated using the same ingredients and process, regardless of whether Howmet sent the used KOH off-site as a hazardous waste or to Royster and it too was aqueous with a pH of 12.5 or greater. It should also be noted that during the period from December 19, 1997, and October 16, 2001, Howmet sent five shipments of used KOH off-site for disposal as hazardous waste at a hazardous waste treatment storage or disposal facility. Each shipment manifest classified the waste as exhibiting RCRA hazardous waste characteristics of corrosivity (D002) and toxicity (D007) and the used KOH in these shipments was aqueous with a pH greater than 12.5.

Thus, it is important to recognize that, among other aspects of these stipulations, there is no dispute that after some period of time Howmet can no longer make use of the KOH as a cleaning agent for its metal castings. There is also no claim by Howmet that the used KOH is employed for another function within either of its operations. It is fair to state that at that point in time Howmet is done with the used KOH, as it has no further use for it. Accordingly, at least when the used KOH is viewed vis-a-vis Howmet's operations, it is at that point discarded by the Respondent, by virtue of being sent either literally to a hazardous waste facility or to Royster. It is worth emphasizing that the parties have stipulated that the used KOH Howmet sends to hazardous waste facilities is indistinguishable from that which it sends to Royster and that, at a minimum, all the KOH, wherever it is sent, is deemed to have the characteristic of corrosivity, having a pH greater than 12.5.[25]

It is against this agreed upon factual backdrop that the Court measures the applicable statutory provisions, regulations and case law. In the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-6933, Congress defined hazardous waste

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[25] Given the stipulation that the used KOH has the characteristic of corrosivity, it is not critical for the Court to determine in this Order whether it also had the characteristic of toxicity. One hazardous characteristic is sufficient to establish that the material, as waste, was hazardous. Still, it can not go unnoticed that by virtue of the stipulations for both Howmet facilities, that the used KOH was generated using the same ingredients and process, regardless of whether Howmet sent the used KOH off-site as a hazardous waste or to Royster. Accordingly, if this issue was necessary to be tried at a hearing, on the stipulated facts, EPA would have sustained its burden of production on this issue and, with the burden of production having shifted, absent a showing by Howmet demonstrating that the used KOH sent to Royster was not toxic, the Court would find that, by virtue of the stipulations, as the KOH sent to the hazardous waste facilities had, in the case of Howmet's New Jersey facility, chromium concentrations ranged from .92 to 51.5 parts per million and that, in the case of the Wichita Falls facility, each shipment manifest classified the waste as exhibiting RCRA hazardous waste characteristic of toxicity (D007), toxicity has also been established.

and solid waste. As pertinent here, "solid waste" is defined as "any garbage, refuse, ... and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations ... ." 42 U.S.C. §6903(27). It also provided that "[t]he term 'hazardous waste' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may – (A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or (B) 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). It is hazardous waste, as a subset of solid waste, that EPA regulates. 42 U.S.C. §6921. Pursuant to its statutory obligations under RCRA, EPA has promulgated regulations dealing with the control of hazardous waste.

Under the EPA regulations, "spent material" is defined as "any material that has been used and as a result of contamination can no longer serve the purpose for which its was produced without processing." 40 C.F.R. § 261.1(c)(1). This definition bears repeating because Howmet has, in its Brief in Opposition, mischaracterized the language employed in that definition in a manner that makes a difference. As posed by Howmet in its brief "[t]he relevant question under the regulation is not whether Respondent and Royster used KOH for different purposes, but rather whether the KOH that Royster obtained from Respondent was used by Royster for ***a*** 'purpose for which it was produced.' *Id*. Specifically, did the material at issue, as employed in Royster's manufacturing process, continue to serve ***a*** 'purpose for which it was produced.'?" Howmet Brief in Opposition at 5. (emphasis added to the word 'a'). Whether inadvertent or not, this may provide a partial explanation of Howmet's misunderstanding of EPA's definition of "spent material" because that definition very clearly provides that it pertains to:

> any material that has been used and as a result of contamination can no longer serve ***the*** purpose for which it was produced without processing

40 C.F.R. § 261.1(c)(1) (emphasis added).

This misperception on Howmet's part, makes a world of difference because the plain language of the regulation supports EPA's argument that the rule does not speak in terms of the original purposes for which a material could be used and therefore is not a hypothetical, *potential uses*, assessment but rather that is a reality-based determination which examines how the material *was* originally used.

EPA's preamble to the final rule regarding the definition of solid waste serves to reinforce the plain wording of the definition of "spent material." In that preamble, the Agency noted that it was "*continuing* to define spent materials as those which have been used and are no longer fit for use without being regenerated, *reclaimed*, or otherwise reprocessed." 50 Fed. Reg. 614, 624 (Jan. 4, 1985)(emphasis added). While the final rule expressed more clearly, but did not change, that definition, EPA did clarify that in situations when material can be used further

without being reclaimed such further use would not be prohibited. The illustration presented by EPA in that preamble made it clear that this only applied when the material could be continued to be used by the facility without alteration.[26] While one could contend that the preamble created some ambiguity regarding the precise contours of such further use, the definition of "spent material" in the regulation itself does not create any ambiguity as applied here. This is because there is no dispute that the KOH, after some period of use as a cleaner of its metal castings, became contaminated from such use and could no longer serve its purpose as a cleaner. There is no contention that Howmet was then able to use the KOH in some other capacity as a cleaner at its operation.

Apart from this conclusion, the Court considers that the federal court decisions issued subsequent to that final rule support this conclusion and it now turns to a discussion of those cases. *AMC I*, (*American Mining Congress v. EPA*, 824 F.2d 1177, (D.C. Cir. 1987), involved a challenge to EPA regulations which amended the definition of "solid waste" with the effect of establishing the agency's authority "to regulate secondary materials reused within *an industry's ongoing production process*."[27] 824 F.2d at 1178 (emphasis added). The D.C. Circuit stated that the case before it turned on the meaning of the phrase "and other discarded materials," which is part of the definition of "solid waste"under RCRA. 42 U.S.C. § 6903(27). *Id*. at 1179. Although the term "solid waste" is defined in RCRA as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended," the D.C. Circuit took that numbing definition of "solid waste" and properly reduced it to its heart by observing that "Congress specifically defined 'solid waste' as 'discarded material.'" 824 F. 2d at 1183.

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[26]Although the preamble offered the example of a solvent initially used to clean circuit boards and then used at the facility for metal degreasing, but still functioning as a solvent, the Court does not view the example as indicative that a facility could only reuse the material as a solvent. Rather, the preamble provided that the same facility could continue to employ material, even though its use was not identical to its initial use, as long as it was not being reclaimed. 50 Fed. Reg. 614, 624. (Jan. 4, 1985).

[27]It should be noted that the D.C. Circuit was limiting its discussion to the agency's regulation of secondary materials reused within *an industry's ongoing production process*. The court repeatedly stated that its analysis was confined to that situation. *See*, for example, 824 F. 2d at 1179, 1182, 1183, 1185, and 1186. Thus, it was not applying the case to *industry reuse* in any generic, industry-wide sense, but was clearly limiting the decision to EPA's authority to regulate wastes within a particular industry.

The court noted that as this was a matter of statutory interpretation, the analytical framework established in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, (1984), ("Chevron"), applied. That framework requires a court to first determine if Congress has spoken directly to the issue. If the statutory language employed does not provide an answer, the legislative history is then examined and, if there is still ambiguity, the court must then determine if the agency's interpretation is based upon a permissible construction of the statute. Applying this analysis, the court posed the question as whether "Congress clearly intend[ed] to limit EPA's regulatory jurisdiction to materials disposed of or abandoned, as opposed to materials reused *within an ongoing production process*?" *Id*. at 1182. (emphasis added). Employing the ordinary usage of the term "discarded," the court concluded that including "materials retained for immediate reuse" strained that concept. The court was tempted to end the inquiry at that point, but it determined that a fuller inquiry was warranted by measuring the use of the term with reference to the purpose of the particular legislation. *Id.* at 1185. Ultimately, the court reduced the issue before it to deciding whether Congress used the term 'discarded' in its ordinary sense of disposal or abandonment or whether it intended to include "materials no longer useful in their original capacity though destined for immediate reuse in another phase of *the* industry's *ongoing* production process." *Id*. at 1185. (emphasis added).

Thus, while the D.C. Circuit decided that the term 'discarded' was to be construed in its ordinary sense and reasoned that EPA had no need to regulate 'spent' materials that were recycled and reused in an ongoing manufacturing process because such materials had not yet become part of the waste disposal problem and still had a beneficial reuse, that holding does not equate with the Respondent's position. This is so because the D.C. Circuit was speaking strictly in the context of beneficial reuse "*in a continuous process by the generating industry itself,*" *Id*. at 1186. Thus, the court's holding limits EPA authority only in the sense that in-process secondary materials which are reused as part of an ongoing production process can not be viewed as "discarded" materials.

EPA, in compliance with the D.C. Circuit's decision in *AMC I*, published a proposed rule on January 8, 1988. Consistent with that decision, EPA proposed excluding "from regulation certain in-process recycled secondary materials in the petroleum refining industry ... that are reclaimed as part of continuous on-going manufacturing processes." 53 Fed. Reg. 519. The same notice identified those "portions of the rules unaffected by the [D.C. Circuit's] opinion and remaining in force." *Id*. EPA noted, correctly, that the decision did not "overturn the Agency's jurisdiction over material recovery when not characterized by on-going, continuous production processes." With pertinence to this litigation, EPA stated that its "remaining regulations dealing with recycling activities clearly involve elements of discard ...[as they do not] consist of on-going manufacturing involving continuous extraction of material values." Speaking with particular relevance to this matter, the Agency noted that "secondary materials applied to the land or used to produce products that are placed on the land are solid wastes ... [and] [i[f the solid wastes are listed or exhibit a hazardous waste characteristic, they are hazardous wastes ...[e]xamples of uses that constitute disposal include ... the use of waste-derived fertilizer placed on the land ... [as these] activities meet [*AMC I*'s] definition of discard and because the use activity is also land disposal." *Id.*

The D.C. Circuit's subsequent decision in *American Mining Congress v. EPA*, 907 F.2d 1179, (D.C.Cir.1990)("*AMC II*") does not alter the *AMC I* holding. As in *AMC I*, the petitioners in *AMC II* had challenged EPA's rulemaking in which it had re-listed certain wastes from metal smelting operations as hazardous. While the court remanded for additional agency explanation of the reasons for its decision to re-list, it rejected the contention that EPA had acted outside its statutory authority. It observed that RCRA requires EPA to develop a comprehensive regulatory scheme to address the treatment, storage and disposal of hazardous waste. It noted that RCRA defines a "solid waste" to include garbage, refuse, and *other discarded material*. 42 U.S.C. §6903(27). Hazardous waste, as a subset of solid waste, is defined as waste that may cause or significantly contribute to an increase in mortality, or illness or pose a hazard to health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. 42 U.S.C.§ 6903(5). In carrying out its statutory obligation, EPA has classified solid waste as hazardous if it has the characteristic of ignitability, corrosivity, reactivity, or extraction procedure toxicity. 40 C.F.R. §§ 261.11, 261.20-.24, and 261.31-.32.

Petitioner AMC, looking to the D.C. Circuit's decision in *AMC I*, argued that the wastes in issue could not be considered "solid wastes" because they had not been discarded. The court noted that EPA's RCRA regulatory authority only extended to the subset of solid waste known as 'hazardous waste.' AMC contended that several of the wastes involved were not solid wastes because they had not been discarded, as they were being beneficially reused in mineral processing operations. In construing a particular court's decisions, there is perhaps no better guide than using that court's own characterization of its earlier holdings. With that observation in mind, the D.C. Circuit, referred to its holding in *American Petroleum Inst. v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) ("*API*") which applied the Supreme Court's test in *Chevron* and determined that the term "discarded" was ambiguous and therefore required the agency to clarify that term through its rulemaking power.[28] Thus, construing its holding in *AMC I*, the court held that AMC was reading the decision in *AMC I* too broadly. Rather, *AMC I* was limited to materials that were "recycled and reused in an *ongoing* manufacturing or industrial process." *AMC II* at 1186. Critical to the court's determination that the material had not been discarded was its finding that it was "*destined for beneficial reuse or recycling <u>in a continuous process by the generating industry itself</u>*." *Id*. (underscoring added). The court made clear in *AMC II* that it applied only to materials "destined for *<u>immediate reuse</u>* <u>in another phase of the industry's ongoing production process</u>. *Id.* at 1186, quoting *AMC I* at 1185. (underscoring added). Accordingly, the court identified two important distinctions: if the material has become part of the waste disposal problem and the material is *not* part of ongoing industrial processes, the agency, applying its

[28]The D.C. Circuit then applied that standard of review, holding that, at least as applied to material placed in wastewater treatment surface impoundments, the agency's interpretation of 'discarded' was reasonable and consistent with RCRA's purposes. Relying upon the agency's exercise of its expert judgment, the court accepted the agency's conclusion that sludges stored in impoundments threatened health and the environment and rejected the petitioner's contention that the fact the sludges may be reclaimed at some time did not mean they were not discarded. 907 F.2d 1179, 1187.

expertise, may treat it as discarded.[29]

Although the court agreed with the argument that secondary material held for recycling in production can't be considered "waste" when the statute defines the term as "discarded" materials, and noted that it had already made this observation in *AMC I*, that saving and reusing materials is at odds with the common understanding of discarding, which contemplates disposing, throwing away or abandoning, this characterization was not without boundaries, as it was limited to secondary materials *reused within an ongoing industrial process.*[30] Accordingly, the D.C. Circuit clarified its holding in *AMC I*, explaining that its ruling applied only to materials "destined for *immediate reuse* in another phase of the industry's ongoing production process." 907 F.2d 1179, 1186. Further, it distinguished material that is part of the ongoing industrial process from material which has become part of the waste disposal problem. *Id.* Thus the D.C. Circuit took exception with EPA's attempt in the final rule to treat secondary materials as "discarded" whenever they left the production process and were stored for any length of time. This clarification is consistent with the situation presented here because Howmet was not reusing the material within any *ongoing industrial process*. Rather, in some instances, it was disposing of the material to another manufacturer, Royster. In other instances the same material was being disposed of by sending it to *a hazardous waste disposal facility*.

Reading *AMC I* and *II* together, the D.C. Circuit has held that where material clearly has not been discarded because it is being reused in a continuous process by the generating user, RCRA does not apply, as such material has not become part of the waste disposal process. However, because determining when something is discarded is not so clear in contexts other than an *AMC I* scenario, the court will look to the agency's call and determine whether it made a reasonable judgment. Where reasonable agency judgments are made, the court will not second guess such agency determinations.

The decision in *Battery Recyclers* does not aid Howmet either. Addressed there were challenges to certain parts of an EPA final rule establishing RCRA regulations which dealt with residual or secondary materials generated from mining processing. In particular, the challenge

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[29]The court then turned to EPA's findings that the six wastes were hazardous, noting at the outset of that discussion that it does not "second-guess the scientific judgments of the EPA." 907 F.2d 1179, 1187. This does not prevent a review to assure that the agency made a reasoned decision based on 'reasonable' extrapolations derived from some reliable evidence, i.e. that the agency engaged in "reasoned decisionmaking." Although several of those waste determinations were remanded for a fuller explanation from the agency to respond to challenges to its rulemaking, the court noted that its decision was not an "attempt to substitute [its] judgment for the expert judgment of the agency." *Id.* at 1191.

[30]In each instance, the court took exception to EPA's attempt to apply RCRA to materials that were not disposed of, abandoned or thrown away, by ignoring materials that were destined for reuse *in an ongoing industry process.*

addressed EPA's Phase IV Rule which revised the reclamation provision by defining a "solid waste" in terms of how materials "generated and reclaimed within the primary mineral processing industry" are stored. 208 F.3d at 1050. The D.C. Circuit began by reviewing the foundations of this area. It noted again that under RCRA a solid waste is defined as "any discarded material," a term which itself was further defined by regulation under the existing solid waste classification system, as material that is abandoned or recycled. 40 C.F.R.§ 261.2(a). Recycled materials were, in turn, also deemed to be solid waste when used in a manner constituting disposal, when burned for energy recovery, when accumulated speculatively, or when reclaimed. The Phase IV rule challenged in *Battery Recyclers* only dealt with reclamation deemed to be solid waste but the rule established a new test for that designation. By using *the manner* of storage as the determining factor for distinguishing between 'waste' and 'nonwaste,' the court held that EPA's Phase IV rule conflicted with its holding in *AMC I* that rejected EPA's attempt to regulate secondary materials which were reused within an ongoing industrial process. Although EPA believed its rule, by exempting materials which were used in recovery without a break in the process, was consistent with the holding in *AMC I*, the court held that the agency was incorrect in its interpretation that it could designate material as 'discarded' once it left the production process and was stored for any length of time. *Id.* at 1052-1053. Accordingly, the court held that EPA was again attempting to regulate in-process secondary materials by improperly labeling as "discarded" secondary material which was "destined for reuse as part of a continuous industrial process." The *Battery Recyclers* decision also referred to that court's holding in *API*. That case was characterized as one which involved the "the end of the [jurisdictional] continuum ... where EPA's authority is most certain." In a sense, the case was unusual because it involved EPA's decision *not* to automatically regulate K061 slag, even though it was a solid waste when it was transported to a metals reclamation facility.[31] But, this

[31]*API* involved a challenge to an EPA final rule under RCRA. in this instance a "land disposal prohibitions and treatment standards for 'First-Third' scheduled wastes. As pertinent here, the court addressed EPA's conclusion that it lacked authority to regulate K061 slag, as it had determined that it was not a solid waste. While the K061 was admittedly a solid waste when it left the electric furnace where it was produced, EPA believed that status ended when it arrived at a metal reclamation facility because it was no longer 'discarded material.' While EPA believed that RCRA required this outcome, based on the court's decision in *AMC I*, the court held that its decision did not direct such a conclusion. The court's reason was simple, direct, entirely consistent with *AMC I* and pertinent to this case. The D.C. Circuit noted that *unlike the materials in AMC I*, the K061 *had been discarded first and* thereafter arrived at the metal reclamation facility. Thus, the K061 had become part of the "waste disposal problem," which problem was the motivation for Congress' enactment of RCRA. As the K061 was included within a mandatory waste treatment plan, its delivery to the reclamation facility was not part of an ongoing industrial or manufacturing process. The court specifically pointed out that it was "immaterial ... that the method of waste treatment ... results in the production of something of value ..." noting that it "expressly *disavowed* a reading of the statute that would prevent EPA from regulating processes for extracting valuable products from *discarded* materials that qualify as hazardous wastes." 906 F.2d at 741. (emphasis in decision). Pointedly, the court added "[i]t

time erring on the side of under-regulating, the court held that EPA misconstrued RCRA once again. In fact, the distinction drawn in *API* is particularly useful in the case before this Court because it highlights the point made by the D.C. Circuit Court of Appeals. Rather than precluding EPA's authority to regulate solid waste, the court observed that as the K061 was *not* part of an ongoing industrial process, but rather involved taking waste from one industry and reclaiming it within another. As such, it viewed such secondary use regulation as entirely consistent with *AMC I.*[32]

Accordingly, the Court rejects Howmet's novel reading that "spent material" is measured according to whatever the potential uses are for a material. Apart from the plain wording of the regulation, EPA's sandbox example illustrates the havoc that would result under the Respondent's construction.

Conclusion

Based on the foregoing discussion, the Court concludes that Howmet's material is solid waste, as it has been "discarded" in the sense that it is no longer being used by Howmet. Restated, there is no ongoing, continuous process of beneficial reuse by Howmet, which is the generating source. Further, Howmet's argument noting that some of its KOH is sent to a hazardous waste disposal facility does not provide support for its position. As noted, Howmet

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is only when EPA attempts to extend the scope of [the RCRA] to include the recycling of *undiscarded* oils ... that conflict [with the statute] occurs. *Id.* at n.16 (last bracket in decision).

[32]Nor does the recent decision by tht D.C. Circuit in *Safe Food and Fertilizer et al. v. E.P.A.*, 350 F.3d 1263 (2004) alter the analysis. That case also involved review of an EPA rule in which the D.C. Circuit determined that RCRA Subtitle C would not apply to recycled materials used to make zinc fertilizers as long as certain handling, storage and reporting conditions were met and the product had concentrations of lead, arsenic, and other materials that were below certain thresholds. While the parties agreed that the materials were 'hazardous' under RCRA, the issue was whether the materials were "solid wastes." With one exception, the court agreed with EPA's decision to treat the materials in issue as not discarded, and by that determination concluding they were not "solid wastes." While the decision involved complex determinations involving RCRA and the Land Disposal Restriction standards, as pertinent to this case the court developed an additional wrinkle to its previous holdings in cases such as *AMC I* and *AMC II*, among other decisions, because it seemed to back away from the oft repeated limitation in its earlier holdings that material must always be considered "discarded" when it moves from a continuous process by the generating industry to another industry. Instead the court clarified that its holding has been that "materials destined for future recycling by another industry *may* be considered discarded." 350 F.3d 1263, 1268. Thus, while the analysis can become more involved when the material moves to another industry, the court will defer to EPA's determinations in those situations as long as they are reasonable and consistent with the statutory purpose. In short, the court will defer to the Agency's determinations in such cases.

does not contend that the KOH destined for Royster was any different than the KOH it sent to the waste disposal facility. Thus, Howmet effectively concedes that the KOH sent to the disposal facility was hazardous waste, while maintaining that the same waste, when sent to a different destination (i.e. Royster) is not hazardous waste because the material would be used by that receiver. Based on the court decisions discussed above, at a minimum, this situation is exactly the type of circumstance in which courts defer to the Agency's expertise and decision in making such determinations. However, this Court also concludes that under a plain reading of the applicable regulations, EPA's position is also sustained.[33]

Consequently, the Court grants EPA's Motions for partial accelerated decision with respect to both docket numbers, finding that Howmet violated the cited regulatory provisions, as alleged in the Complaints, during the time periods involved.[34] Howmet is directed to comply with the provisions cited in the Complaints as well as with all other applicable hazardous waste management requirements. The case now proceeds to the penalty phase. A hearing on the appropriate penalties will be scheduled shortly.

So Ordered.

William B. Moran
United States Administrative Law Judge

April 25, 2005
Washington, D.C.

In the Matter of Howmet Corporation, Respondent
Docket Nos. RCRA-02-2004-7102 & RCRA-06-2003-0912

CERTIFICATE OF SERVICE

[33]For the reasons discussed in the body of this Order, the Court also summarily rejects Howmet's alternative argument that no penalty should attach to the violations because there was no adequate notice that such material would be considered solid hazardous waste. Similarly, EPA's Motion to strike Respondent's Affirmative Defenses is GRANTED.

[34]Obviously, by virtue of the rulings in this Order, Respondent's Motion to Dismiss is DENIED.

I certify that the foregoing **Order On Motions**, dated April 25, 2005, was sent this day in the following manner to the addressees listed below:

_____

Maria Whiting-Beale
Legal Staff Assistant

Dated: April 25, 2005

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