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October 28, 2005

By Hand Delivery

Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Mail Code 1103B
1341 G Street, NW, Suite 600
Washington, DC 20005

Re: Docket Nos. RCRA-06-2003-0912 & RCRA-02-2004-7102
In the Matter of Howmet Corporation
Notice of Appeal and Brief in Support

Dear Sir or Madam:

Enclosed for filing in the above-referenced docket, please find one original and two copies of Howmet Corporation's Notice of Appeal and Brief in Support of Appeal. Please date stamp one of the enclosed copies and return it to the awaiting courier who will deliver it to me.

Respectfully submitted,

Bryan J. Moore

Enclosures

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October 28, 2005

By Express Mail

Clerk of the Board
Environmental Appeals Board
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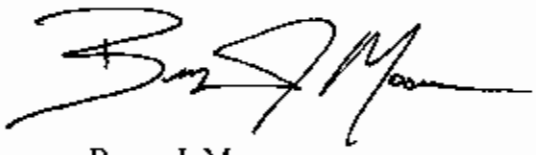
Mail Code 1103B
1341 G Street, NW, Suite 600
Washington, DC 20005

Re: Docket Nos. RCRA-06-2003-0912 & RCRA-02-2004-7102
In the Matter of Howmet Corporation
Notice of Appeal and Brief in Support

Dear Sir or Madam:

Enclosed, please find an additional copy of Howmet Corporation's Notice of Appeal and Brief in Support of Notice of Appeal. One original and one copy of these documents were hand delivered for filing in the above-referenced docket on Friday, October 28, 2005.

Respectfully submitted,



Bryan J. Moore

Enclosures

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF	)	
	)	
HOWMET CORPORATION	)	
	)	**DOCKET NOS. RCRA-06-2003-0912 &**
	)	**RCRA-02-2004-7102**
APPELLANT	)	

HOWMET CORPORATION'S NOTICE OF APPEAL

COMES NOW, Appellant Howmet Corporation ("***Appellant***") and files this notice of appeal of the Administrative Law Judge's ("***ALJ's***") Initial Decision in the above-captioned matter. The ALJ's Initial Decision was issued on September 30, 2005, and incorporates by reference the ALJ's April 25, 2005 Order on Motions, in which the ALJ granted motions for partial accelerated decision filed by Appellees U.S. Environmental Protection Agency ("***EPA***") Region 2 and Region 6 (collectively, "***Appellees***"). As discussed more specifically below, Appellant appeals the ALJ's legal determination of liability, as set forth in the Order on Motions.

SUMMARY OF THE ORDER APPEALED FROM

In the Order on Motions, the ALJ found Appellant liable for violations of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k, as amended by the 1976 Resource Conservation and Recovery Act and the 1984 Hazardous and Solid Waste Amendments (commonly referred to as "***RCRA***"), and the RCRA implementing regulations promulgated by EPA. Specifically, the ALJ found that Appellant (1) sent shipments of hazardous waste to a facility that was not authorized to receive such waste, in violation of 40 C.F.R. § 262.12(c); (2) transported those shipments via a transporter that was not authorized to transport hazardous waste, in violation of 40 C.F.R. § 262.12(c); (3) failed to prepare a hazardous waste manifest for the shipments, in violation of 40 C.F.R. § 262.20(a); and (4) failed to properly notify the facility to which the shipments were

sent, in violation of 40 C.F.R. § 268.7(a)(2). The ALJ also struck Appellant's affirmative defenses and denied Appellant's claim that it was not given fair notice of Appellees' interpretation of the applicable regulatory standard.

For the reasons set forth in the appellate brief accompanying this notice, Appellant appeals the foregoing rulings and the legal determinations underlying those rulings and respectfully requests that the ALJ's findings be set aside and this matter dismissed in its entirety, pursuant to 40 C.F.R. §§ 22.30(f) and 22.20(a), respectively.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT
HOWMET CORPORATION

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CERTIFICATE OF SERVICE

I hereby certify that Appellant Howmet Corporation's Notice of Appeal was served on the following via hand delivery, facsimile, electronic mail, and/or certified mail on this the 28th day of October, 2005:

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Environmental Appeals Board
U.S. Environmental Protection Agency
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Washington, DC 20005

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Bryan J. Moore

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF	)	
	)	
HOWMET CORPORATION	)	
	)	**DOCKET NOS. RCRA-06-2003-0912 &**
	)	**RCRA-02-2004-7102**
APPELLANT	)	

HOWMET CORPORATION'S BRIEF IN SUPPORT OF NOTICE OF APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

RULES

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF	)	
	)	
HOWMET CORPORATION	)	
	)	**DOCKET NOS. RCRA-06-2003-0912 &**
	)	**RCRA-02-2004-7102**
APPELLANT	)	

HOWMET CORPORATION'S BRIEF IN SUPPORT OF NOTICE OF APPEAL

COMES NOW, Appellant Howmet Corporation ("***Appellant***" or "***Howmet***") and files this brief in support of its notice of appeal of the Administrative Law Judge's ("***ALJ's***") Initial Decision in the above-captioned matter. Appellant appeals the ALJ's legal determination of Appellant's liability for violations of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k, as amended by the 1976 Resource Conservation and Recovery Act and the 1984 Hazardous and Solid Waste Amendments (commonly referred to as "***RCRA***"), and the RCRA implementing regulations promulgated by the U.S. Environmental Protection Agency ("***EPA***"). For the reasons set forth below, the ALJ's Initial Decision should be set aside and this matter should be dismissed in its entirety.

I.
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following two issues are presented for review:

(1) May EPA assert RCRA jurisdiction over a material where (*i*) the material was produced for multiple uses; (*ii*) although having been used in one application, the material is still fit to be reused in another application for which the material was produced to serve; (*iii*) the material can be reused in such application without processing; and (*iv*) the applicable regulation limits EPA's jurisdiction to a used material that can no longer serve the purpose for which it was produced without processing?

(2) If the applicable regulation can be interpreted to extend EPA's RCRA jurisdiction to such materials, was Appellant given fair notice of that interpretation?

II.
STATEMENT OF THE NATURE OF THE CASE AND RELEVANT FACTS

A. Relevant Facts

The undisputed material facts of this case are set forth in the parties' joint stipulations, attached hereto as ***Exhibits A*** and ***B***. The facts relevant to this appeal are summarized below.

This case arose from Howmet's shipment of a used liquid potassium hydroxide ("***KOH***") solution to Royster-Clark ("***Royster***") for use by Royster in manufacturing land-applied tobacco fertilizer. At its facilities in Dover, New Jersey, and Wichita Falls, Texas, Howmet manufactures precision investment castings for aerospace and industrial gas turbine applications.[1] In its manufacturing operations, Howmet utilizes a KOH solution to clean ceramic core from the metal castings, and continually uses or reuses the KOH solution until the solution can no longer effectively be employed for this purpose without being reclaimed or otherwise processed.[2] The used KOH solution is characteristically hazardous, in that it is corrosive as defined by EPA's regulations, having a pH equal to or greater than 12.5.[3]

For certain periods, Howmet would either ship the used KOH to an authorized hazardous waste disposal facility or to Royster, depending solely upon Royster's demand for KOH for use in its fertilizer manufacturing process.[4] In Royster's operations, the used KOH was a source of potassium in, and controlled (*i.e.*, neutralized) the pH of, Royster's fertilizer mixture.[5] Royster

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1 *See* Ex. A ¶¶ 3, 4; Ex. B ¶¶ 3, 4.

2 *See* Ex. A ¶¶ 11, 12; Ex. B ¶¶ 10, 11.

3 *See* Ex. A ¶¶ 15, 26; Ex. B ¶¶ 14, 22; *see also* 40 C.F.R. § 261.22(a)(1).

4 *See* Ex. A ¶¶ 13, 14; Ex. B ¶¶ 12, 13.

5 *See* Ex. A ¶ 19; Ex. B ¶ 18.

did not process or otherwise treat or reclaim the used KOH prior to adding it to the fertilizer mixture; Royster used the KOH as received from Howmet.[6]

B. Applicable Law and Regulations

Pursuant to RCRA, EPA promulgated regulations defining what constitutes a "hazardous waste." Consistent with the statutory definition of hazardous waste, EPA's regulations define hazardous waste as a subset of solid waste.[7] In essence, a material cannot be regulated as a hazardous waste unless it is first determined to be a solid waste.

RCRA defines "solid waste" to include any "discarded material."[8] EPA has, in turn, promulgated a definition of "discarded material" which provides, in part, that discarded materials include "spent materials" that are "[u]sed to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land."[9] Per EPA's regulations, a "spent material" is "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."[10]

C. Summary of the Parties' Contentions

Appellees, EPA Regions 2 and 6 (collectively, "***Appellees***" or "***EPA***"), contend that the used KOH that Howmet sent to Royster was a hazardous waste subject to regulation under RCRA, and that Howmet's shipments of used KOH to Royster failed to comply with certain RCRA regulations. The dispute in this case is focused on EPA's waste determination – Howmet

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6 *See* Ex. A ¶¶ 18, 19; Ex. B ¶¶ 17, 18; *see also* Complainant U.S. EPA Region 2's Mem. of Law in Supp. of Complainant's Mot. for Partial Accelerated Decision ("***Region 2 Mem.***") at 12 (discussing Royster's use of the used KOH).

7 *See* 42 U.S.C. § 6903(5); 40 C.F.R. § 261.3.

8 42 U.S.C. § 6903(27).

9 40 C.F.R. § 261.2(c)(1)(B).

10 *Id.* § 261.1(c)(1).

contends that the used KOH sent to Royster was not a solid waste and, therefore, not a hazardous waste subject to EPA's RCRA jurisdiction.

EPA's position that Howmet's used KOH was a hazardous waste follows from the agency's claim that Howmet's used KOH was a "spent material." Because the used KOH was used by Royster to produce a land-applied fertilizer, EPA contends that the used KOH was a "discarded material" and, therefore, a solid waste. Because the used KOH exhibited the characteristic of corrosivity, EPA contends that it was a hazardous waste. As noted above, Howmet does not dispute that the used KOH was used to produce a land-applied product, or that it was characteristically corrosive. Rather, Howmet disputes EPA's determination that the used KOH was a spent material.

Relying upon the plain wording of the "spent material" definition in EPA's regulations, Appellant asserts that the focus in this case should be upon the purpose for which KOH is produced to serve.[11] Relying upon the same definition, EPA claims that the "production" process at issue in this case is Howmet's "production" of *used* KOH.[12] Whereas EPA contends that the "purpose for which" a material "was produced" should be defined as the first *use* that is made of the material,[13] Appellant takes the opposite position, arguing that one's *use* of a material cannot define or otherwise change the *purpose* for which the material was produced.[14] Appellant maintains that a reasonable interpretation of the "spent material" definition must account for

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11 *See* Appellant's Br. in Opp'n to Complainants' Mot. for Partial Accelerated Decision and to Strike Affirmative Defenses and in Supp. of Respondent's Mot. to Dismiss (***"Appellant's Brief"***) at 5.

12 *See* Complainants' Reply to Respondent's Br. in Opp'n to Complainants' Mot. for Partial Accelerated Decision and to Strike Affirmative Defenses and in Supp. of Respondent's Mot. to Dismiss (***"EPA's Reply Brief"***) at 4-5; Region 2 Mem. at 18; Complainant U.S. EPA Region 6's Mem. of Law in Supp. of Mot. for Partial Accelerated Decision (***"Region 6 Mem."***) at 13.

13 *See, e.g.*, Region 2 Mem. at 8, 15, 17; Region 6 Mem. at 5, 12.

14 *See* Appellant's Brief at 6.

materials, like KOH, that are produced to serve multiple uses.[15] On the other hand, EPA's interpretation of the same definition would hold that a multi-use material is no longer fit for use if it cannot continue to serve the purpose for which it was initially used, despite the fact that the material may still be fit for one or more other purposes for which it was produced.[16]

D. Summary of the ALJ's Ruling

In his April 25, 2005 Order on Motions, the ALJ in the proceeding below granted EPA's motions for partial accelerated decision and to strike Appellant's affirmative defenses. By virtue of the rulings in the Order on Motions, the ALJ denied Appellant's motion to dismiss this matter.

The ALJ ruled that the used KOH that Howmet shipped to Royster was a spent material "under a plain reading of the applicable regulations."[17] Additionally, relying upon his reading of various D.C. Circuit decisions, the ALJ concluded that, to avoid regulation of Howmet's used KOH as a solid waste, the used KOH would have to be used in an "ongoing, continuous process of beneficial reuse by Howmet."[18] For the reasons set forth below, Appellant respectfully submits that the ALJ's ruling is unsupportable and should be set aside.

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15 *See id.* at 10.

16 *See, e.g.*, Region 2 Mem. at 8, 17; Region 6 Mem. at 5, 12.

17 Order on Motions at 21 (April 25, 2005).

18 *Id.*

III.
ARGUMENT

A. The Material In Question Is Not A "Spent Material" Under The Plain Language Of EPA's Regulations

EPA's construction of the term "spent material" is plainly erroneous and inconsistent with the regulatory definition of that term. As such, it is not entitled to deference and carries no weight.[19] As EPA acknowledged in the proceedings before the ALJ below, "[t]he plain meaning of words is ordinarily the guide to the definition of the regulatory term."[20] A court may not defer to an agency's interpretation if "an 'alternative reading is compelled by the regulation's plain language.'"[21] As set forth below, the plain language of the regulation defining "spent material" simply does not permit the interpretation of the term put forth by EPA and adopted by the ALJ.

As noted above, EPA's RCRA regulations define a "spent material" as one that "has been used and . . . can no longer serve the *purpose for which it was produced* without processing."[22] Appellees attempt to avoid application of the plain meaning of the controlling regulatory phrase – "purpose for which it was produced" – electing instead to focus on the specific uses of KOH by Howmet and Royster. The relevant question under the regulation is not whether Howmet and Royster used KOH for different applications, but rather whether the KOH that Royster obtained

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19 *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (Scalia, J.) ("It is axiomatic that an agency must adhere to its own regulations.").

20 *In re Harpoon P'ship*, EPA Docket No. TSCA-05-2002-0004, 2004 WL 139918, at 11 n.9 (May 27, 2004) (quoting *In re Bill-Dry Corp.*, RCRA (3008) Appeal No. 98-4, 9 E.A.D. 575, 595 (EAB 2001)) *aff'd*, TSCA Appeal No. 04-02, 2005 WL 1254975 (May 19, 2005); *see also In re Strong Steel Prods.*, EPA Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020, MM-5-2001-006, 2003 WL 22534560 (Oct. 27, 2003) ("The interpretation starts with the plain language of the regulation . . . .").

21 *Shalala*, 512 U.S. at 512 (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)); *see also id.* at 518 (Thomas, J., dissenting) (concluding that a agency's interpretation "that runs afoul of the plain meaning of the regulation . . . is contrary to law, in violation of the Administrative Procedure Act").

22 40 C.F.R. § 261.1(c)(1) (emphasis added).

from Howmet was used by Royster for "the purpose for which [KOH is] produced."[23] Specifically, did the used KOH, as employed in Royster's manufacturing process, continue to serve "the purpose for which" KOH is produced to serve?

The interpretation put forward by EPA would effectively define the "purpose for which" a material "was produced" as the first use that is made of the material. Such an interpretation ignores the word "produced" and substitutes the word "used," such that the regulation is revised to read that a "spent material" is one that "has been used and . . . can no longer serve the purpose for which it was *used*." This reading of the regulation is different from and flatly inconsistent with its plain meaning. The words "produced" and "used" are not synonyms and are not interchangeable. Indeed, they are completely opposite concepts – *i.e.*, create vs. consume. Given the indisputable distinction between creation and consumption, one's use of a material simply cannot define or otherwise change the purpose for which the material was produced.

EPA further confuses "production" and "use" of KOH by mistakenly focusing on the "production" of *used* KOH by Howmet, rather than the commercial production of unused or "virgin" KOH and the purpose for which virgin KOH is produced to serve. In the proceedings below, EPA asserted that the *used* KOH could no longer serve "'the [cleaning] purpose for which it was *produced' by Howmet.*"[24] A used material is not "produced" to serve any purpose. Rather, the virgin material is used and, once the material "can no longer serve the purpose for which it was produced without processing," the used material is deemed a spent material pursuant to EPA's regulations and may then be subject to EPA's RCRA jurisdiction.[25]

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23 *Id.*

24 Region 2 Mem. at 18 (emphasis added); Region 6 Mem. at 13 (emphasis added).

25 40 C.F.R. § 261.1(c)(1) .

Appellant does not produce KOH, which is the relevant production process for purposes of the "spent material" determination. Rather, Appellant purchases KOH commercially for use in its manufacturing process. Howmet is not a producer of KOH, it is a manufacturer of metal castings that employed KOH in its manufacturing process and, when the strength of the KOH solution was no longer suitable for Howmet's use, it was used by Royster in its manufacturing process, without being reclaimed.[26] Howmet's use of KOH is immaterial for purposes of determining whether the KOH purchased and used by Howmet could "no longer serve the purpose for which it was produced."[27]

Appellees have wholly failed to address this question. EPA has made no attempt to address the purpose for which KOH is produced. Appellees simply did not allege in their complaints, or discuss in their motions in the proceedings below, the commercial purpose, or multiple uses, for which the KOH purchased by Howmet was produced to serve. EPA asserts that to do so would improperly shift the responsibility for determining when a material is a hazardous waste from the generator of the used material (*e.g.*, Howmet) to the manufacturer of the virgin material (*e.g.*, the virgin KOH manufacturer). Here again, EPA fails to acknowledge the process prescribed by its own regulations. Per EPA's regulations, the generator of a solid waste must determine if its waste is hazardous.[28] However, the threshold determination that must be made is whether the material is even a solid waste, which is the very determination at issue in this case. Appellant recognizes, and has never disputed, that it has the responsibility to

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[26] *See* Ex. A ¶¶ 4, 11-13, 18, 19; Ex. B ¶¶ 4, 10-12, 17, 18; *see also* Region 2 Mem. at 12 (discussing Royster's use of the used KOH).

[27] 40 C.F.R. § 261.1(c)(1).

[28] *See id.* § 262.11.

determine whether its used KOH is a spent material – that is, whether the KOH solution could continue to serve the purpose for which it was produced without processing.

It is beyond dispute that KOH is manufactured for many uses, including use as a cleaner (*i.e.*, Howmet's use) and as a source of potassium and neutralizing agent in the manufacture of fertilizer (*i.e.*, Royster's use).[29] KOH is a material with a single, elemental purpose and multiple uses. The fundamental purpose of KOH is to provide a high concentration of hydroxide ions and a concentrated source of potassium, which in turn results in KOH being effective in various different applications and for various different uses.[30]

Appellees attempt to avoid the reality that both Howmet and Royster were using the KOH in question for the purpose for which the material was produced. While the KOH could no longer serve Howmet's needs, Royster continued to use it, without processing, for the purpose for which it was produced – as a source of potassium and a neutralizing agent.[31] Neither of the Appellees' complaints allege any facts to the contrary. Accordingly, the KOH, as used by Royster, does not constitute a "spent material" as that term is defined by the plain meaning of EPA's regulations.

For the foregoing reasons, Appellees failed to satisfy their burden of demonstrating that they are entitled to judgment as a matter of law and their motions for accelerated decision should have been denied. Furthermore, as neither of the Appellees' complaints even allege that the

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[29] *See* Order on Motions at 6 n.12.

[30] A simple search on the Internet reveals the many uses of KOH – to manufacture potassium carbonate and other potassium chemicals, fertilizers, phosphates, agrochemicals, alkaline batteries, and dyes. It is also widely used in the soap and bleaching industry.

[31] *See* Region 2 Mem. at 12 (discussing Royster's use of used KOH); Ex. A ¶¶ 18, 19; Ex. B ¶¶ 17, 18. KOH's alkaline value – it's high pH – is directly attributable to the presence of the high concentration of hydroxide ions in KOH. In its fertilizer manufacturing operations, Royster was using the high concentration of hydroxide ions in the used KOH to neutralize or otherwise lower the pH of its mixture.

KOH was not produced for the purpose for which it was used by Royster, the complaints are insufficient to support the claimed violations and, as a matter of law, Appellant's Motion to Dismiss should have been granted by the ALJ in the proceedings below.[32]

B. Published EPA Statements And Administrative Materials Support Appellant's Application Of The Spent Materials Regulation

As set forth above, interpretation of a regulation begins with its plain meaning. In this case, it ends there as well. The regulation defining a "spent material" is unambiguous; there is no need to look beyond the face of the regulation as there is no ambiguity to resolve. EPA should not be allowed to transform by "interpretation" a regulation that is straightforward on its face and requires nothing more than a plain reading. It is the "text of the regulation . . . which must be given controlling effect."[33] Accordingly, there was no cause for the ALJ to delve further into the meaning of the regulation – the plain language of the regulation controls.

1. EPA's Statements In The Preamble To The Spent Materials Regulation Support A Finding That Howmet's Used KOH Is Not A Spent Material

Nevertheless, although there is no cause to move beyond the text of the regulation defining "spent materials," EPA's and the ALJ's misconstruction of the preamble to the regulation must be addressed. The proper analysis begins with the recognition that, in 1983, EPA proposed to define "spent material" as "any material that has been used and has served its *original purpose*."[34] In 1985, EPA finalized the definition of "spent material" to read as now

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[32] *See* 40 C.F.R. § 22.20(a) (providing for dismissal of a proceeding "on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant").

[33] *Shalala*, 512 U.S. at 526 (Thomas, J., dissenting) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

[34] 48 Fed. Reg. 14,472, 14,508 (April 4, 1983) (emphasis added).

provided in 40 C.F.R. § 261.1(c)(1) – "any material that has been used and as a result of contamination can no longer serve the *purpose for which it was produced.*"[35]

In the preamble to the 1985 final rule – the preamble relied upon below by Appellees – EPA explained its reasoning for revising the wording of the proposed definition:

> We are continuing to define spent materials as those which have been used and are *no longer fit for use* without being regenerated, reclaimed, or otherwise re-processed. . . . 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.*[36]

EPA's clarification makes clear that the definition of "spent material" in 40 C.F.R. § 261.1(c)(1) was intentionally worded to allow for the exact scenario at issue here – further use of a material that is not identical to the initial use of the material, but which is a use for which the material was produced.

In this case, the ALJ's and Appellees' construction of the term "spent material" improperly requires reuse of the material for the original *use.*[37] That construction does not square with the express regulatory definition of "spent material," or with EPA's clarification of that definition in the preamble to its 1985 rulemaking – that a material may be reused for any use for which the material was *produced* to serve and is still fit to serve. Nowhere in the preamble to the regulation does EPA state that the initial use and subsequent use or uses of the material must be the same or similar. Indeed, EPA's statements in the preamble make clear that if the used material is still "fit for use" – *any* use for which it was produced – the material is not spent.[38]

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35 50 Fed. Reg. 614, 663 (Jan. 4, 1985) (emphasis added).

36 50 Fed. Reg. at 624 (emphasis added).

37 *See* Order on Motions at 14-15; Region 2 Mem. at 17 (contending that a material becomes "spent" when "the original use" of the material ceases); Region 6 Mem. at 12 (same).

38 50 Fed. Reg. at 624.

In an effort to support their same or similar "continued use" construction of the spent materials regulation, Appelices rely upon a single example provided by EPA in the rule's preamble – a circuit board solvent being reused for metal degreasing. EPA makes no claim that this single example is illustrative of all the scenarios under which a material can be reused without being deemed spent.[39] Moreover, the example neither supports Appellees' interpretation nor refutes the plain meaning of the regulation that a material may be reused for any purpose for which it was produced. If the solvent at issue was produced solely for use as a solvent, then Appellant readily agrees that the solvent must continue to be used as a solvent to avoid regulation as a spent material. In this scenario, where the material was produced for only one specific use, Appellees' flawed construction of the spent materials regulation still produces the proper result – the initial and subsequent use of the material must be the same or similar because the material was produced solely for that use.[40]

This single-use product scenario, however, is not the situation presented in this case. This case concerns the subsequent use of a material that, as noted above, was produced for a single purpose but multiple uses. As applied to this situation, Appellees' strained interpretation of the spent materials regulation produces an erroneous result that is directly at odds with the plain language of the regulation. In the multiple-use product scenario, such as this one, the

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[39] Regarding this example, the ALJ, in his Order on Motions, opined that the example is not "indicative that a facility could only reuse the material as a solvent." Order on Motions at 15 n.26. The ALJ further reasoned 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." *Id.* (emphasis added). As set forth below, limiting permissible reuse of a material to reuse at the same facility, as required by the ALJ, finds no support in the spent materials regulation, EPA's application of that regulation and the agency's position in this case, or the applicable case law.

[40] The foregoing reasoning and analysis apply equally to the 1998 letter to Safety-Kleen that EPA relied upon in the proceedings below. *See* Region 2 Mem., Declaration of Ton Moy, Ex. 3, Letter from David Bussard, Waste Identification Division, Office of Solid Waste, EPA, to Catherine A. McCord, Manager, Environment and Business Integration, Safety-Kleen (Aug. 1998).

interpretation put forth by Appellees would prohibit reuse of the material for any use other than the initial use that was made of the product, regardless of whether the material is still fit to serve the purpose for which it was produced when employed in other applications and for other uses.[41] This is an unacceptable interpretation of a regulation that, on its face, expressly allows reuse of a material for any use, so long as the material is still serving "the purpose for which it was produced."[42]

Furthermore, turning back to the 1985 preamble, the parenthetical sentence immediately proceeding the solvent example clarifies that the "continued use" theory is considerably broader than the interpretation put forth by Appellees. The sentence in question explains that the "continued use" theory "is analogous to using/reusing a secondary material as an effective substitute for commercial products."[43] The regulatory concept of using or reusing secondary materials as effective substitutes for commercial products (as promulgated in EPA's RCRA regulations at 40 C.F.R. § 261.2(e)(1)(ii)) does not in any way restrict the subsequent use to only those uses that are identical or similar to the initial use.

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41 To appreciate the difference between the single-use and multi-use product scenario, it is instructive to compare an unformulated product, such as KOH, to a manufactured product, such as a formulated cleaner. Whereas a formulated cleaner is a mixture of various ingredients, the opposite is true of unformulated products, which are often ingredients in various formulations. Whereas a formulated product is typically formulated for a single purpose (*e.g.*, cleansing), an unformulated product, acting as an ingredient, may have a number of uses, but the fundamental purpose of the product in each use remains the same.

42 40 C.F.R. § 261.1(c)(1).

43 50 Fed. Reg. at 624.

2. EPA's Prior Construction Of The Spent Materials Regulation Is At Odds With The Interpretation Put Forth By Appellees In This Case

Per the plain language of the spent materials regulation, and EPA's own statements in the preamble to that regulation, the used KOH that Howmet provided to Royster is not a spent material. This outcome is not changed by the EPA guidance letters and administrative materials relied upon by Appellees in the proceedings below. As set forth above, it is the text of the regulation that controls, not EPA's erroneous interpretation of that regulation. Past repetition of a mistaken interpretation cannot overcome the fundamental defect in the position that EPA has taken in this matter.[44]

Furthermore, although offered by Appellees' to support EPA's position in this case, certain of these materials actually demonstrate that, almost since the day the spent materials regulation was promulgated in 1985, EPA has been applying the regulation in line with the construction put forth by Appellant.

(i) The 1986 Letters

Take, for example, the two 1986 letters discussed in EPA's filings in the proceeding below and attached hereto as ***Exhibit C*** (collectively, the "***1986 letters***").[45] One of the letters was written by Steven Silverman, an EPA attorney, (the "***Silverman letter***"); the other letter was written by Matthew Straus, then Chief of EPA's Waste Characterization Branch. Both letters

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[44] Moreover, to the extent that EPA or an ALJ can be said to have applied Appellees' interpretation in any of these materials – which is not apparent from the face of the materials – Appellant respectfully submits that such application was in error. In any event, these materials are not binding in this case and cannot compel application of a regulatory interpretation that is contrary to law.

[45] Letter from Steven E. Silverman, Attorney, Solid Waste and Emergency Response Division, EPA, to Daniel McCaskill, Vice President, Distribution Systems and Environmental Affairs, Van Watels and Rogers Division (June 4, 1986); Letter from Matthew A. Straus, Chief, Waste Characterization Branch, EPA, to A. L. Horner, Environmental Specialist, Albright and Wilson, Inc. (Oct. 20, 1986). In the proceedings before the ALJ below, the letters were attached to EPA's Reply Brief.

expressly contradict EPA's position in this case and support Appellant's application of the spent materials regulation.

The letters advise that used phosphoric acid from aluminum metal finishing operations may be reused as an ingredient in fertilizer manufacture. The letters note that, in addition to metal finishing applications, phosphoric acid, like KOH, is also used in fertilizer production. Thus, phosphoric acid, like KOH, is a multi-use product. The Silverman letter also notes that the used phosphoric acid will not be reclaimed before being reused in the fertilizer manufacturing process. Thus, the fertilizer manufacturer receiving the used phosphoric acid will employ the used acid in its operations just as Royster employed Howmet's used KOH in its operations – as is, without any reclamation or processing.[46]

It is readily apparent that EPA's analysis in the 1986 letters is a stepwise application of the spent materials regulation identical to the one put forth by Appellant in this case. EPA analyzed the proposed subsequent use of the used material; determined that the subsequent use was for the purpose for which the virgin material was produced to serve; determined that the used material was still fit for that purpose; and determined that the used material could be reused for that purpose without processing. Step by step, the analysis mirrors Appellant's interpretation of the spent materials regulation and reaches the same result. In both letters, EPA concludes that a multi-use product, which has been used in industrial applications until it is no longer effective for that use, may be reused as an ingredient in fertilizer manufacturing without invoking EPA's RCRA jurisdiction. Moreover, the material at issue in the 1986 letters, an acid, would exhibit the

[46] *See* Region 2 Mem. at 12 (discussing Royster's use of the used KOH); Ex. A ¶¶ 18, 19; Ex. B ¶¶ 17, 18.

same hazardous characteristic as Howmet's used KOH – both would be characteristically corrosive.

There is no support for EPA's disparate treatment of Howmet's used KOH and the used phosphoric acid at issue in the 1986 letters. There is no support for Appellees' position that Howmet's used KOH is a hazardous waste when EPA concluded nearly two decades ago that used phosphoric acid "would not be considered a solid or hazardous waste under RCRA when used in the same manner as virgin phosphoric acid." Howmet's used KOH, when employed as a source of potassium and neutralizing agent in Royster's fertilizer manufacturing operations, is used in the same manner as virgin KOH and no differently than the used phosphoric acid at issue in the 1986 letters.

Nevertheless, Appellees will attempt to distinguish the used phosphoric acid on the basis that it was represented to the agency to be as pure or purer than virgin phosphoric acid, as noted the 1986 letters. Even assuming the two used materials can be so distinguished, it is a distinction without a difference. Under the facts as recounted in the 1986 letters, there is only one legal mechanism for excluding the used phosphoric acid from EPA's RCRA jurisdiction – application of the spent materials regulation. If the conclusions reached by the agency in the 1986 letters are to have any legal merit, EPA had to apply the spent materials regulation and find that the used acid was not a spent material, and therefore was not discarded, because it could continue to be used as phosphoric acid, "the purpose for which it was produced," without processing.[47]

Appellees, however, will attempt to distinguish EPA's prior analysis by likening the used phosphoric acid to virgin acid and claiming, as Appellees often did in the proceedings below,

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[47] 40 C.F.R. § 261.1(c)(1).

that the agency does not have authority to regulate virgin materials under RCRA.[48] Technically, that is a misstatement of the law. As noted above, a material must (1) first be discarded (2) in order to be considered a solid waste (3) to in turn be regulated under RCRA as a hazardous waste. EPA's RCRA jurisdiction does not extend to materials that have not been discarded and, thus, are not solid wastes capable of being classified as hazardous wastes. However, if a virgin material that exhibits a hazardous characteristic, such as phosphoric acid, is discarded, EPA may properly regulate it as a hazardous waste under RCRA. It is not the virgin or used nature of the material that triggers EPA's RCRA jurisdiction; whether virgin or used, the material must be discarded before EPA can invoke its RCRA jurisdiction.[49]

In this case, as in the 1986 letters, the question of whether a material has been discarded hinges upon application of the spent materials regulation. Nearly twenty years ago, under the same set of facts as presented in this case, EPA concluded that it did not have RCRA jurisdiction over materials that are legally indistinguishable from the material at issue in this case. The facts are the same and the applicable regulation has not change, thus the conclusion should not vary. Just as EPA lacked jurisdiction over the used phosphoric acid at issue in the 1986 letters, the agency lacks jurisdiction over Howmet's used KOH.

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[48] *See, e.g.*, EPA's Reply Brief at 7.

[49] *See, e.g., American Mining Congress v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987) ("***AMC I***") (finding "clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned"); *see also* 42 U.S.C. § 6903(27) (defining "solid waste" as any "discarded material"); 40 C.F.R. § 261.2(a)(1) (same); 53 Fed. Reg. 519, 520 (Jan. 8, 1988) (noting that *AMC I* "limited the Agency's authority over hazardous secondary materials destined for recycling to materials that are 'discarded'").

(ii) The *Brenntag* Decision

EPA's reliance upon *Brenntag Great Lakes, LLC*[50] in the proceedings below was similarly misplaced. Like the 1986 letters, the *Brenntag* case affirms Appellant's construction of the spent materials regulation; the case offers no support for the interpretation put forth by Appellees. The principle facts of *Brenntag* are largely inapplicable to this case because the material at issue in *Brenntag* – isopropyl alcohol ("***IPA***") – was used and then processed prior to its reuse. Indeed, the ALJ's decision notes that Milsolv's "treatment" of the used IPA was "the focus of EPA's enforcement action."[51] Such processing prior to reuse is expressly prohibited by the spent materials regulation.[52] There is no such allegation in this case that the used KOH at issue was processed or in any way treated prior to Royster's use of the material in its manufacturing operations.[53]

To the extent that *Brenntag* has any relevance to the case at hand, it is illustrative of the proper application of the spent materials regulation. In Milsolv's hands, the aqueous IPA was a spent material because Milsolv was processing it prior to its reuse. However, in Tradco's hands, the same material was not spent because Tradco was reusing the aqueous IPA without processing it.[54] This was true – in fact, this was EPA's position in the case – despite the fact that the IPA was first used by 3M in adhesive manufacturing operations until it was no longer fit for use in

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50 *In the Matter of Brenntag Great Lakes, LLC*, EPA Docket No. RCRA-5-2002-0001, 2004 WL 1328663 (June 2, 2004).

51 *See id.* at 6.

52 *See* 40 C.F.R. § 261(c)(1); *see also Brenntag* at 6-7 (noting that the applicable state regulation allowed "only for reuse of the chemical 'as is'").

53 *See* Region 2 Mem. at 12 (discussing Royster's use of the used KOH); Ex. A ¶¶ 18, 19; Ex. B ¶¶ 17, 18.

54 *See Brenntag* at 18-19 (noting that Tradco's purchase and sale of the aqueous IPA "violated no law").

those operations, then sold to a middleman, who then sold the used material to Tradco for use in the "automotive after-market."[55]

Applying *Brenntag* to the case at hand, Howmet is akin to 3M and Royster is akin to Tradco. Howmet employed KOH in its casting operations until the KOH was no longer fit for use in those operations. Howmet's used KOH was then sold to Royster who employed the used KOH in its fertilizer manufacturing operations "as is" without processing. As evidenced by the holding in *Brenntag*, Howmet's used KOH was not a spent material – in Royster's operations, it continued to serve the purpose for which KOH is produced.

C. The ALJ's Ruling In His Order On Motions Is Contrary To The Plain Meaning Of The Regulation And Any Reasonable Interpretation Of The Regulation

As noted above, in his April 25, 2005 Order on Motions, the ALJ ruled that the used KOH that Howmet shipped to Royster was a spent material "under a plain reading of the applicable regulations."[56] Additionally, relying upon his reading of various D.C. Circuit decisions, the ALJ concluded that, to avoid regulation of Howmet's used KOH as a solid waste, the used KOH would have to be used in an "ongoing, continuous process of beneficial reuse by Howmet."[57] For the reasons set forth below, Appellant respectfully submits that the ALJ's interpretation of the spent materials regulation and application of D.C. Circuit case law are flawed and cannot support the rulings in his Order on Motions.

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55 *See id.* at 4, 5, 18.

56 Order on Motions at 21.

57 *Id.*

1. The ALJ's Construction Of The Spent Materials Regulation Improperly Focuses On The Material's Original Use Rather Than The Purpose For Which It Was Produced

In his Order on Motions, the ALJ maintained that Appellant's framing of the issue – that the relevant question is whether Howmet's used KOH was used by Royster for a "purpose for which it was produced" – "mischaracterized the language employed in [the spent material] definition in a manner that makes a difference."[58] The ALJ contends that Appellant's reference in the proceedings below to "*a* purpose" rather than "*the* purpose" for which KOH was produced "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."[59]

For the reasons noted above, the ALJ's focus on the "original use" of the material is misplaced – it effectively defines the "purpose for which" a material "was produced" as the first use that is made of the material. Furthermore, Appellant does not suggest an inquiry that focuses on *potential* uses of a material; Appellant does not propose a "what could have been" test but rather a test that focuses on what "was." Per the plain language of the spent materials regulation, the analysis must focus on what purpose the material was produced to serve. As set forth above, the regulation must be applied to account for materials like KOH that are produced for multiple uses.

Now having received and reviewed the ALJ's Order on Motions, Appellant realizes that its use of "*a* purpose" rather than "*the* purpose" may have caused the ALJ to misunderstand

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[58] *Id.* at 14.

[59] *Id.* at 14-15 (emphasis in original).

Appellant's position. Appellant used the terms "use" and "purpose" interchangeably. To avoid any confusion, Appellant has distinguished those terms in this brief and clarified, as noted above, that KOH has a single, elemental purpose and multiple uses.

If EPA must limit KOH, a multi-use product, to one "purpose" for purposes of applying the spent materials definition, then that purpose should be stated in terms of the fundamental purpose of the product, not in terms of the product's multiple uses. The elemental purpose of KOH – *the* purpose for which it is produced – is to provide a high concentration of hydroxide ions and a concentrated source of potassium. As noted above, this purpose yields many and varied uses, but each use is fundamentally similar in that each use relies upon KOH as a source of hydroxide ions and potassium. Thus, used KOH would be a spent material when it has been used and can no longer serve as a source of hydroxide ions and potassium without being processed.

In the case of a multi-use product such as KOH, which is produced for a number of uses, selecting one use from the list as "*the* purpose" for which the product was produced is inherently an arbitrary determination. In this case, EPA selected a use from the list of KOH uses that subjects Howmet's used KOH to regulation under RCRA and defined that use as "*the* purpose for which" the KOH used by Howmet was produced. Had EPA selected KOH's use in the manufacture of fertilizer as "*the* purpose," there would be no RCRA liability. Although in this scenario, Howmet may be alleged to have used a product for a purpose for which it was *not* produced, RCRA liability would not attach because Howmet's used KOH could still serve "*the* purpose for which it was produced."[60] As noted above, Howmet's use of KOH is immaterial for

[60] 40 C.F.R. § 261.1(c)(1) (emphasis added).

purposes of determining whether the KOH purchased and used by Howmet could "no longer serve the purpose for which it was produced."[61]

Such arbitrary application of the spent materials regulation should be avoided, not fostered. As set forth above, the spent materials regulation is properly applied to multiple-use products by examining the fundamental purpose that the product was produced to serve. In the case of KOH, that purpose is to provide a high concentration of hydroxide ions and a concentrated source of potassium.

2. The ALJ's Application Of D.C. Circuit Case Law Has Been Rejected By The D.C. Circuit And EPA

In his Order on Motions, the ALJ also relied upon his reading of various D.C. Circuit decisions to conclude that Howmet's used KOH could not avoid regulation as a solid waste unless the used KOH was used in an "ongoing, continuous process of beneficial reuse by Howmet."[62] However, the cases relied upon by the ALJ do not support this conclusion. Those cases provide only that a material that is reused within the same industry's ongoing production process cannot be considered a discarded material (*i.e.*, cannot be considered a solid waste).[63] The decisions do not require reuse by the same entity or industry, or an ongoing, continuous process, to avoid regulation as a spent material. Neither these cases nor the applicable spent materials definition preclude reuse of the material by another entity or industry, so long as the

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61 *Id.*

62 Order on Motions at 21; *see also id.* (concluding that "Howmet's material is solid waste, as it has been 'discarded' in the sense that it is no longer being used by Howmet").

63 *See id.* at 15-16; *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2004) (discussing the line of D.C. Circuit cases holding "that the term 'discarded" cannot encompass materials that 'are destined for beneficial reuse or recycling in a continuous process by the generating industry itself'") (quoting *AMC I*, 824 F.2d at 1186).

material is reused for "the purpose for which it was produced without processing."[64] EPA does not dispute this point.[65]

Although his ruling in the Order on Motions appears to overlook this distinction, the ALJ made passing reference to it in his analysis of the case law. As noted in the ALJ's analysis, the D.C. Circuit, in a recent opinion regarding "discarded materials," clarified the holding in the line of cases relied upon by the ALJ.[66] In *Safe Food and Fertilizer*, the appellate court explained that "materials destined for future recycling by another industry *may* be considered discarded" if the materials meet one or more of the regulatory conditions for "discarded materials," such as the spent materials regulation.[67] The court rejected the proposition that used material transferred from one company to another, or from one industry to another, must always be considered discarded: "[W]e have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'"[68]

Accordingly, contrary to the ALJ's conclusion in his Order on Motions, Howmet's used KOH did not become a discarded material simply because it was reused by another company in a different industry.[69] In Royster's operations, the used KOH continued to be used for the purpose for which KOH is produced. Therefore, despite its use by a different company in a different industry, the used KOH was not a spent material subject to regulation under RCRA.

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64 *See Safe Food and Fertilizer*, 350 F.3d at 1268; 40 C.F.R. § 261.1(c)(1).

65 *See* Region 2 Mem. at 29 ("[B]oth the [spent materials] regulation and EPA interpretation allow a material to be used and re-used continually, *even by different entities*, outside of the universe of RCRA regulation, until it is deemed spent.") (emphasis added).

66 *See Safe Food and Fertilizer*, 350 F.3d at 1268; Order on Motions at 20 n.32.

67 *Safe Food and Fertilizer*, 350 F.3d at 1268 (emphasis in original).

68 *Id.*

69 *See* Region 2 Mem. at 29

D. EPA Cannot Rewrite The Spent Materials Regulation In This Proceeding

In this case, EPA essentially attempts to rewrite its own regulations because the agency does not like the result yielded by application of the plain meaning of the language that the agency promulgated. While EPA has the authority to rewrite its regulations, it can do so only through notice and comment rulemaking; *ad hoc* attempts to rewrite regulations in the course of litigation are unlawful.[70]

In the proceedings below, EPA claimed that if Appellant's reading of the spent materials regulation prevails, disastrous results will ensue. The ALJ was apparently swayed by the doomsday picture painted by EPA.[71] The simple response to EPA's hyperbole is that if a plain reading of the regulation will, in fact, yield a result that threatens human health or the environment, EPA should promulgate revisions to the regulation through notice and comment rulemaking. EPA is charged with promulgating regulations for the management of hazardous waste; the agency is equally charged with enforcing its regulations as written.

In this case, EPA has attempted to advance its results-oriented approach by concocting a hypothetical scenario of children playing in a sandbox of contaminated sand. EPA claims that if Appellant's reading of the spent materials regulation prevails, then a brass foundry could use virgin sand as an abrasive until it is contaminated, at which point the sand could be used to fill children's sandboxes. While clearly an emotional appeal, the leap to the conclusion that EPA is correctly interpreting the regulation is too great. Following EPA's logic, the dramatic picture of children playing in contaminated sand would be out of EPA's reach if the sandbox was lined and the foundry sand was not land-applied.

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[70] *See, e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 at 536 ("It is axiomatic that an agency must adhere to its own regulations.").

[71] *See* Order on Motions at 20-21.

The reality is that it must be recognized that EPA's RCRA regulations were not drafted to account for every situation or protect against all possible scenarios, no mater how inconceivable. Short of rewriting its spent materials regulation, if EPA has concerns about the reuse of used KOH, or any other used material, EPA could undertake rulemaking to list the material as a hazardous waste subject to EPA's RCRA jurisdiction.[72] As the agency charged with implementation and enforcement of the RCRA statutory provisions and the regulations promulgated thereunder, EPA has permissible, available administrative means at its disposal to address any perceived threat to human health or the environment arising from the reuse of used KOH. The one thing that EPA is precluded from doing is the very thing the agency is attempting to do in this case – rewrite its regulations in the course of litigation.

E. Appellant Was Not Given Fair Notice Of The Interpretation Put Forth By Appellees In This Matter

As set forth above, there are no grounds for finding EPA's "spent material" interpretation to be anything other than erroneous and contrary to law. However, should the EAB conclude otherwise, Appellant submits that it has not been given fair notice of the interpretation advanced by EPA. Constitutional principles of due process dictate that a penalty may not be assessed where the regulated party has not been provided notice of the agency's interpretation of the applicable regulation.[73] The relevant question is "whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations."[74]

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72 *See id.* §§ 261.2(d), 261.11, 261.30(a); 42 U.S.C. § 6921(b).

73 *See General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

74 *Id.* at 1329.

Fair notice is not provided unless the regulated party can identify, with "ascertainable certainty," on the face of the regulations and other public statements issued by the agency, the standard that the agency is applying.[75] If a violation of a regulation will subject the regulated entity to sanctions, the "regulation cannot be construed to mean what an agency intended but did not adequately express."[76] "The test 'is not what [the agency] might possibly have intended, but what [was] said."[77] To satisfy fair notice standards, the notice must be an "authoritative interpretation of the regulation" from the agency.[78]

As set forth above, neither the plain wording of the spent materials regulation, nor the preamble to that regulation or the administrative materials relied upon by EPA, provides an authoritative interpretation of the regulation that accords with the one put forth by EPA in this matter. Indeed, as noted above, the plain wording of the spent materials regulation, the preamble to the regulation, EPA's statements in the 1986 letters, and the *Brenntag* decision all support Appellant's construction of the spent materials regulation.

EPA's interpretation is not ascertainable, with any degree of certainty, from the face of the regulation. Nor is it evident in any public statement issued by EPA. What the agency said in the spent materials regulation, in the preamble to the regulation, and in the 1986 letters is simply

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75 *Id.*; *see also U.S. v. Hoechst Celanese Corp.*, 964 F. Supp. 967, 979, 982 (D.S.C. 1996), *rev'd in part on other grounds* 128 F.3d 216 (4th Cir. 1997) ("The whole point of the 'fair notice' line of cases is that, as a matter of due process, the regulatory obligations to which persons are subject flow from what the regulations themselves say with ascertainable certainty."); *In re Harpoon P'ship*, TSCA Appeal No. 04-02, 2005 WL 1254975, at 3, 8 (May 19, 2005).

76 *Hoechst Celanese Corp.*, 964 F. Supp. at 979 (citing *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)); *see also id.* at 980 ("Awarding penalties where the problem is the language chosen by the agency, rather than any unwillingness to comply would only 'delay the day when . . . regulations will be written in clear and concise language' so that regulated parties 'will be better able to understand and observe them.'") (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976)).

77 *Id.* at 979-80 (quoting *U.S. v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (brackets in original)).

78 *Gates & Fox Co.*, 790 F.2d at 157.

not consistent with the interpretation put forth by Appellees in this case. Appellees' interpretation has never been adequately expressed by EPA in any public forum and, therefore, cannot be applied in this case to levy penalties against Appellant.[79]

Accordingly, even if the EAB accepts EPA's interpretation of the spent materials regulation, this proceeding should nevertheless be dismissed because Appellant has not been given fair notice of that interpretation and, absent such notice, Appellant has committed no violation of the regulatory requirements.[80] Furthermore, for the foregoing reasons, the ALJ should not have granted Appellees' motion to strike Appellant's third affirmative defense – due process.

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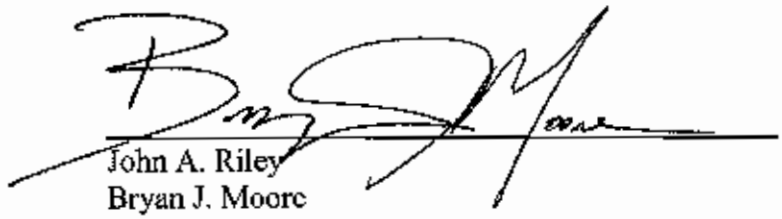
[79] *See Hoechst Celanese Corp.*, 964 F. Supp. at 979; *see also U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 225 (4th Cir. 1997) (finding that EPA's "regulations, their preamble, or purpose" did not provide fair notice where EPA's interpretation of the regulations was not mandated and "some of the language in the preamble" supported the regulated entity's "narrower interpretation").

[80] *See Hoechst Celanese Corp.*, 964 F. Supp. at 979.

IV.
CONCLUSION

For the foregoing reasons, as a matter of law the ALJ erred in granting Appellees' motions for an accelerated decision and to strike affirmative defenses, and in denying Appellant's Motion to Dismiss. Appellant respectfully requests that the ALJ's Initial Decision and April 25, 2005 Order on Motions be set aside and that this matter be dismissed in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that Appellant Howmet Corporation's Brief in Support of Notice of Appeal was served on the following via hand delivery, facsimile, electronic mail, and/or certified mail on this the 28th day of October, 2005:

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
HOWMET CORPORATION,	)	DOCKET NO.: RCRA-02-2004-7102
	)	
Respondent.	)	

JOINT STIPULATIONS

The following stipulations have been agreed to by the parties. These stipulations apply to the Howmet Corporation facility located in Dover, New Jersey and cover the time period August 6, 1999 through September 27, 2000, unless expressly stated otherwise. The parties agree that the facts set forth or summarized in the attachments hereto are undisputed and admissible as evidence in these proceedings.

1. Howmet Corporation. ("Howmet" or "Respondent") is a wholly owned subsidiary of Alcoa Inc.

2. Howmet is, and was during the referenced time period, a Delaware corporation.

3. Howmet owns and operates a manufacturing plant located at or near 9 Roy Street, Dover, New Jersey 07801 - 4308 (the "Dover or New Jersey facility").

4. Howmet manufactures precision investment castings for aerospace and industrial gas turbine applications at its New Jersey facility.

5. In July 1980, Respondent (then identified as Howmet Turbine Components Corporation) notified EPA Region II that it generates hazardous waste at its New Jersey facility. In August 1989, Respondent notified EPA Region II of its name change to Howmet Corporation.

6. In July 1980, EPA assigned Howmet EPA Identification Number NJD 002 445 583 for the New Jersey facility (Dover Castings Division).

7. Howmet is, and was during the referenced time period, a "person," as that term is defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and 40 C.F.R. § 260.10 (1993) as incorporated by reference by NJAC 7:26G-4.1(a).

8. Howmet is, and was during the referenced time period, the "owner" of the New Jersey facility as that term is defined in 40 C.F.R. § 260.10 (1993) as incorporated by reference by NJAC 7:26G-4.1(a).

9. Howmet is, and was during the referenced time period, the "operator" of the New Jersey facility as that term is defined in 40 C.F.R. § 260.10 (1993) as incorporated by reference by NJAC 7:26G-4.1(a).

10. Howmet is, and was during the referenced time period, a "hazardous waste" "generator" at its New Jersey facility as those terms are defined in 40 C.F.R. § 260.10 (1993) as incorporated by reference by NJAC 7:26G-4.1(a).

11. Howmet utilizes a liquid potassium hydroxide ("KOH") and water ("H20") solution ("KOH/H20") to leach out or remove (clean) ceramic core from metal castings during manufacturing operations at its New Jersey facility.

12. Howmet continually uses or re-uses the KOH/H20 solution to clean metal castings until the solution can no longer be effectively employed by Howmet for this purpose without being reclaimed or otherwise processed. (Hereinafter, used KOH/H20 solution no longer used by Howmet to clean castings will be referred to as "used KOH.")

13. During the time period of August 6, 1999 through September 27, 2000, Howmet accumulated the used KOH in a storage tank at its New Jersey facility and then either: a) discarded the used KOH as a hazardous waste by sending it to an off-site authorized hazardous waste disposal facility; or b) sent its used KOH off-site to Royster-Clark ("Royster"), a fertilizer manufacturer.

14. During the time period of August 6, 1999 through September 27, 2000, 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.

15. Used KOH generated at the New Jersey facility is aqueous with a pH equal to or greater than 12.5.

16. During the time period of August 6, 1999 through September 27, 2000, Howmet sent used KOH from its New Jersey facility to fertilizer manufacturer Royster-Clark, Inc. ("Royster") to be used in the production of land applied tobacco fertilizer at Royster's Plymouth and Rocky Mount, North Carolina facilities ("fertilizer manufacturing facilities").

17. Royster's fertilizer manufacturing facilities did not have EPA identification numbers through at least September 27, 2000.

18. During the time period of August 6, 1999 through September 27, 2000, Howmet sent the used KOH to Royster's fertilizer manufacturing facilities by tanker truck. The used KOH was pumped from the truck into storage tanks at the Royster facilities.

19. Royster pumped the stored used KOH received from Howmet into a fertilizer materials mixer, as needed. The used KOH was a source of potassium and controlled (neutralized) the pH of the fertilizer mixture.

20. During the time period of August 6, 1999 through September 27, 2000, Howmet sent twenty-six (26) shipments of used KOH from its New Jersey facility to Royster's manufacturing facilities. These shipments are represented on Attachment A.

21. During the time period of August 6, 1999 through September 27, 2000, Howmet did not prepare a hazardous waste manifest for, or send a hazardous waste manifest with, any of the 26 shipments of used KOH which it sent from its New Jersey facility to the Royster fertilizer manufacturing facilities. Instead, Howmet prepared and sent a hazardous materials bill of lading with each of the 26 shipments of used KOH which it sent from its New Jersey facility to the Royster fertilizer manufacturing facilities. These shipments are represented on Attachment A.

22. During the time period of August 6, 1999 through September 27, 2000, Howmet employed transporter Potter Transport, Inc. ("Potter") on twenty three (23) occasions to transport the used KOH from its New Jersey facility to Royster's fertilizer manufacturing facilities. These shipments are represented on Attachment A.

23. During the time period of August 6, 1999 through September 27, 2000, Potter did not have an EPA identification number to transport hazardous waste.

24. Howmet did not prepare, send or maintain at its facility land ban notifications for the used KOH which it sent to Royster's fertilizer manufacturing facilities from Howmet's New Jersey facility during the time period of August 6, 1999 through September 27, 2000.

25. The shipments of used KOH to Royster from Howmet's New Jersey facility were associated with a material safety data sheet (" MSDS"). The MSDS was prepared by Howmet. An accurate copy of the MSDS is set forth in Attachment B.

26. 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. These shipments are summarized in Attachment C.

RESPONDENT:

Howmet Corporation

BY: _____

NAME: John A. Riley

TITLE: Attorney

DATE: 8-16-04

COMPLAINANT:

United States Environmental Protection Agency - Region 2

BY: _____

NAME: Amy Chester

TITLE: Attorney

DATE: 8/16/04

ATTACHMENT A

Shipments of Used KOH from Howmet's Dover, New Jersey facility to Royster's Plymouth and Rocky Mount, North Carolina facilities

Shipment Date	Destination Facility	Shipper No. on Bill of Lading	Transporter	Volume
8/6/99	Royster Plymouth	25318	DSI Transport	4125 gals.
8/17/99	Royster Rocky Mount	25562	DSI Transport	3800 gals.
10/11/99	Royster Plymouth	26266	Potter Transport	4000 gals.
10/20/99	Royster Plymouth	26384	Potter Transport	3800 gals.
11/15/99	Royster Plymouth	26736	Potter Transport	4167 gals.
12/3/99	Royster Plymouth	26953	Potter Transport	4000 gals.
3/2/00	Royster Plymouth	28451	Potter Transport	4100 gals.
3/13/00	Royster Plymouth	28589	Potter Transport	4300 gals.
3/27/00	Royster Plymouth	28761	Potter Transport	4300 gals.
4/4/00	Royster Plymouth	28880	Potter Transport	4400 gals.
4/13/00	Royster Plymouth	28984	Potter Transport	4200 gals.
4/21/00	Royster Rocky Mount	29561	Potter Transport	4100 gals.
5/1/00	Royster Rocky Mount	29673	Potter Transport	4400 gals.
5/10/00	Royster Plymouth	29778	Potter Transport	4500 gals.
5/26/00	Royster Rocky Mount	29965	Potter Transport	4300 gals.
6/6/00	Royster Rocky Mount	30086	Potter Transport	4300 gals.
6/15/00	Royster Rocky Mount	30143	Potter Transport	4000 gals.
6/26/00	Royster Rocky Mount	30311	Potter Transport	4300 gals.
7/5/00	Royster Rocky Mount	30371	Potter Transport	3800 gals.
7/16/00	Royster Rocky Mount	30472	Potter Transport	3800 gals.
8/10/00	Royster Rocky Mount	30646	Potter Transport	4200 gals.
8/21/00	Royster Rocky Mount	30800	Potter Transport	4300 gals.
8/31/00	Royster Plymouth	30931	Potter Transport	4200 gals
9/11/00	Royster Plymouth	31042	Potter Transport	4300 gals.
9/18/00	Royster Plymouth	31117	Potter Transport	4300 gals.
9/27/00	Royster Plymouth	31220	APC	4300 gals.

ATTACHMENT B

HOWMET CORPORATION

Material Safety Data Sheet

General Information

Generators:

Howmet Dover Casting
Roy Street
Dover, New Jersey 07801-4308
201-361-0300

Howmet Hampton Casting
One Howmet Drive
Hampton, Virginia 23661
804-838-4680

Howmet Wichita Falls Casting
6200 Central Freeway
Wichita Falls, Texas 76307-1616
817-855-8100

Howmet LaPorte Casting
1110 East Lincolnway
LaPorte, Indiana 46350-3954
219-326-7400

Product name: *Used Potassium Hydroxide Solution*

Hazard Class: 8
Packing Group: II

Identification Number: UN1814
Label Required: Corrosive

Process generating the material. Caustic cleaning of metal castings (including ceramic core removal)

Composition and Hazardous Ingredients

Major constituents:	CAS Numbers	%	Permissible Exposure Limit (OSHA) in mg/m3	Threshold Limit Value (ACGIH) in mg/m3
Potassium hydroxide	1310-58-3	20-30	not established	2 (ceiling)
Silica	7631-86-9	< 5	5	5
Alumina	1344-28-1	< 5	not established	10
Zircon	10101-52-7	< 5	5	5
Water	7732-18-5	65-80	NA	NA
		~ 100		

The total trace metals are less than 20 mg/l (ppm) and are distributed as follows:

Mercury	< 0.005	Copper	< 5
Nickel	< 0.07	Cobalt	< 10
Chromium	< 1	Iron	< 10
Lead	< 2		

Physical Data

Appearance: clear to off-white mobile liquid
Specific gravity: 1.3
Water solubility: mixes with water

Odor: little or no odor
Density: 10.8 pounds per gallon
pH: 14+ *(VERY CORROSIVE TO HUMAN TISSUE AND WHITE METALS!!!)*

Used Potassium Hydroxide Solution

Fire and Explosion Data

Potassium hydroxide solution does not burn, however it can react with aluminum metal to generate highly explosive hydrogen gas.

Flash point: none.

Upper and lower explosion limits: none/not applicable

Extinguishing media: not applicable

Protective equipment: Firefighters must wear gloves, boots, raincoats, face shields , and helmets to prevent skin and eye contact. Self-contained breathing apparatus must be worn in fire situations to prevent breathing of caustic mists.

Reactivity Data

This material is stable when properly contained and handled. Potassium hydroxide attacks aluminum, tin, zinc and alloys containing these metals. Potassium hydroxide can react violently with strong mineral acids.

Health Hazard Information

Concentrated solutions of potassium hydroxide are extremely corrosive to all human tissue including skin, eyes, and respiratory passages

First Aid:

EYE CONTACT: Immediately flush with running water for 15 minutes, including under the eyelids! Get medical attention!

SKIN CONTACT: Immediately flush with running water for 15 minutes. Get medical help if a large area is contacted or if irritation persists.

INHALATION: Mists generated through heating or agitation are corrosive to breathing passages. If an overdose occurs:

1. Remove victim to fresh air,
2. Restore and support breathing through artificial respiration, if necessary,
3. Get medical help, and
4. Keep victim quiet and warm until help arrives.

INGESTION: If victim is conscious, give 2-3 glasses of water to dilute the base. DO NOT INDUCE VOMITING! corrosive material may be aspirated into lungs.

Used Potassium Hydroxide Solution

Spill, Leak, and Disposal Procedures

Spill and leaks:

1. Keep unnecessary persons from the spill area.
2. Put on protective clothing and equipment (rubber gloves, apron, boots, goggles, and respirator for dusts and mists).
3. Stop the spill at the source.
4. Contain the spill.
5. Retrieve spilled material.
6. Decontaminate using water.

Disposal: controlled neutralization with acids.

Special protection information

Those handling potassium hydroxide solution must wear protective clothing and equipment to prevent contact with the solution (rubber gloves, apron, boots, long sleeve shirt, and chemical safety goggles).

An eyewash station, washing facilities, and safety shower should be readily available in areas of handling and use.

Special Precautions and Comments

Stored containers must be inspected weekly for leaks and other signs of deterioration. Problems must be corrected immediately.

Prepared By:

Keith T. Shell (Manager, Environmental Engineering) 5/8/96
616-894-7226 FAX = 616-894-7293

ATTACHMENT C

Shipments of Used KOH from Howmet's Dover, New Jersey facility
as Hazardous Waste to an authorized Treatment, Storage or Disposal facility (TSDF)

Shipment Date	Destination Facility	Manifest No.	Hazardous Waste Code on Manifest	Chromium Level *	pH	Volume
08/26/99	Philip Services	PAG 0284922	D002	3.57	>12.5	4835 gals.
10/26/99	Philip Services	PAG0988271	D002	0.96	>12.5	4799 gals.
11/05/99	Philip Services	PAG0989450	D002	0.92	>12.5	4895 gals.
11/23/99	Philip Services	PAG137322	D002	51.5	>12.5	4420 gals.
12/10/99	Philip Services	PAG137609	D002	1.97	>12.5	4586 gals.
12/17/99	Philip Services	PAG135707	D002	39.4	>12.5	4503 gals.
01/10/00	Philip Services	PAG135896	D002	1.82	>12.5	5017 gals.
01/20/00	Philip Services	PAG136095	D002	0.99	>12.5	5027 gals.
01/28/00	Philip Services	PAG136162	D002	0.97	>12.5	4503 gals.
02/07/00	Philip Services	PAG136725	D002	2.74	>12.5	4586 gals.
02/11/00	Philip Services	PAG136812	D002	9.78	>12.5	4329 gals.
02/17/00	Philip Services	PAG136874	D002	1.61	>12.5	5300 gals.
02/24/00	Philip Services	PAG136916	D002	1.06	>12.5	5156 gals.

*All information on this chart obtained from Waste Analysis Profile for each shipment. (All units are ppm, per Gross Metals Analysis.)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

In the Matter of:	§	
	§	
Howmet Corporation	§	
6200 Central Freeway	§	
Wichita Falls, Texas 76307-1616	§	**Docket No. RCRA-06-2003-0912**
	§	
EPA I. D. No. TXD095214185	§	
	§	
Respondent.	§	

STIPULATION OF FACTS

Complainant and Respondent hereby agree and stipulate that the facts set forth below in paragraphs 1 through 22 are true and correct. The stipulated facts relate to Respondent's facility in Wichita Falls, Texas, and the period from on or about March 26, 1999, through on or about September 19, 2000, (relevant time period), unless stated otherwise. The parties agree that this stipulation and the attachments hereto are admissible as evidence in this proceeding.

1. Howmet Corporation (Howmet) is a wholly-owned subsidiary of Alcoa, Inc.

2. Howmet is a Delaware corporation.

3. Howmet owned and operated a manufacturing plant located at 6200 Central Freeway, Wichita Falls, Texas (Facility).

4. Howmet manufactured precision investment castings for aerospace and industrial gas turbine applications at the Facility.

5. In April, 1980, Howmet filed a notice of registration identifying itself as a large quantity generator of hazardous waste at the Facility. The notice of registration was updated on September 18, 2001, and represented that the Facility generated "hazardous waste," as defined in Texas Health & Safety Code § 361.003(12) and 30 TAC § 335.1(62) (40 C. F. R. § 261.3).

6. EPA assigned Howmet EPA identification number TXD095214185 for the Facility.

7. Howmet is and during the relevant time period was a "person" as that term is defined in Texas Health & Safety Code § 361.003(23), 42 U. S. C. § 6903(15) and 40 C. F. R. § 260.10.

8. Howmet was the "operator" and "owner" of the Facility as those terms are defined in 30 TAC §§ 335.1(101) and (100) (40 C. F. R. § 260.10).

9. Howmet was a "hazardous waste" "generator" as those terms are defined in 30 TAC §§ 335.1(62) and (58) (40 C. F. R. § 260.10).

10. Howmet utilized a liquid potassium hydroxide (KOH) and water (H20) solution (KOH/H20) to leach out or remove (clean) ceramic core from metal castings during manufacturing operations at the Facility.

11. Howmet continually used or re-used the KOH/H20 solution to clean metal castings until the solution could no longer be effectively employed by Howmet for this purpose without being reclaimed or otherwise processed. Hereinafter, used KOH/H20 solution no longer used by Howmet to clean castings is referred to as "used KOH."

12. Howmet accumulated the used KOH in a storage tank at the Facility and then either (a) discarded the used KOH as a hazardous waste by sending it to an off-site, authorized hazardous waste disposal facility or (b) sent its used KOH off-site to Royster-Clark, Inc., (Royster), a fertilizer manufacturer.

13. During the relevant time period 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.

14. The used KOH generated at the Facility was aqueous with a pH of 12.5 or greater.

15. During the relevant time period Howmet sent 24 shipments of used KOH from the Facility to Royster to be used in the production of land-applied tobacco fertilizer at Royster's Plymouth and Rocky Mount, North Carolina, facilities (fertilizer manufacturing facilities). The dates of these shipments are shown on Attachment A.

16. Royster's fertilizer manufacturing facilities did not have EPA identification numbers.

17. Howmet sent the used KOH to Royster's fertilizer manufacturing facilities by tanker truck. The used KOH was pumped from the truck into storage tanks at the Royster facilities.

18. Royster pumped the stored used KOH received from Howmet into a fertilizer materials mixer, as needed. The used KOH was a source of potassium and controlled (neutralized) the pH of the fertilizer mixture.

19. Howmet did not prepare a hazardous waste manifest for, or send a hazardous waste manifest with, any of the 24 shipments of used KOH sent from its Facility to the Royster fertilizer manufacturing facilities. Instead, Howmet prepared and sent a hazardous materials bill of lading with each of the 24 shipments.

20. The shipments of used KOH to Royster from Howmet's Facility were associated with a material safety data sheet prepared by Howmet, a copy of which is attached as Attachment B.

21. Prior to and during the relevant time period Howmet did not prepare or maintain land ban notifications for the used KOH sent to Royster's fertilizer manufacturing facilities and did not send such notifications to Royster's fertilizer manufacturing facilities.

22. 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). The used KOH in these shipments was aqueous with a pH greater than 12.5. These shipments are shown on Attachment C.

So Agreed:

Date:_____

_____
John C. Emerson
Assistant Regional Counsel
EPA Region 6

Attorney for Complainant

Date: Sept. 27, 2004

_____
John A. Riley
Vinson & Elkins L. L. P.

Attorneys for Respondent Howmet Corporation

473194_1.DOC

Attachment A

Shipments of KOH Solution From Howmet's Texas Facility to RCI's North Carolina Facilities

Shipment Date	Destination	Bill of Lading/Invoice	Transporter	Volume
3/26/99	RCI (Rocky Mount)	3282	DSI	3600 gals.
4/12/99	RCI (Rocky Mount)	3437	DSI	3600 gals.
4/27/99	RCI (Plymouth)	3593	DSI	3600 gals.
5/12/99	RCI (Rocky Mount)	3717	DSI	3600 gals.
5/12/99	RCI	3720	DSI	3600 gals.
6/3/99	RCI (Plymouth)		DSI	3600 gals.
6/16/99	RCI (Plymouth)	4049	DSI	3600 gals.
7/19/99	RCI (Plymouth)	4452	DSI	3600 gals.
8/5/99	RCI (Rocky Mount)		DSI	3600 gals.
8/18/99	RCI (Plymouth)	5233	DSI	3600 gals.
9/1/99	RCI (Rocky Mount)	5366	DSI	3600 gals.
10/5/99	RCI (Plymouth)	5654	DSI	3600 gals.
11/15/99	RCI (Plymouth)	5010	DSI	3600 gals.
3/6/00	RCI (Plymouth)	7961	DSI	3600 gals.
3/23/00	RCI (Plymouth)	8119	DSI	3600 gals.
4/10/00	RCI (Plymouth)	1498	DSI	3600 gals.
5/2/00	RCI (Rocky Mount)	1655	DSI	3600 gals.
5/2/00	RCI (Rocky Mount)	1656	DSI	3600 gals.
6/14/00	RCI (Plymouth)		DSI	3600 gals.
7/17/00	RCI (Rocky Mount)	0958	DSI	3600 gals.
8/2/00	RCI (Plymouth)	1125	Trimac	3600 gals.
8/23/00	RCI (Plymouth)	1287	DSI	3600 gals.
8/23/00	RCI (Plymouth)	1309	Trimac-DSI	3600 gals.
9/19/00	RCI (Plymouth)	1550		3600 gals.

Attachment B

HOWMET CORPORATION

Material Safety Data Sheet

General Information

Generators:

Howmet Dover Casting
Roy Street
Dover, New Jersey 07801-4308
201-361-0300

Howmet Hampton Casting
One Howmet Drive
Hampton, Virginia 23661
804-838-4680

Howmet Wichita Falls Casting
6200 Central Freeway
Wichita Falls, Texas 76307-1616
817-855-8100

Howmet LaPorte Casting
1110 East Lincolnway
LaPorte, Indiana 46350-3954
219-326-7400

Product name: *Used Potassium Hydroxide Solution*

Hazard Class: 8
Packing Group: II

Identification Number: UN1814
Label Required: Corrosive

Process generating the material: Caustic cleaning of metal castings (including ceramic core removal)

Composition and Hazardous Ingredients

Major constituents:	CAS Numbers	%	Permissible Exposure Limit (OSHA) in mg/m3	Threshold Limit Value (ACGIH) in mg/m3
Potassium hydroxide	1310-58-3	20-30	not established	2 (ceiling)
Silica	7631-86-9	< 5	5	5
Alumina	1344-28-1	< 5	not established	10
Zircon	10101-52-7	< 5	5	5
Water	7732-18-5	65-80 – 100	NA	NA

The total trace metals are less than 20 mg/l (ppm) and are distributed as follows:

Mercury	< 0.005	Copper	< 5
Nickel	< 0.07	Cobalt	< 10
Chromium	< 1	Iron	< 10
Lead	< 2		

GOVERNMENT EXHIBIT 3 06-2003-09/2

Physical Data

Appearance: clear to off-white mobile liquid
Specific gravity: 1.3
Water solubility: mixes with water

Odor: little or no odor
Density: 10.8 pounds per gallon
pH: 14+ *(VERY CORROSIVE TO HUMAN TISSUE AND WHITE METALS!!!)*

Used Potassium Hydroxide Solution

Fire and Explosion Data

Potassium hydroxide solution does not burn, however it can react with aluminum metal to generate highly explosive hydrogen gas.

Flash point: none.

Upper and lower explosion limits: none/not applicable

Extinguishing media: not applicable

Protective equipment: Firefighters must wear gloves, boots, raincoats, face shields , and helmets to prevent skin and eye contact. Self-contained breathing apparatus must be worn in fire situations to prevent breathing of caustic mists.

Reactivity Data

This material is stable when properly contained and handled. Potassium hydroxide attacks aluminum, tin, zinc, and alloys containing these metals. Potassium hydroxide can react violently with strong mineral acids.

Health Hazard Information

Concentrated solutions of potassium hydroxide are extremely corrosive to all human tissue including skin, eyes, and respiratory passages

First Aid:

EYE CONTACT: Immediately flush with running water for 15 minutes, including under the eyelids! Get medical attention!

SKIN CONTACT: Immediately flush with running water for 15 minutes. Get medical help if a large area is contacted or if irritation persists.

INHALATION: Mists generated through heating or agitation are corrosive to breathing passages. If an overdose occurs:

1. Remove victim to fresh air,
2. Restore and support breathing through artificial respiration, if necessary,
3. Get medical help, and
4. Keep victim quiet and warm until help arrives.

INGESTION: If victim is conscious, give 2-3 glasses of water to dilute the base. DO NOT INDUCE VOMITING! corrosive material may be aspirated into lungs.

Used Potassium Hydroxide Solution

Spill, Leak, and Disposal Procedures

Spill and leaks:

1. Keep unnecessary persons from the spill area.
2. Put on protective clothing and equipment (rubber gloves, apron, boots, goggles, and respirator for dusts and mists).
3. Stop the spill at the source.
4. Contain the spill.
5. Retrieve spilled material.
6. Decontaminate using water.

Disposal: controlled neutralization with acids.

Special protection information

Those handling potassium hydroxide solution must wear protective clothing and equipment to prevent contact with the solution (rubber gloves, apron, boots, long sleeve shirt, and chemical safety goggles).

An eyewash station, washing facilities, and safety shower should be readily available in areas of handling and use.

Special Precautions and Comments

Stored containers must be inspected weekly for leaks and other signs of deterioration. Problems must be corrected immediately.

Prepared By:

Keith T. Shell (Manager, Environmental Engineering) 5/8/95
616-894-7226 FAX = 616-894-7293

Attachment C

Shipments of Used KOH from Howmet's Texas Facility as Hazardous Waste to an Authorized Treatment, Storage or Disposal facility

Shipment Date	Destination Facility	Manifest No.	Volume
12/19/97	LESI (Lone Mountain)	01339444	3600 gals.
1/6/99	Safety Kleen (Lone Mountain)	01889380	3600 gals.
11/8/00	Safety Kleen (Lone Mountain)	02221807	3600 gals.
12/5/00	Safety Kleen (Lone Mountain)	02221793	3852 gals.
10/16/01	Safety Kleen (Lone Mountain)	S00657666	3150 gals.

Daniel McCaskill
Vice President
Distribution Systems & Environmental Affairs
Van Watels & Rogers Division
2600 Campus Drive
Box 5932
San Mateo, CA 94402

Dear Mr. McCaskill:

You have inquired as to the regulatory status under the RCRA subtitle C regulations of phosphoric acid derived from aluminum anodizing operations which is used subsequently as an ingredient in fertilizer manufacture. You have indicated that phosphoric acid is typically used in fertilizer production, that the phosphoric acid, returned from anodizing is as pure or purer than virgin phosphoric acid, and that the acid returned from anodizing does not contain toxic constituents not ordinarily present in virgin phosphoric acid or present in concentrations ordinarily found in virgin phosphoric acid. You also indicate that the acid is not reclaimed before being used in the fertilizer process. Your question is whether the anodizing phosphoric acid falls under the use constituting disposal provisions of 40 C.F.R. Part 266 Subpart C.

We think this is a difficult question. The general principle in the Agency's regulations is that hazardous secondary materials ultimately applied to the land are hazardous wastes, as are the
waste-derived products in which they are contained. See 40 C.F.R. §261.2(c)(l). We do not think that principle applies here under the circumstances outlined above. In essence, we do not think anodizing phosphoric acid that is purer in acid content, and no more contaminated than virgin phosphoric acid can be viewed as a secondary material. Thus, such acid would not be considered a solid or hazardous waste under RCRA when used in the same manner as virgin phosphoric acid.

Sincerely,

Steven E. Silverman
Attorney
Solid Waste & Emergency
Response Division (LE-132S)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OCTOBER 20, 1986

Mr. A L. Horner

Environmental Specialist
Albright & Wilson, Inc.
P.O. Box 26229
Richmond, VA 23260-6229

Dear Mr. Horner:

I am writing in response to your request for a written determination as to the regulatory status of 36% phosphoric acid that is generated as part of the chemical polishing of aluminum. /1
In your letter, you state that this material is an effective substitute for 75% technical grade phosphoric acid and a variety of other potential nutrient materials used in wastewater treatment plants. In addition, you also state that it can be a substitute for 54% P2 05 wet acid used in specialty fertilizer producers.

As you know, 40 CFR 261.2(e) specifies which materials are not solid wastes when they are recycled. Among other things, materials that are used or reused as effective substitutes for commercial products, or materials that are used or reused as ingredients in an industrial process are not solid wastes provided. (1) that these materials are not used in a manner constituting disposal (or used to produce products that are applied to the land), (2) they are not burned for energy recovery (or used to produce a fuel or contained in fuels), or (3) they are not accumulated speculatively. Thus, 36% Phosphoric acid used as wastewater conditioners are not solid waste. (See 50 FR 628, FN 15, January 4, 1985.)

This is also the case (as provided below) for 36% phosphoric acid used to produce fertilizers however, we think this is a more difficult call. In particular, the general principle in the Agency's regulations is that hazardous secondary materials ultimately applied to the land are hazardous wastes, as are the waste-derived products in which they are contained (See 40 CFR §261.2(c)(1).) However, if the anodizing phosphoric acid is purer in acid content, and no more contaminated than virgin phosphoric acid (as it has been described to us), we do not believe 36% phosphoric acid generated as part of the chemical polishing of aluminum that is used to produce fertilizers can be viewed as a secondary material. Thus, such acid would not be considered a solid or hazardous waste under RCRA when used in the same manner as virgin phosphoric acid.

It should be noted that there is a provision in 40 CFR §261.2(f) associated with this exclusion more specifically, you must be able to demonstrate that the 36% phosphoric acid is being used as cited above, and not merely capable of such use or that it has been used for such purposes in the past. I suggest that you keep documentation to support your claim that the 36% phosphoric acid is being used in a manner that is within the scope of this exclusion.

Please feel free to call me if you have any further questions, my telephone number is (202) 475-0551.

Sincerely,

Matthew A. Straus
Chief
Waste Characterization Branch

1/ As described in your letter, the process which generates the 36% Phosphoric acid involves the submerging of aluminum parts in phosphoric acid to increase the brightness of aluminum. After the phosphoric acid bath, the parts are rinsed with water; a specifically designed rinse operation is utilized to produce 36% Phosphoric acid.