UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

UNIVERSAL METAL and ORE COMPANY, INC., DOCKET NO. II-RCRA-91-0207

RESPONDENT

ORDER DENYING MOTION TO DISMISS

AND SETTING FURTHER PROCEDURES

I. PROCEDURAL BACKGROUND

This action under Section 3008 of the Solid Waste Disposal Act, as amended (RCRA) (42 U.S.C.§ 6928), was initiated on September 27, 1991, by the filing, by the Director Air and Waste management Division, United States Environmental Protection Agency, Region II, of a Complaint, Compliance Order and Notice of Opportunity for Hearing charging Respondent, Universal Metal and Ore Company, Inc. (Universal or Respondent), with violations of the Act and applicable regulations including 40 CFR Part 265 and New York State regulations, 6 NYCRR Part 372.[1/] The complaint is based on the contention that used batteries handled by Universal were hazardous wastes and that Universal's activities with regard to these batteries at its facility in Mt. Vernon, New York, constituted the operation of a hazardous waste treatment, storage, or disposal facility without a permit in violation of the Act and the cited regulations. It is alleged that Universal received used Nickel-Cadmium (NiCd) vented battery cells and used NiCd pocket plate battery cells (NiCd batteries) from foreign and domestic sources, that Universal stored these NiCd batteries at a facility in Mt. Vernon, New York, and then shipped and exported the NiCd batteries for sale to facilities performing thermal reclamation. The complaint avers that the NiCd

batteries are characteristic hazardous waste and must be managed in accordance with all applicable RCRA regulations.[2/]

The complaint against Universal includes 15 counts; Counts 1 to 7 charge violations of both Federal and State Regulations, Counts 8 to 11 allege violations of only New York State Regulations, and Counts 12 to 15 charge violations of only Federal Regulations. For these alleged violations, Complainant proposes to assess Universal a civil penalty totaling $853,998.

Universal answered under date of October 16, 1991, admitting that it was in existence and operated its business on November 19, 1980, but alleging, inter alia, that it is impossible to determine whether the "NiCd batteries" received at its facility from foreign (apparently Canadian) and domestic sources were new or used.

Universal alleged that the batteries were commodities moving in commerce and denied that the batteries were discarded and could be considered either solid or hazardous waste. Universal, therefore, denied that it was subject to RCRA or that EPA had any jurisdiction in the matter. Universal contested the penalty as completely inappropriate and requested a hearing.

Concomitant with its answer, Universal filed motions to dismiss, alleging improper service and lack of subject matter jurisdiction.[3/] The latter motion is based upon assertions, supported by the aff idavit of its President, Steven Vollweiler, that Universal purchases and sells all of its batteries, including the pocket plate NiCd battery cells and vented NiCd battery cells at issue here, that its materials are the raw material supply of the battery and steel industry, and that such materials are not solid wastes, because the materials are not discarded and are not part of the solid waste problem addressed by RCRA (Motion to Dismiss). Universal relies heavily on American Mining Congress v. EPA (AMC I), 824 F.2d 1177, 1190 (D.C. Cir. 1987), where the court, after an exhaustive review of the Act and its legislative history, held that EPA's authority under RCRA is limited to materials that are discarded by virtue of "being disposed of, abandoned, or thrown away."

Complainant submitted an "Opposition" to Universal's motion, designated a "Reply", under date of November 15, 1991, asserting that the narrow holding in AMC I was not applicable. Complainant pointed out that the same court which decided AMC I had made it clear in subsequent decisions, American Mining Congress v. U.S. Environmental Protection Agency (AMC II), 907 F. 2d 1179 (D.C. Cir. 1990), and American Petroleum Institute v. U.S. Environmental Protection

Agency (API) , 906 F. 2d 729 (D.C. Cir. 1990), that EPA could, under some circumstances, regulate hazardous wastes that were to be recycled. Universal filed a "Reply" to Complainant's "Opposition" under date of November 22, 1991, and on December 6, 1991, Complainant filed a motion to strike Universal's reply or, in the alternative, a motion to respond. The latter motion was granted and Complainant submitted a Supplemental Reply on March 29, 1993. Oral argument on Universal's motion to dismiss was held on April 7, 1993. On March 1, 1996, the ALJ issued an order directing the parties to submit supplemental briefs on the effect, if any, on the issues in this case of four recent decisions: Catellus Dev. Corp. v. U.S. (Catellus), 34 F. 3d 748 (9th Cir. 1994) ; Owen Electric Steel Co. v. Browner (Owen Electric), 34 F. 3d 146 (4th Cir. 1994) ; U.S. v. ILCO, Inc. (ILCO), 996 F. 2d 1126 (llth Cir. 1993) ; and Douglas County, Neb. v. Gould, Inc. (Douglas County), 871 Fed. Supp. 1242 (D. Neb. 1994). The parties have complied with this order.[4/] Additionally, by letter, dated May 21, 1996, Universal pointed out that the "Rechargeable Battery Management Act", Pub. L.104-142, had been signed by the President. Universal argued that this statute and the Universal Waste Rule, 60 Fed. Reg. 25492 (May 11, 1995), essentially codified the way it had been handling rechargeable batteries for decades and mooted this case. These and other arguments of the parties are addressed infra.

II. FACTUAL BACKGROUND

The pertinent facts concerning Universal's business operations are largely undisputed. Universal was founded in 1951 and pioneered the recycling of NiCd batteries, which previously were either landfilled or incinerated. Incineration of the batteries emitted cadmium into the atmosphere (Affidavit of Steven Vollweiler, pp. 1, 2, Ex. A to Motion to Dismiss - hereinafter Vollweiler Aff.). As part of the recycling process, Universal purchases the NiCd batteries from their owners, stores them at its site in Mt. Vernon, New York and, when sufficient quantities of NiCd batteries are accumulated, sells these batteries to refineries in France and Korea, which distill the batteries into pure cadmium and nickel iron.[5/] The distilled cadmium is sold by the recyclers to battery manufacturers and is used as raw material to make NiCd batteries, while the nickel iron is sold to steel mills to make stainless steel (Id. at 2). During the course of its business over the years, Respondent has kept over 30,000,000 pounds of NiCd batteries (several billion batteries) out of the nation's landfills. Instead, these materials have been used in industrial operations around the world (Id. at 6).

The NiCd batteries at issue are dry and contain no liquids; the batteries can be recharged an indefinite number of times; and are used in such items as flashlights, appliances, airplanes and large trucks. When the batteries can no longer be recharged, the batteries are purchased by Universal from individuals and such entities as the Library of Congress and the New York Transit Authority (Tr. 12-16, 22). Universal accumulates approximately one million NiCd batteries at its facility each year, where the batteries are stored until they sold in an ongoing overseas commodities market. A customer might, for example, order 10 tons or 1 ton of the NiCd batteries, which can be shipped as desired (Tr. 15-17).

Overall, there are two waste streams that feed NiCd batteries into Universal's operation. One is from the battery manufacturers such as Everready. According to Universal, batteries obtained from manufacturers are considered by EPA to be a spent chemical not subject to regulation.[6/] The other waste stream is the one at issue here, where NiCd batteries are purchased from individual or commercial users and are considered by the Agency to be hazardous waste. (Tr. 13,14,16.) In this regard, individual and commercial sources of supply account for about one percent of Universal's business. Since this litigation started, Universal has stopped purchasing NiCd batteries from these sources, to avoid the possibility of accumulating further civil penalties (Tr. 18). According to Universal, imposition of civil penalties of over $850,000 as demanded in the Complaint, would put it out of business, because it is a small, family-owned operation (Tr. 33).

The NiCd batteries which Universal purchases are shipped in steel containers to its warehouse facility in Mount Vernon, New York (Tr. 15, 20, 23). Here, the batteries are stored in barrels and drums consisting of cardboard-like material with a metal rim around the top (Tr. 19-20, 41). During over 40 years of operation, there has never been any reported release of cadmium or nickel to the environment from Universal's Mt. Vernon facility, nor has there ever been any such releases while the batteries are in transit (Vollweiler Aff., p. 3; Tr. 22, 23, 40-42). There appears to be no question of harm or potential harm to human health or the environment from Universal's operations, and the Complainant's main purpose in pursuing this action is to protest and enforce its regulatory program involving the definitions of discarded material and hazardous waste (Tr. 49, 50).

III. POSITIONS OF THE PARTIES

A. Respondent's Position

Universal argues that the NiCd batteries which it purchases and sells are not a solid waste (and therefore cannot be a hazardous waste), because the batteries are not discarded. Instead, Respondent contends that the batteries are a commodity and therefore, are not part of the waste disposal problem addressed by RCRA. Universal relies heavily on AMC I, supra which held that EPA's regulatory authority under RCRA is limited to materials that are discarded by virtue of being "disposed of, abandoned or thrown away". Therefore, Respondent asserts that materials which are valuable enough to be bought and sold in commerce and which are not "discarded, disposed of or abandoned", are not solid waste. (Respondent's Memorandum of Points and Authorities in Support of Motion to Dismiss (Resp. Memorandum at 6).

Respondent emphasizes the significance of whether a material such as a NiCd battery is deemed to be a commodity or a solid waste. It points out that once a material is determined to be a solid waste, a determination must be made as to whether the waste is hazardous. If a waste is classified as hazardous, numerous regulatory requirements apply including reporting and manifest requirements, transportation to and acceptance or rejection by a hazardous waste treatment, storage or disposal (TSD) facility. In addition, Respondent notes that TSD facilities must meet numerous and complex operational requirements, including standards on methods of operation, approval of all on-site equipment, monitoring, financial assurance, closure, post-closure, emergency response plans and the testing and analysis of all incoming hazardous waste. Universal points out that these are requirements the complaint alleges it failed to follow. (Resp. Memorandum at 10-11).

On the other hand, Universal points out that solid wastes that are not hazardous are regulated less stringently under the municipal solid waste provisions in RCRA §§ 6941-6949a, and that materials not considered solid wastes are not regulated at all. Universal emphasizes the costly and complex distinctions between being regulated as a TSD facility, a municipal solid waste facility and not being regulated (Id. at 11). Because the batteries it buys and sells are a commodity, Universal alleges that the batteries never become part of the discarded material problem addressed by RCRA. In contrast, if the batteries are regarded as hazardous waste, Universal says that the batteries become part of the disposal problem and lose their economic value. According to Universal, this will result in the generator paying substantial amounts for treatment, storage and disposal, and most of the NiCd batteries will go to landfills rather than being recycled. Universal points out that Congress has stated "recycling" is a major objective of RCRA, H. Rpt. 94-1491, 94th Cong.,

2nd Sess. 2 (1976), reprinted 1976 U.S. Code, Cong. and Adm. News at 6238, 6240 (Resp. Memorandum at 13).

EPA included an interpretation of AMC I in a proposed rule making, describing the portions of the regulation considered to be unaffected by the decision, 55 Fed. Reg. 519-529 (Jan. 8, 1988). EPA's position is that AMC I only excluded from regulation certain in-process recycled secondary materials, and certain sludge, by-products and spent materials that are reclaimed as part of continuous, on-going manufacturing processes.[7/] Universal says that EPA interprets the AMC I very narrowly so that the holding is limited to the specific facts of that case and does not apply to the recycling of NiCd cells at issue here. Universal argues that this Agency interpretation may not be given the status of a regulation, because EPA denied the public the right to respond to the proposed regulation and has never proposed a final rule on the matter. (Resp. Memorandum at 9; Univ. Reply at 5, 8).

Respondent points out that the Agency's definition of discarded materials includes materials that are abandoned, recycled, and inherently waste-like, 40 C.F.R. § 261.2(a). Universal alleges that the NiCd batteries it receives and distributes are neither

abandoned nor inherently waste-like within the definition at 40 CFR § 261.2(d). While recognizing that the Agency definition of recycled materials includes "reclaimed" materials, Respondent emphasizes that the EPA definition of reclaimed material includes "spent" material as solid waste regardless of whether the materials are discarded or whether the material was actively traded for value in international commerce.81

Universal asserts that Complainant's reliance on AMC II, supra is misplaced (Resp. Memorandum, at 8, 9, n. 2; Univ. Reply, at 9-

11) . There, the wastes involved were generated by smelting operations, producing large volumes of wastewater, which were collected, treated, and disposed of in surface impoundments. These impoundments produced sludges, which were capable of posing

substantial present or potential hazards to human health or the environment by leaching into the ground. Because the sludges were stored in surface impoundments, where hazardous wastes or constituents thereof could easily

permeate into the ground and jeopardize human health and the environment, Universal argues that AMC II is distinguishable. Universal asserts that its batteries, on the other hand, move throughout the world as part of the international raw material supply for steel mills and battery manufacturers. Therefore, Respondent contends that the batteries are not discarded but are valuable raw materials. (Univ. Reply,

@ Resp. Mem. at 9, 10; Univ. Reply at 8. A "spent material" is a 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 CFR § 261.1(c).

12

pp. 10, 11) On this basis, Respondent distinguishes the AMC II holding and implies that it is not controlling here.

Universal also distinguishes the holding in API, because there was no dispute that the material at issue in that case, K061 slacj/sludge from a steel producing facility, was a solid waste when it left the furnace in which it was produced. Sludge is defined as is any solid, semi-solid or liquid waste generated from ... an air pollution control facility.... "91 Because the NiCd cells in this case have never been discarded and have not been specifically designated as a solid waste, Universal argues that the Court's reasoning in API does not apply (Reply at 11, 12).

B. Complainant's Position

Complainant argues that Universal's motion to dismiss is based on a fundamentally flawed premise, namely, that "spent" NiCd batteries destined for recycling can not be "discarded materials" (Supplemental Reply, dated March 29, 1993, at 1). Complainant says that Universal's position is at odds with the regulatory definitions of "solid" and "hazardous" waste and is without support in the Act, its legislative history and related case law.10-1 Although

?J K061 is defined as "(e)mission control dust/sludge from the

primary production of steel in electric furnaces" (40 CFR §

261.32) . "Sludge means any solid, semi-solid, or liquid waste

generated from a municipal, commercial, or industrial wastewater

treatment plant, water supply treatment plant, or air pollution

control facility exclusive of the treated effluent from a

wastewater treatment p 1 ant" (RCRA § 1 0 0 4 (2 6A) ; 4 0 CFR § 2 6 0. 1 0) .

0

!J **RCRA § 1004(27)** provides in part: "(t)he term 'solid waste'

(continued...)

Complainant acknowledges that promoting conservation, recovery and reuse was one of the goals of RCRA, it emphasizes that Congress' overriding concern was the effect on human health and the environment of the disposal of discarded hazardous waste.!'J

Complainant emphasizes the fundamental RCRA principle that in order to be a hazardous waste, a waste must first be a "solid waste". It asserts that the Act, legislative history and subsequent amendments make it clear that "solid waste" can encompass materials destined for recycling. Recognizing that the definition of "solid waste" in the Act (RCRA § 1004(27)) (supra note 10) does not expressly include materials destined for recycling, Complainant says that such materials are encompassed within the term "other discarded materials" (Supp. Reply at 4, 5). Complainant points out

that RCRA § 1004 (7) defines "hazardous waste management" as

including "recovery"12/ and that "resource recovery" means "the

lo/ (... continued)

means 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 .....

Ll-I Supp. Reply at 4, quoting (note 5) H.R. Rep. No. 1491, 94th Cong. 2nd. Sess. at 3, reprinted 1976 U.S. Code, Cong. and Adm. News at 6238, 6241: The overriding concern of the Committee, however, is the effect on the population and the environment of the disposal of discarded hazardous wastes--those which by virtue of their composition or longevity are harmful, toxic or lethal.

12/ Section 1004 (7) provides: The term "hazardous waste

management" means the systematic control of the collection, source

separation, storage, transportation, processing, treatment,

(continued...)

recovery of material or energy from solid waste" (RCRA § 1004(22)). Complainant asserts that any doubts on this score were laid to rest by the Hazardous and Solid Waste Amendments of 1984 (HASWA), Pub. L. 98-616 (Nov. 8, 1984), § 3001(d) of which specifically refers to recycling in connection with standards for small quantity generators the Administrator was directed to promulgate.13J

As Complainant notes, the Agency has adopted the view that it may regulate solid and hazardous wastes destined to be recycled (Supp. Reply at 8, 9). The regulation, 40 CFR § 261.2, provides at (a) (1) that "(a) solid waste is any "discarded material" that is not excluded by § 261.4(a) or that is not excluded by a variance under..... and at (a) (2) "a discarded material is any material

which is: (i) Abandoned, as explained in paragraph (b) of this section; or (ii) Recycled, as explained in paragraph (c) of this section; or (iii) Considered inherently waste-like, as explained in paragraph (d) of this section." Section 261.2(b) provides in

part: "Materials are solid waste if they are abandoned by being:

(1) Disposed of; or..." Section 261.2(c) provides that "Materials

are solid wastes if they are recycled--or accumulated, stored, or

1-21 (... continued)

recovery and disposal of hazardous wastes.

13/ Supp. Reply at 5-8. Section 3001(d) , Small quantity

generator waste, provides at 1 (2): The standards referred to in

paragraph (1) , including standards applicable to the legitimate

use, reuse, recycling, and reclamation of such wastes, may vary from the standards applicable to hazardous waste generated by larger quantity generators, but such standards shall be sufficient to protect human health and the environment.

treated before recycling--as specified in paragraphs (c)(1) through

(4) of this section" and the batteries at issue here are within §

261.2 (c) only if within paragraph (c) (3) . Paragraph (c)(3) provides: "Reclaimed. Materials noted with an "*" in column 3 of Table 1 are solid wastes when reclaimed." Section 261.1(a) (4) provides that a material is "reclaimed" if it is processed to recover a usable product or it is regenerated and, in accordance with the cited Table, "spent materials" are solid wastes when reclaimed.

Complainant maintains that AMC I, on which Universal heavily relies, is inapplicable because, as pointed out in AMC II, 907 F.2d at 1186, AMC I only concerned materials that were destined for immediate reuse in another phase of an ongoing production process and, thus, were not part of the waste disposal problem. Complainant argues that the NiCd batteries involved herein are not destined for immediate reuse in another phase of an ongoing production process and are part of the waste disposal problem. Complainant relies upon the D.C. Circuit's decisions in AMC II, 907 F.2d at 1186, and API, 906 F.2d at 741, to support its position that AMC I does not prevent EPA from asserting jurisdiction over any material that is being recycled outside of an industry manufacturing process. (Comp. Opposition at 7, 8).

IV. DISCUSSION

There is no doubt that the batteries at issue here are "spent" within the common understanding of the term, which means "used up; consumed; exhausted of active or required components or qualities". Webster's Third New International Dictionary (1986). While Complainant alleges that the batteries are spent, it understandably glosses over the regulatory definition of the term (40 CFR § 261. 1 (c)) , which is that 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 (supra note 6). (emphasis added). "Contamination" is not defined in the regulation and it must be presumed that the common or usual meaning of the term was intended. "Contaminate" means "to soil, stain, or infect by contact or association; to make inferior or impure by admixture; to make unfit for use by the introduction of unwholesome or undesirable elements". Webster's Third New International

Dictionarv (1986). There is no specific allegation or evidence

that the batteries purchased and stored by Universal are

I'contaminated" within this common understanding of the term. This

supports Universal's assertion that it is not possible to distinguish new batteries from used batteries [by their appearance].

Although the batteries may not readily be fitted within the regulatory definition of a "spent material", the batteries are a solid waste in accordance with Table I of 40 CFR § 261.2 only if determined to be within that definition. Table I lists six

materials which are sometimes or always solid wastes: spent

materials; sludges (listed in 40 CFR §§ 261.31 or 261.32) ; sludges exhibiting a characteristic of hazardous waste; by-products listed in 40 CFR §§ 261.31 or 261.32; by-products exhibiting a characteristic of hazardous waste; commercial chemical products listed in 40 CFR § 261.33 and scrap metal. Accordingly, the batteries at issue here are within Table I only if deemed a "spent material". The Table specifies, inter alia, that spent materials" are solid wastes when reclaimed.141 It is concluded that the fact the batteries purchased and stored by Universal are subsequently reclaimed is not relevant to whether the batteries are solid wastes.

The batteries are solid wastes, because they are "disposed of" by the original owner or user. As previously noted (ante at 12), the regulation, § 261.2 (a) (1) , defines a solid waste as any "discarded material" and § 2 61. 2 (a) (2) defines "discarded material" as including material which is "abandoned." Although used materials sold or delivered to another party would not normally be regarded as "abandoned", § 261.2 (b) (i) provides that materials are solid wastes if they are "abandoned" by being "disposed of". The

L4J Section 261. 1 (c) (4) provides: A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents.

L51 Among the def initions of "abandon" is to "cease to assert a right or title to with intent of never again resuming or reasserting it". Webster's Third New International Dictionary (1986).

definition of "disposal" in the Act is primarily concerned with the placing of solid or hazardous waste on land or water so that such waste or any constituent thereof may enter the environment.L6, "Disposed of", however, is defined as including "to transfer to the control of another" and to "get rid of". Webster's Third New International Dictionary (1986). There can be no doubt that, when the batteries can no longer be recharged and are sold or transferred to Universal, the batteries are "disposed of" by the owner or user within this common understanding of the term.

None of the cases cited above require or imply a different result. AMC II made it clear that AMC I concerned only materials "destined for immediate use in another phase of the industry's ongoing production process and have not yet become part of the waste disposal problem." 907 F.2d at 1186. The court stated that "(n)othing in AMC I prevents the Agency from treating as 'discarded' the wastes at issue in this case, which are managed in land disposal units that are part of wastewater treatment systems, which have therefore become 'part of the waste disposal problem', and which are not part of an ongoing industrial process." (Id.) Similarly, in API, which involved K061 slag/sludge and which was

161 **RCRA § 1004 (3)** provides:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any water, including ground waters.

19

undisputably discarded before becoming subject to metals reclamation, the court said that K061 was part of the waste disposal problem, which was why EPA had the power to require that it be subject to reclamation. "Nor does anything in AMC I require EPA to cease treating K061 as 'solid waste' once it reaches the metal reclamation facility." 906 F.2d at 729. "KO61 is delivered to the reclamation facility not as part of an 'ongoing manufacturing process within the generating industry', but as part of a mandatory waste treatment plan prescribed by EPA." (Id.) While Universal is correct that AMC II involved the placement of wastewater and resulting sludges in surface impoundments, which is by definition disposal, and API involved a sludge, which is by statute a solid waste, the principle that AMC I only applies to "secondary materials" reused in an ongoing industrial process and that the Agency may regulate discarded materials intended for recycling is firmly established. It is worthy of note that on November 4, 1992, the D.C. Circuit denied petitions by AMC and API to enforce the court's mandate, holding that AMC I did not require EPA to revise its regulation, but rather was limited to preventing EPA from

exerting its regulatory authority over "in-process secondary

materials."

20

V. SUPPLEMENTAL BRIEFING

The four recent cases concerning which the parties were directed to submit supplemental briefs do not require or even imply a different result, because these cases concern materials that are solid waste under the regulation when recycled or reclaimed rather than materials which are solid waste when abandoned as defined in the regulation. ILCO, supra, 996 F.2d 1126, involved the smelting of lead from used lead-acid motor vehicle batteries. Because the lead plates and other lead components of the batteries, referred to as "plates and groups", were processed in defendant's smelter to produce lead ingots for sale, the district court had reasoned that the "plates and groups" were raw

materials not subject to RCRA. The court of appeals reversed, emphasizing that EPA, in accordance with authority granted by Congress, had defined "discarded material" as any material which is abandoned, recycled, or inherently waste-like (40 CFR § 261.2(a)(2)). 996 F.2d at 1128. The court noted that reviewing interpretations of an administrative agency is a two-step process, citing Chevron U.S.A., Inc v. National Resources Defense Council, 467 U.S. 837, 845 (1984) (Id. 1130). If Congress has clearly and precisely spoken to the precise question at issue, effect must be given to that intent. If the court finds that the statute is silent or ambiguous with respect to the specific issue, the court must ask whether the agency's regulation is based upon a Is permissible" or "reasonable" construction of the statute. Without analysis, the court stated that Congress had not spoken to the precise question at issue, i.e., whether EPA had reasonably

construed RCRA to permit the regulation of the recycling of hazardous materials. The court answered this question in the affirmative, noting that Congress had not clarified the meaning of "discarded" and that the Agency had filled the statutory gap by defining discarded as any material which is abandoned, recycled, or inherently waste-like (40 CFR § 261.2(a)(2)). (Id. 1131). This statement should be viewed with caution, because there is not a period or a semicolon after "recycled", but rather the qualifying words "as explained in paragraph (c) of this section;" (§ 261.2 (a) (2) (ii)) . "Recycled material" is defined, inter alia, as spent material which has been reclaimed (§ 261.2(c)(3)) and a material is "reclaimed" if it is processed to recover a usable product or if it is regenerated (§ 2 6 1. 1 (c) (4) Examples include recovery of lead values from spent batteries and regeneration of spent solvents.

The court said that "reclaimed material" clearly includes lead values derived from the plates and groups at issue here. (Id.) Moreover, the court said that these battery components fall within the definition of recycled material, because ILCO runs the plates and groups through a smelting process to recover a usable product, lead ingots. Because the lead components met the definition of "recycled", the court ruled that the lead components were discarded material as def ined in 4 0 CFR § 2 6 1. 2 (a) (2) . The court noted that

96 spent materials" which are recycled or are "accumulated, stored, or treated before recycling" are solid wastes (§ 261.2(c) (1)) and that 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 (§ 261.1(c)(1)). Accordingly, the court said that the applicable regulations are unambiguous with respect to spent lead components used in a recycling process:

I$spent materials are solid wastes when reclaimed". 4 0 CFR §

261.2 (c) and Table I. As does Complainant herein, the court

treated the qualifying word "contamination" in the definition of spent material as of no moment.

universal emphasizes the two-step procedure involved in

Inc. v. NRDC, Inc, supra, the

Chevron analysis, Chevron U.S.A., Inc. v. NRDC, Inc, supra, the first issue being whether the statutory language clearly addresses an issue (Supplemental Brief, dated April 19, 1996, at 3, 4). If the statutory language is clear, the analysis ends, because both the agency and the courts must abide by Congressional intent as expressed in the plain language of a statute. In such a circumstance, Universal contends that there is no legislative "gap" to fill and no room for agency discretion. Universal asserts that if, and only if, the statutory language is unclear or ambiguous is the second step of the Chevron analysis reached, that is, whether the agency interpretation is reasonable and a permissible construction of the statute. Universal asserts that RCRA uses the term "discarded" to identify materials that are "wastes" and that the customary meaning of a waste is material that is "useless" or I# worthless", citing 19 Oxford English Dict. (2nd ed. 1989); Amer. Heritage Dict. (1985) (Id. 2). According to Universal, the concept of value is intregal to a determination of whether a material is a

waste and that a material which is sold for value is neither "discarded" nor a "waste". Universal says that when referring to a waste "discarded" means "thrown away" or "gotten rid of", citing Webster's II Dictionary, New Riverside University Dictionary (1988) and that Congress used the term "discarded" in its ordinary sense (Id. 3). Universal argues that this conclusion is supported by the fact that RCRA is replete with definitions of terms Congress believed were

ambiguous or needed special attention, but that certain terms, such as "discarded", have such plain, commonly understood meanings that definitions for the purpose of the Act were considered to be unnecessary (Id. 13). Universal inquires rhetorically: "(i)f Congress does not define every ordinary word in a statute, does this mean that the agency administering the statute is entitled to 'fill in the gaps'. Such a result, according to Universal, would seriously weaken the role of Congress in our system of government. Universal asserts that the court in ILCO impermissibly leaped to the second step of the Chevron analysis without seriously considering whether the statutory language was unclear. Moreover, Universal says that the real basis of the decision in ILCO is that the batteries were initially discarded. It insists that ILCO is not controlling here, because the batteries at issue have never been discarded (Supplemental Brief at 13, 14).

Similarly, Catellus, 34 F.3d 748, supra, involved an action by a land owner under CERCLA § 107 (a) (3) to recover response costs on the theory that the defendant, an auto parts retailer who accepted used auto batteries as trade-ins, had in effect, through the

battery cracking plant to whom it sold the used batteries so that the lead content could be extracted and smelted, arranged for the disposal or treatment of a hazardous substance, battery casings. The used batteries had indisputably been "disposed of" both by defendant's customers and the defendant. The court noted that "disposal" and "treatment" are defined in CERCIA by reference to RCRA and that it had held that "disposal" necessarily includes the concept of "waste" (Id. 750). (Citation omitted).

The court further noted that it had agreed with other circuits that "disposal" refers only to the affirmative act of discarding a substance as waste, and not to the productive use of the substance. Quoting the definition of "treatment" in RCRA § 1003(34), the court said that this term also included the concept of waste. The court ruled that defendant could be said to have arranged for the treatment or disposal of the spent batteries only if the spent batteries could be characterized as waste. Referring to the RCRA definition of solid waste as including "other discarded material" (RCRA § 1004(27)), the court referred to its recent decision, Louisiana Pacific v. ASARCO, Inc., 24 F.3d 1565 (9th Cir. 1994), which held that a by-product of a metallurgical process, if sold, can be a product for purposes of Washington's product liability statute and, yet, a waste for the purposes of CERCLA (Id. 751). The court focused on the fact that

the slag was a "by-product" with nominal commercial value and that ASARCO wanted to "get rid of the slag." Turning to EPA's RCRA regulations defining solid waste (40 CFR § 261.2), the Catellus court pointed out that solid waste

25

included materials that are recycled, and that the batteries were

96 reclaimed," i.e. , "processed to recover a usable product" (§ 261.1(c) (4)), and thus not within § 261.2(e) , describing recycled materials which are not solid wastes, that is, materials "used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed." The court said that under the regulations, the spent batteries would clearly be defined as waste and cited with approval ILCO "RCRA regulations reasonably define lead components from spent batteries as waste" (Id. 752). The court found further support for its holding in the fact that the battery casings, unlike the plates within the casings, had to be disposed of and were not a subject of recycling.

Owen Electric, 34 F.3d 146, supra, involved a petition to set

aside an EPA determination that a portion of Owen's facility, where

slag from the production of steel in an electric arc furnace was placed or stored during an approximate six-month curing period, was a solid waste management unit (SWMU) within the meaning of RCRA § 3004(u). The slag was placed on the ground and following the curing period, was sold to the construction industry as a road base material or for other commercial purposes. The sole issue, as described by the court, was whether the slag was discarded and therefore a solid waste. The regulatory definition of solid waste, 40 CFR § 261.2, was not applicable, because 40 CFR § 261.1(b)(1) provides that the definition of solid waste contained in this part applies only to wastes that are also hazardous for the purpose of the regulations implementing subtitle C of RCRA. Whether an area

26

is a SWMU within the meaning of RCRA § 3004(u) does not depend on whether waste contained therein is hazardous and there appeared to be no contention that the slag was hazardous. The court noted that the meaning of "discarded material" had been analyzed in a number of cases and observed that, if AMC I were the controlling authority, Owen Electric might prevail, because the slag was

eventually recycled and could not be said to,have been discarded (Id. 149). The court further observed, however, that subsequent cases have read AMC I narrowly, referring to API, AMC II, and ILCO. After analyzing the holdings in these cases, the court concluded that the fundamental inquiry in determining whether a by-product has been "discarded" is whether the by-product is immediately

recycled for use in the same industry; if not the by-product is justifiably seen as part of the waste disposal problem and therefore a solid waste.L7-1 The court held that it was reasonable

under Chevron for EPA to adhere to this line of inquiry in determining whether a by-product was a solid waste and that the **Agency** was justified in finding that, where a by-product sits untouched for six months, it cannot be said that the material was

never 'disposed of, abandoned, or thrown away'. The petition for

review was denied.

17/ Id. 150. Section 261.1(c) (3) provides that "(a) 'by-

product' is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process." By-products exhibiting a characteristic of hazardous waste are not solid waste when reclaimed (40 CFR §

261.2 (c) (3) , Table I) -

Douglas County, 871 Fed. Supp. 1242, supra, involved an action by the purchaser of property to recover response costs under CERCLA § 107(a)(3). The property was contaminated by virtue of the fact that certain of the defendants had operated a lead smelter and battery reclamation facility at the site. Among the defendants was Madewell & Madewell, Inc., who operated a spent lead-acid battery facility in Oklahoma. Madewell's only connection with the contamination was that it had sold plates from the batteries to the operators of the lead smelter. The issue was whether Madewell had arranged for the "disposal or treatment" of a hazardous substance within the meaning of CERCLA § 107(a). Citing Catellus, the court held that disposal necessarily involved the concept

of waste, held that Madewell's sale of the lead plates constituted the sale of a useful product rather than an arrangement for disposal of a hazardous substance and granted Madewell's motion for summary judgment. The court distinguished ILCO by virtue of the fact that ILCO both processed spent batteries and operated a lead smelter and that the contamination occurred on the site.

Standing alone, the language of the Act favors Universal. The simple fact is that an item or article which is sold for value is not a waste and thus not "discarded" in the usual meaning of the term. See Waste Management Of The Desert, Inc. v. Palm Springs Recycling Center, Inc., 869 P.2d 440; 1994 Cal.LEXIS 1217 (Sup. Ct. Cal. 1994), which, although involving an interpretation of the California Integrated Waste Management Act, concludes, in a compelling analysis, that property which is sold for value is not

"discarded" in any traditional understand] ng of the term. T e Agency has, however, def ined solid waste as any "discarded" material (40 CFR § 261.2 (a) (1)) and has defined "discarded" as including **any** material which is "abandoned" (§ 2 61. 2 (a) (2) (i) "Abandoned" is, in turn, defined as including materials which are "disposed of" **261.2(b)(1)).** There can be little doubt that, when the batteries are no longer rechargeable and are sold or transferred to Universal by the owners or users, the batteries are "disposed of" within the usual meaning of the term. Webster's Third New International Dictionary (1986). See also Palm Springs, supra. The validity of the regulation is not at issue here. This conclusion requires denial of Universal's motion to dismiss insofar as based upon the contention that the NiCd batteries at issue were not "discarded" **and** thus not subject to RCRA.

VI. MOOTNESS

Section 104 (a) of the "Mercury-Containing and Rechargeable Battery Management Act", Public Law 104-142 (May 13, 1996), provides that the collection, storage, or transportation of used rechargeable batteries and used rechargeable consumer products containing rechargeable batteries that are not easily removable shall be regulated in accordance with regulations promulgated by EPA at 60 Fed. Reg. 25492 (May 11, 1995).181 The cited regulation,

L81 Section 104.(a) of P.L. 104-142 provides:

(a) BATTERIES SUBJECT TO CERTAIN REGULATIONS- The

collection, storage, or transportation **of** used

(continued...)

referred to as the "Universal Waste Rule," exempted three identified wastes, including hazardous waste batteries, from the requirements of 40 CFR Parts 262-270, and subjected these wastes to Part **273.L9/** Part 273 applied to nickel-cadmium and to lead-acid batteries not managed under Part 266. Because it appears that Universal accumulated more than 5,000 kg of batteries on site at one time during the calendar year, Universal would be a large quantity handler of universal waste in accordance with Part 273, Subpart **C.** Subpart **C** includes requirements that EPA be notified prior to meeting or exceeding the 5,000 kg storage limit, that batteries be

L81 (... continued)

rechargeable batteries, batteries described in section 3 (5) (C) or in title II, and used rechargeable consumer products containing rechargeable batteries that are not easily removable rechargeable batteries, shall, notwithstanding any law of a State or political subdivision thereof governing such collection, storage, or transportation, be regulated under applicable provisions of the regulations promulgated by the Environmental Protection Agency at 60 Fed. Reg. 25492 (May 11, 1995), as effective on May 11, 1995, except as provided in paragraph (2) of subsection (b) and except that--

(1) the requirements of 40 CFR 260.20, 260.40, and 260.41 and the equivalent requirements of an approved State -program shall not apply, and

(2) this section shall not apply to any lead acid battery managed under 40 CFR 266 subpart G or the equivalent requirements of an approved State program.

19/ The rule was intended to greatly facilitate the environmentally-sound collection and increase the proper recycling or treatment of hazardous waste nickel-cadmium batteries and other batteries, certain hazardous waste pesticides, and mercury containing thermostats (60 Fed. Reg. 25492). EPA acknowledged that the existing RCRA regulations have been a major impediment to national collection and recycling campaigns for these wastes (Id.).

managed in such a way as to prevent releases of any universal waste or component thereof to the environment, and that any universal waste battery that shows evidence of leakage, spillage, or damage that could cause leakage must be placed in a container. 40 CFR §§ 273.32(a)(1) and 273.33(a)(1).

Because the batteries accumulated by Universal are shipped in steel containers and are stored in drums at its facility and there have been no reports of releases of cadmium or nickel to the environment, universal asserts that it has substantially complied with the "Universal Waste Rule", and thus the violations alleged herein are moot. This contention is rejected, because the violations alleged in the complaint occurred several years prior to the promulgation of the Universal Waste Rule and the amount of an appropriate penalty, if any, for these violations remains at issue. It is true, of course, that the compliance order, insofar as based upon 40 CFR Parts 262-270, may not be affirmed, because these regulations are no longer applicable to handlers of used batteries such as Universal.

In its Supplemental Reply to Universal's motion to dismiss, dated March 29, 1993, complainant indicated that it would move to amend the complaint to reduce the amount of the penalty currently proposed.LOI To date no such motion has been filed. The record,

20-1 Id. 3, note 2. Complainant also indicated that this proceeding may be affected by the Paperwork Reduction Act (44 **U.S.C. §§** 3501 et seq.) and that the results of the Agency's analysis of this issue would be made available when completed. This has not been accomplished to date.

however, strongly suggests that only a nominal penalty is warranted. Because the batteries were stored in drums, there was no "disposal" as def ined in the Act (ante at 15) , so that hazardous waste or constituents thereof may enter the environment. Complainant has not alleged that Universal's activities presented any actual or potential risks to human health or the environment. Moreover, Universal's operations were beneficial to the environment in that large quantities of batteries, which would otherwise be disposed of in landfills, were reclaimed. Therefore, the very large penalty demanded by Complainant appears to be based solely on alleged damage to the RCRA program. Such damage, if it exists, is not obvious in view of EPA's promulgation of the Universal Waste Rule and the enactment of the "Mercury-Containing and Rechargeable Battery Management Act."

ORDER

universal's motion to dismiss is denied. on or before

April 18, 1997, the parties will inform the AIJ of whether this matter has been or will be settled. I . f not settled, the parties will submit schedules for suggested further proceedings by the mentioned date.

Dated this -*141*- day of March 1997.

Spen@r T. Nissen

Administrative Law **Judge**

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER DENYING MOTION TO DISMISS AND SETTING FURTHER PROCEDURES, dated March 14, 1997, **in re: UNIVERSAL METAL ORE COMPANY, INC., Dkt. No. II-RCRA91-0207,** was mailed to the Regional Hearing Clerk, Reg. II, and **a** copy was mailed to Respondent and Complainant (see addressees).

Helen F. Handon

Legal Staff Assistant to Judge Nissen

Office of Administrative Law Judges

U.S. Environmental Protection Agency

Mail Code 1900

401 M Street, SW

Washington, DC 20460

Phone: 202-260-0040

Fax: 202-260-3720

· Date: March 14, 1997

ADDRESSEES:

William L. Kovacs, Esq. Keller and Heckman, LLP 1001 G Street, NW, Suite 500 West Washington, DC 20001

Christine McCulloch, Esq.

Assistant Regional Counsel

Office of Regional Counsel

U.S. EPA, Region II

290 Broadway

New York, NY 10007-1866

Ms. Karen Maples

Regional Hearing Clerk

U.S. EPA, Region II

290 Broadway

New York, NY 10007-1866

1 *iJ* This order incorporates a draft by Administrative Law Judge

Daniel M. Head. Judge Head retired on January 3, 1997.

2 @ The assertion that the NiCd batteries are characteristic hazardous waste is based on tests of allegedly representative samples which indicate that the batteries exceed p H levels set forth in 40 CFR § 261.22 and 6 NYCRR § 371.3(c) and were, therefore corrosive. Tests of additional samples indicate that the batteries exceed toxicity levels for cadmium specified in 40 CFR § 261.24 and 6 NYCRR § 371.3(e) (Complaint, 1 30-42). There does not appear to be any dispute in this regard.

3/ The claim of improper service was based upon the fact, admitted by EPA, that a copy of the Rul-es of' Practice did not accompany the complaint as required

by Section 22.14(b)(6) of the Rules. This motion was denied (Transcript of Oral Argument,"Tr.", April 7, 1993, at 4).

4 *!V* By letter, dated April 7, 1993, Universal called the ALJ's attention to United States of America v. Poly-Carb, Inc. et al, CU(continued...) 4 (... continued)

N-91-360-ECR (D. NV., 1993), wherein the court granted defendants' motion for summary judgment, because there was no evidence that phenolic caustic, a by-product of the refining process, sold by defendant refinery to another defendant was "discarded" and thus a waste. Although the government's action was brought under CERCLA, the court emphasized that CERCIA referred to SWDA for the definition of solid waste as including "other discarded material".

5 2/ Complainant has not alleged that the batteries are

00 accumulated speculatively" as def ined in 4 0 CFR 2 6 1. 1 (c) (8) and it is unnecessary to address this issue in order to decide Universal's motion.

6Tr. 16. This characterization of the exclusion isinaccurate. Presumably, batteries obtained by Universal from manufacturers are off-specification. The batteries are not

hazardous wastes, however, because the batteries are not specifically listed and not known generically by the chemicals they contain. See 40 CFR § 261.33.

7/ The term "secondary materials" is not def ined in the regulation or in AMC I. The preamble to the revised rule indicates that the term "means a material that potentially can be a solid and hazardous waste when recycled" and that the rule itself refers to the following types of secondary materials: " (s)pent materials, sludges, by-products, scrap metal and commercial chemical products recycled in ways that differ from their normal use." 50 Fed. Reg. **614-658** (January **4,** 1985) at 616 (note 4).