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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIR. APPEALS BOARD
ENVIRONMENTAL APPEALS BOARD

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 In the Matter of: :
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 HOWMET CORPORATION, : RCRA Appeal No.
 : (3008) 05-04
 Appellant. :
 :
 Docket Numbers: :
 RCRA-02-2004-7102 :
 RCRA-06-2003-0912 :
 :
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Tuesday, April 11, 2006
Environmental Protection Agency
East Building
Room 1152
1201 Constitution Avenue, N.W.
Washington, D.C. 20460

Oral argument in the above-entitled matter
convened, pursuant to notice, at 10:30 a.m.

BEFORE:

HONORABLE SCOTT C. FULTON
HONORABLE KATHIE A. STEIN
HONORABLE EDWARD E. REICH
Environmental Appeals Judges

ALSO PRESENT:

EURIKA DURR, Clerk

APPEARANCES:

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ALSO PRESENT:

JOHN EMERSON
PETE RAACK

- - -

C O N T E N T S

<u>ORAL ARGUMENT</u>	<u>PAGE</u>
On behalf of the Appellant	5
On behalf of the Appellee	34
Rebuttal on behalf of the Appellant	68

1 to the Board is in bringing further clarity to our
2 understanding of the arguments presented in the
3 briefs. We trust that you will be indulgent of and
4 responsive to our questions as best you can.

5 So let us begin by asking counsel to
6 identify themselves for the record, starting with
7 counsel for Appellant Howmet Corporation.

8 MR. MOORE: Bryan Moore, and to my left is
9 John Riley on behalf of Appellant, Howmet
10 Corporation.

11 JUDGE FULTON: Will you both be presenting
12 argument this morning?

13 MR. MOORE: I will be presenting argument.
14 Mr. Riley will be presenting the rebuttal, so we
15 would ask for the five minutes for rebuttal.

16 JUDGE FULTON: Very well, thank you.
17 And counsel for Appellee?

18 MS. CHESTER: My name is Amy Chester, and
19 I'm from Region II and will be representing the
20 Government in this matter. We have John Emerson
21 from Region VI and Pete Raack from OECA, both of
22 whom are on the brief but will not be speaking.

1 JUDGE FULTON: Okay. So Ms. Chester,
2 you'll be present the entire argument for the
3 Agency, okay.

4 Okay, very well. Mr. Moore.

5 ORAL ARGUMENT ON BEHALF OF APPELLANT

6 HOWMET CORPORATION

7 MR. MOORE: Good morning, Your Honors.

8 This case concerns the application of EPA's spent
9 materials regulation. More specifically, this case
10 concerns the regulatory definition of what is a
11 spent material. That is a one sentence definition.
12 Accordingly, this case concerns a single sentence.

13 In this case Appellant Howmet asked that
14 the definition of "spent material" be applied as
15 written, as it is codified in the Code of Federal
16 Regulations. EPA, however, refuses to apply the
17 regulation as promulgated by the Agency. EPA asked
18 that the Board allow the Agency to rewrite its
19 spent materials definition in the context of this
20 case in order to hold Howmet liable for violations
21 of the Resource Conservation Recovery Act, RCRA.

22 While EPA has, of course, the authority to

1 rewrite its regulations, it can do so only in the
2 context of notice and comment rulemaking. EPA ad
3 hoc attempt to write the spent material definition
4 in the course of this case is unlawful.

5 Furthermore, there is no need to depart from the
6 plain language of the regulation. The regulatory
7 language is clear on its face.

8 To my left we have the regulation at
9 issue. Under 40 CRF 261.1(c)(1), a spent material
10 is "any material that has been used and, as a
11 result of contamination, can no long serve the
12 purpose for which it was produced without
13 processing." Applying this definition as written,
14 as codified, as promulgated by the Agency, to the
15 facts to this case is a straightforward process.

16 The first step, the first part of the
17 definition speaks in terms of a material that has
18 been used. In this case that material is potassium
19 hydroxide, or KOH, as it is commonly known and as
20 you will see in our briefs. In its manufacturing
21 operations Howmet employed KOH for one of its many
22 uses to clear ceramic core for metal castings. The

1 KOH was used by Howmet until it was no longer
2 effective in Howmet's operations. Howmet then
3 shifted its used KOH to Royster-Clark for use by
4 Royster in manufacturing fertilizer. So we have a
5 material, KOH, and we have use, use by Howmet in
6 its operations to clean ceramic core for metal
7 castings.

8 The next step in the regulatory definition
9 is ask whether, in Royster's hands, the KOH could
10 continue to serve the purpose for which it was
11 produced without processing. Accordingly, this
12 step requires us to define the purpose for which
13 the KOH was produced. KOH is produced for the
14 purpose of providing a concentrated source of
15 potassium and a high concentration of hydroxide
16 atoms, which in turn results in KOH being effective
17 in various different applications and for various
18 different uses.

19 The next step in the analysis asks whether
20 Royster processed the KOH that it received from
21 Howmet. It's undisputed that Royster did not.
22 Royster used the KOH, as is, as Royster received it

1 from Howmet. In Royster's operations, the KOH was
2 the source of potassium for the fertilizer, and it
3 neutralized the pH of Royster's fertilizer mix.
4 That is the high concentration of hydroxide atoms.

5 JUDGE STEIN: Mr. Moore, was there any
6 water added to the KOH during the processing of it
7 at Howmet's facility?

8 MR. MOORE: I believe that the KOH, as
9 used by Howmet, was in a liquid solution to begin
10 with.

11 JUDGE STEIN: So in other words, the
12 material that Howmet received from the manufacturer
13 of the KOH, the water was already added into it?

14 MR. MOORE: I believe that would be the
15 case.

16 JUDGE STEIN: Is the record clear on that
17 point?

18 MR. MOORE: I don't believe it is. I
19 believe the record speaks in terms of a liquid
20 solution.

21 JUDGE FULTON: Mr. Moore, also, just by
22 mention, one of the challenges in this appeal is

1 that we're working with a factual record that's
2 confined to the stipulations, the fact that the
3 parties entered into, and we may find ourselves
4 asking questions from time to time during this
5 argument that might involve reference to facts
6 outside the record.

7 And whether it's in response to one of our
8 questions or whether in the course of presenting
9 something to us where considering facts outside the
10 record, if you could help us identify those facts
11 along the way so that we're clear on that.

12 And just a case in point here. You
13 indicated that Royster used the KOH on a kind of
14 as-is without any modification basis. Is that in
15 the factual stipulation?

16 MR. MOORE: Yes I believe it is, Your
17 Honor. I can't--I don't have the stipulations here
18 at the podium with me, but I believe it is one of
19 the factual stipulations.

20 JUDGE FULTON: Maybe you all can look at
21 that during EPA's argument and just point
22 that--point us to that.

1 MR. MOORE: Certainly. Certainly, Your
2 Honor.

3 JUDGE REICH: Can I just, for purposes of
4 understanding your argument, because in some ways
5 when you follow the initial decision, there seems
6 to be a different perception of what your argument
7 was than what you've clarified in your brief.

8 In citing back to Federal Register
9 preamble language about that they changed from
10 original purpose and so forth, that all seemed to
11 have relevance in terms of a scenario where
12 something was being used for other than its
13 original purpose. But in your brief you seem to
14 make the distinction between, essentially, a
15 singular purpose and multiple uses. Does that mean
16 that that whole earlier analysis is essentially
17 irrelevant?

18 Because your argument that even if you
19 were applying something comparable to the original
20 purposes, it's still being used for the original
21 purpose?

22 MR. MOORE: I believe in our earlier

1 argument--and I hope this does address Your Honor's
2 question--we spoke in terms of the purposes,
3 plural, for which KOH is produced to serve, those
4 purposes being the use of KOH. KOH is a multiuse
5 product, and that was the thrust of our argument
6 there.

7 Judge Moran did point out that we spoke in
8 terms of the purposes, plural, whereas the
9 regulation, on its face, speaks in terms of "the"
10 purpose. And there was some confusion there as to
11 the regulation not taking into consideration a
12 product that could have more than one use.

13 JUDGE REICH: If EPA had adopted the
14 proposed regulations with the word "original"
15 purpose in there, would your argument still be that
16 this was being used by Royster for the original
17 purpose because of the way you have defined the
18 purpose of KOH?

19 MR. MOORE: I think the way that it was
20 first framed in the 1983 proposal and then
21 clarified by the 1985 adoption was that EPA meant
22 it's original use, and that they then came back and

1 clarified and said, no, that's not going to work.
2 We don't want to limit you to a single use if it is
3 still fit to serve one or more of the other uses
4 that it was produced to serve.

5 JUDGE REICH: So you do agree that in
6 looking at purpose you have to look at use?

7 MR. MOORE: I believe so, yes.

8 JUDGE REICH: Okay.

9 MR. MOORE: I believe that purpose and use
10 are intertwined, and Howmet is a very good example
11 of that. Howmet has multiple uses and therefore it
12 could be said to have multiple purposes. But when
13 you boil it down to an elemental purpose, a single,
14 solitary purpose, it comes back down to its
15 chemical composition, it's chemical makeup in every
16 single use.

17 JUDGE STEIN: Mr. Moore, why would a
18 statute like RCRA that addresses waste or
19 abandoned, thrown-away materials loop back to a
20 manufacturer's purpose--

21 MR. MOORE: That is--

22 JUDGE STEIN: --as opposed to, for

1 example, the waste generator's purpose?

2 MR. MOORE: Well, that those to the--two
3 points: 1) The way the regulation's worded. The
4 regulation is worded in terms of a material, and
5 the purpose for which that material is produced.
6 So applying the regulation, on its face, yields
7 that construction.

8 The other point--and EPA has made this a
9 point in its case about why you shouldn't look to
10 the original purpose of the material, and that is
11 because they have no regulation over virgin
12 materials until they are discarded. And one way of
13 being discarded is being spent; another way is
14 being abandoned.

15 A virgin material, if its abandoned, is
16 certainly subject to EPA's jurisdiction, but I
17 think EPA's point that they have no jurisdiction
18 over virgin material is the very reason why you
19 should look at the purpose that the unused, or some
20 would say virgin, product is produced to serve.
21 Because we're trying to determine in this case
22 whether the used material, used KOH, can still

1 serve those purposes, and if it can without
2 processing, it's not subject to EPA's jurisdiction.

3 JUDGE STEIN: When I look at the
4 definition of generator in the regulations, and
5 that's in, I think, 260.10, it says, "Any person by
6 cite whose act or process produces hazardous waste
7 identified or listed in this part or whose act
8 first causes the hazardous waste to become subject
9 to regulation." Why can't I look at the word
10 "produced" in the context of the RCRA scheme, in
11 the context of the act to the generator whose
12 process with this aqueous solution produced at some
13 point a waste or a material that can no longer be
14 used for its original purpose of cleaning these
15 parts?

16 MR. MOORE: Well, because we have to keep
17 in mind that regulation speaks in terms of a
18 purpose for which it was produced. And used
19 products are not produced for any single purpose;
20 they're the result of another production process,
21 in this case the production of metal castings. So
22 we need--we have to come up with a purpose for

1 which the material was produced. And the material
2 at the start of the regulation is the unused
3 product, and it continues to be KOH throughout this
4 analysis.

5 JUDGE STEIN: Well, it seems to me that
6 you're using the word "produced" in a very, one
7 might argue, narrow sense, in the sense of a
8 production process, a manufacturer produces a
9 product. But aren't there other ways to look at
10 the word "produced"? Isn't there at least some
11 ambiguity as to what "produced" might mean and
12 particularly against a backdrop in RCRA where
13 you're talking about people whose acts can produce
14 a waste?

15 MR. MOORE: Yes. But when we talk about
16 production in the context of a purpose for that
17 production, I think we have to focus on a certain
18 type of production there. It's not just any
19 production of a waste, because the analysis that
20 we're undertaking is to determine if it even is a
21 solid waste.

22 We're not at that point yet; we're not at

1 the point of solid waste. We're certainly not at
2 the point of hazardous waste. We're at the point
3 of whether this is a spent material so that we can
4 then take the next step in the analysis to
5 determine if we have a waste product.

6 JUDGE STEIN: Right. But as I understand
7 that it's undisputed, that if this material is
8 spent it in fact is hazardous waste. Am I correct
9 in understanding that?

10 MR. MOORE: No, you're absolutely correct,
11 Your Honor.

12 JUDGE STEIN: But it's a corrosive
13 material, correct?

14 MR. MOORE: It is. It's a corrosive
15 material off the shelf. It has a low pH. It is a
16 caustic material.

17 JUDGE STEIN: So it doesn't become more
18 corrosive in the way in which Howmet used the
19 material at its plant?

20 MR. MOORE: I don't believe it does. And
21 here again we would be going off the statement of
22 facts, I believe. I don't know of that anywhere in

1 the facts.

2 JUDGE FULTON: The statement of facts
3 indicate why the KOH was no longer usable by
4 Howmet?

5 MR. MOORE: Yes. It would pick up the
6 ceramic, because it dissolved the potassium
7 hydroxide ions, worked to dissolve the ceramic in
8 the castings. And so the KOH would become too
9 heavy with ceramic and cannot be continually used
10 in the process.

11 JUDGE FULTON: And the factual stipulation
12 is clear on that, you think?

13 MR. MOORE: I believe the factual
14 stipulation says that it could no longer be
15 effective in Howmet's process.

16 JUDGE FULTON: I noted that you're
17 indicating that it's because it was too high in
18 ceramic content to be functional any longer, and I
19 believe the Region's characterization was
20 that--let's see--it was used until it contains
21 impurities or contaminants which would affect the
22 newly-cast metal parts. Are those consistent

1 statements or inconsistent statements?

2 MR. MOORE: I would agree with that, Your
3 Honor, you have to recognize in the context of this
4 regulation a contaminant can be water. It can be
5 simply diluted KOH, and it is therefore
6 contaminated if it is no longer fit to serve your
7 purpose under this regulation.

8 JUDGE FULTON: On this question of the
9 original purpose and the change from the proposed
10 regulation to the final regulation, in light of the
11 fact that the Agency was purporting to make a
12 clarifying change to more clearly express its
13 intent, would you agree that as part of the
14 interpretative process here we can still consider
15 this idea of originality in the context of the
16 regulation as now worded?

17 MR. MOORE: I wouldn't--I would say you
18 cannot consider originality in the sense of the
19 initial use, the first use that is made of a
20 product. I think you have to look at the--if you
21 want to look, you need to look at the original
22 purpose for which the product was produced. I

1 don't know that the use of "original" there is
2 helpful at all because the purpose remains the
3 purpose for which the product was produced.

4 And EPA did clarify not only that there
5 was some ambiguity in the use of original purpose,
6 but it would have the--it may have the result of
7 disallowing a subsequent use that is not identical
8 to the initial use. So EPA specifically said: We
9 don't want to preclude a subsequent use that's not
10 identical to the initial use.

11 JUDGE FULTON: Um-hmm.

12 JUDGE STEIN: Does the record reflect
13 whether or not Royster paid Howmet any monetary
14 consideration for this product?

15 MR. MOORE: There again, yes. I believe
16 that the record reflects that stipulations speak in
17 terms of the transaction which was arms length,
18 yes.

19 JUDGE STEIN: Does it specify an amount of
20 money?

21 MR. MOORE: There again, I do believe so,
22 and we can locate these stipulations during EPA's

1 argument.

2 JUDGE STEIN: If one were concerned about
3 the potential for so-called "sham recycling," what
4 evidence in the record exists to refute the notion
5 that this is really a form a sham recycling?

6 MR. MOORE: The evidence indicates clearly
7 that Royster used the product, as is. It only took
8 as much from Howmet as it could use in its
9 manufacturing operations. But for Royster's
10 product, but for another source of used KOH,
11 Royster would have gone out and purchased unused
12 KOH. There was no speculative accumulation and
13 there was an arm' length transaction there.

14 JUDGE STEIN: Does the record reflect at
15 all whether the used product from Howmet met
16 commercial specifications that Royster otherwise
17 would have used in its fertilizer product?

18 MR. MOORE: The record speaks in terms of
19 the agreement between Howmet and Royster, speaks in
20 terms of an environmentally sound product, but it
21 does not reflect any specifications, I do not
22 believe, that Royster had for KOH product.

1 JUDGE STEIN: I have in mind a Federal
2 Register notice, the January 4, 1985 notice at page
3 638 in the third column which talks about the
4 potential for sham recycling. "A recurring type
5 situation posing the potential for sham recycling
6 involves using corrosive wastes as neutralizing
7 agents. The potential for disposal in these
8 situations is high since the waste basket can be
9 dumped into other materials, and any resulting
10 change in pH would be incidental to the disposal
11 purpose of the transaction.

12 "Accordingly, EPA will not accept a claim
13 that a corrosive secondary material is being used
14 as a substitute for virgin acid or caustic, unless
15 indicia of legitimate recycling are present."

16 And it goes on. Are you familiar with
17 that passage? And why is it that this situation
18 doesn't fall within that area of caveat that EPA
19 placed?

20 MR. MOORE: Yes, Your Honor, I am familiar
21 with that passage, and one of the reasons why it
22 does not fall within that analysis by EPA or those

1 concerns expressed by EPA is because that, in
2 addition to providing a neutralizing agent for the
3 pH mixture of Royster's fertilizer, it also
4 provides the primary source of potassium for that
5 fertilizer mixture, which is absolutely necessary
6 for Royster's--well, its tobacco(ph) mixture.

7 JUDGE STEIN: Okay.

8 JUDGE FULTON: Mr. Moore, probably my
9 greatest concern about your argument is sort of
10 thinking through its implications for the structure
11 of this regulation. I mean when you look at
12 61.2(c), this passage that deals with recycled
13 materials that are nonetheless regulated if used in
14 a manner constituting disposal, and there's
15 reference to this list which includes spent
16 materials, you see in that list a number of things.
17 And when you work through the list, it kind of
18 leaves you with the impression that the spent
19 materials category was intended to be a catch-all
20 of some sorts.

21 And my question is, does your argument
22 essentially eviscerate this catch-all provision?

1 What is left under "spent materials" if we were to
2 accept your argument?

3 MR. MOORE: I don't believe that "spent
4 materials" is a catch-all provision, Your Honor; I
5 do believe it is a specifically-defined provision,
6 and what is left of the provision on the basis of
7 our argument is any product that is produced for a
8 single use--a single purpose, excuse me--a single
9 purpose for which it is produced, and it is used
10 for that purpose and it's proposed to be used for
11 another purpose, it cannot be used for that other
12 purpose under the spent materials regulation.

13 JUDGE FULTON: Any unformulated chemical
14 would fall outside this provisions coverage, then,
15 I assume.

16 MR. MOORE: That's too--I believe that's
17 too broad of a statement for me to be able to
18 confirm. I don't know whether there would be
19 unformulated products that really only have a
20 single use, single purpose or not.

21 JUDGE FULTON: But it would have
22 particularly profound implications for that

1 universe of material. As I recall, you had in
2 your--a passage in your brief that distinguished
3 between formulated and unformulated products, the
4 notion being that when you had a formulated
5 product, there was a more--typically a more narrow
6 or specific purpose associated with that formulated
7 product.

8 But this other universe of unformulated
9 material, feedstocks and the like, would be
10 profoundly implicated by this interpretation.

11 MR. MOORE: I don't know. There again, I
12 don't know if I could agree with the
13 characterization as "profoundly implicated." You
14 would still have to go through the analysis in the
15 regulation, and you also have the final part of
16 this analysis which is not implicated in this case,
17 and that is processing: whether you can get there
18 from here without processing it.

19 And I believe that if there is a
20 floodgate's concern, that still needs to be taken
21 into consideration because I don't know that you
22 can speak to the universe of unformulated, or

1 ingredients--those types of products--and say that
2 they can continue to be used over and over and over
3 and over and over again without any processing.

4 JUDGE FULTON: Can you make me feel a
5 little better than your brief did on this
6 hypothetical that the Region posed about the sand,
7 just to recall it for us all? They said that if a
8 brass factory uses virgin sand as an abrasive until
9 it's contaminated and then used the sand as sandbox
10 fill, then under Howmet's interpretation here, that
11 would not be a regulated material.

12 MR. MOORE: Yes, Your Honor. That's the
13 heartstrings argument that EPA's made here. And,
14 quite frankly, I believe it is incumbent upon EPA
15 to make you feel better about that because the
16 truth of the matter is, is that they have to--that
17 argument, that analysis rests upon land application
18 of the sand. So if we were to put the sand in a
19 sandbox that was lined, or sandbox that was above
20 ground, a sandbox at McDonald's, that analysis
21 doesn't apply, and it would be absolutely okay if
22 you follow the EPA analysis.

1 And the other thing to remember is that
2 RCRA, the spent materials regulation, is not the
3 only method of capturing that type of activity.
4 And, second, if EPA were concerned about this,
5 there's two things that they can do? 1) They can
6 list the waste, specifically say that this type of
7 waste, sand from a brass foundry, is a listed
8 hazardous waste and therefore we don't have to go
9 through the spent materials analysis.

10 The other thing that EPA could have done
11 if they had intended to say that any material that
12 has been used in an industrial process cannot be
13 placed into a product that will be land applied.
14 That is exactly what they could have said
15 promulgating the spent materials regulation.

16 The way that they promulgated it, without
17 making that statement, suggests that there must be
18 some products that can be used and can continue to
19 be used and are still fit for use in a product that
20 can be land applied.

21 JUDGE FULTON: Thank you. For purposes of
22 generators, how do you--how do you structure your

1 thinking about storing these materials that might
2 have remaining uses?

3 MR. MOORE: Well, the generator is always
4 tasked with making a waste determination. It is
5 incumbent upon the generator to determine whether
6 it has a solid waste and whether that solid waste
7 is a hazardous waste. And if it is, that's how you
8 treat it.

9 If the generator determines that the
10 product that it has is not a waste product, that is
11 not a spent material therefore there is no RCRA
12 permitting analysis that you need to go through,
13 but there is a speculative accumulation concern
14 that the Agency could bring. And you need to be
15 wary of that.

16 JUDGE FULTON: If you have a material some
17 of which is shipped offside and disposed of as a
18 hazardous waste and some of which is sold under a
19 recycling arrangement, how do you store that
20 material? Are you subject to the hazardous waste
21 storage limitations? Is it treated as a hazardous
22 waste, effectively, until the decision is made on

1 which path to send the material off on?

2 MR. MOORE: I do not know that it would
3 have to be. In the facts of this case I believe
4 that it was. There again, I think we're going off
5 the--going outside the bounds of the stipulations,
6 and I will refrain from doing that.

7 JUDGE FULTON: But do the storage rules
8 apply, the hazard waste storage rules apply in that
9 circumstance?

10 MR. MOORE: No, they would not, because
11 they would not be a hazardous waste unless it was
12 effectively accumulated or unless your intent for
13 that waste load was to not ship it to somebody such
14 as Royster for use in a second application but to
15 ship it to a hazardous waste site. Then you've
16 made the determination that that product is not
17 going to be reused and therefore it is a hazardous
18 waste at that point in time.

19 JUDGE FULTON: So it turns on the intent
20 of the generator?

21 MR. MOORE: It actually turns on the use
22 that is going to be made of the material.

1 JUDGE FULTON: Which you don't know until
2 the decision is made regarding the use.

3 MR. MOORE: That's correct. But it would
4 not only hinge on the intent of the generator. In
5 this case, for instance, the reason that the single
6 waste load was not shipped to Royster is because
7 Royster had no need for it at that point in time in
8 its process.

9 JUDGE STEIN: If you have a material that
10 potentially could go to Royster but they have no
11 need for it, so it could be used for their purposes
12 and it's not and therefore it's going to be
13 disposed of, is that material a hazardous waste or
14 not?

15 MR. MOORE: It is.

16 JUDGE STEIN: But can't it still serve the
17 purpose for which it was produced?

18 MR. MOORE: It can, but you just abandoned
19 it. It is a hazardous waste by virtue of being
20 abandoned and disposed.

21 JUDGE REICH: Can I ask a question on a
22 different aspect of the case? We haven't really

1 talked about the fair notice issue in the case. If
2 the Board were to conclude that Howmet was in fact
3 liable and, in fact, the interpretation of the reg
4 was sufficiently ascertainably certain that fair
5 notice did not apply as a consideration but,
6 nonetheless, there was some ambiguity there that
7 the Board might otherwise have taken into account
8 in determining the amount that the penalty under
9 the statutory factors under RCRA, is the Board
10 precluded from considering that, given that you've
11 stipulated to the penalty?

12 Does your stipulation in effect waive any
13 argument that could be made along those lines?

14 MR. MOORE: The legal effect of the
15 stipulation I have not researched, and I am not
16 prepared to address that. In all fairness to EPA,
17 I will say that we have not raised that issue on
18 appeal. In good faith we have stipulated with the
19 Agency as to a penalty and, of course, would be
20 prepared to address the next phase of this case:
21 how to pay that penalty or appeal it should we not
22 prevail before the Board.

1 JUDGE REICH: Okay. Thank you.

2 JUDGE FULTON: How are we doing with your
3 time?

4 MR. MOORE: It's apparently long since
5 gone, but it's all your time, it's not my--

6 JUDGE FULTON: Would you like to wrap up
7 before you sit down, take a minute, or--it's up to
8 you.

9 MR. RILEY: We could use our props.

10 MR. MOORE: I would like to take just that
11 minute to speak about the argument that EPA is
12 putting forward in this case and the effect that it
13 has on the regulation as written.

14 EPA contends that the purpose for which a
15 material was produced should be defined as the
16 first use that is made of the material. And the
17 exhibit to my left shows you the very effect that
18 that has on the reading of the regulation. And
19 we've previously talked about the 1983 proposal for
20 spent materials regulation.

21 What it said, it spoke in terms of
22 original purpose. And then the 1985 final

1 promulgation came out, and EPA said on, we're not
2 taking that approach; what we're taking is the
3 approach that we see in 40 CFR 261.1, and that is
4 speaking in terms of the purpose for which the
5 material was produced, not the initial use that's
6 made of the material.

7 However, EPA has now gone back to 1983 in
8 this case, and they are looking at the first use
9 that was made of the material. This is an
10 unreasonable reading of a regulation that's clear
11 on its face, and it is an unlawful attempt to
12 rewrite that regulation in the course of this case.

13 JUDGE REICH: Going back to what I asked
14 you, really, at the beginning of the argument, is
15 your concern that they're linking purpose to use or
16 that they're linking it to first use?

17 MR. MOORE: Our concern is that they're
18 leaking it to first use and not purpose of
19 production. To produce is to create and to use is
20 to consume. The words are not interchangeable;
21 they're not synonyms and one cannot replace the
22 other.

1 JUDGE REICH: I thought you went to,
2 earlier, though, determining the purpose for which
3 it's produced, you did have to look at use, not
4 necessarily first use, but you did have to look at
5 use.

6 MR. MOORE: Not when you talk in terms of
7 purpose versus use. What is the purpose of this
8 material? Well, you could say, well, it's used for
9 the following uses, and you have 15 uses. Or you
10 may have one use. And certainly in terms of a
11 single use product, that single use defines the
12 purpose but that you can't have any other purpose.

13 In terms of a multiuse produce such as
14 KOH, and if you want to talk in terms of a single
15 purpose--and we're brought here today because of
16 the text of the regulation and Judge Moran's Order
17 suggesting that when you speak in terms of "the
18 purposes" for which KOH is produced versus "the
19 purpose," that's a material difference.

20 We can get down to an elemental purpose
21 for KOH. That is not difficult, but it still is
22 the case that KOH has multiple uses. Its single

1 purpose is its chemical composition.

2 JUDGE STEIN: Is that elemental purpose
3 reflected in the parties' stipulation--and forgive
4 me if that question's already been asked--but--

5 MR. MOORE: No, it is not, Your Honor.

6 JUDGE FULTON: Okay, Thank you, Mr. Moore.

7 MR. MOORE: Thank you for your time.

8 JUDGE FULTON: Ms. Chester?

9 MS. CHESTER: Good morning.

10 You can take that down.

11 MR. MOORE: Sure, if it's bothering you.

12 ORAL ARGUMENT ON BEHALF OF APPELLEE

13 ENVIRONMENTAL PROTECTION AGENCY

14 MS. CHESTER: We're here today requesting
15 that this Board affirm the ALJ's decision. As
16 pointed out by Howmet, the primary issue before the
17 Board is whether their used KOH constitutes spent
18 material.

19 Now, Howmet, as I stated, utilized the KOH
20 as a solvent to clean metal castings. Once the KOH
21 became too contaminated for that purpose, they sent
22 the used KOH off-site to Royster free of charge, by

1 the way--that's in the declarations--at least for
2 the time period relevant to this cite, this case,
3 the violations time period the violations allege.
4 That's the Pirkle declaration. I believe it's
5 stipulation paragraph Number 14 or 15.

6 When Howmet [sic] received the fertilizer,
7 instead of using it as a solvent in the manner that
8 Howmet used it, they used it as a source of
9 potassium and to control and neutralize the pH of
10 the fertilizer. Because the KOH when Howmet was
11 only being used as a solvent, as held by the ALJ,
12 the material constituted a spent material.

13 JUDGE STEIN: Excuse me, Ms. Chester,
14 could you speak up just a little bit.

15 MS. CHESTER: Sure. Is this better?

16 JUDGE STEIN: Yes, thank you.

17 MS. CHESTER: Okay. Now, EPA's
18 application of the spent--there it goes--EPA's
19 application of the term "spent material" to this
20 case is based on the plain language of the
21 regulations, language which is reinforced by and
22 exemplified in the--thank you--in the Rules January

1 4, 1985 preamble.

2 Now Howmet argues that this is rewriting
3 the regulation, but as we will see, as exemplified
4 in our brief, EPA has consistently reiterated and
5 applied the definition of "spent material" since
6 it's promulgation, as it has done so in this case.

7 This is evidenced by at least two
8 administrative tribunal decisions and advisory
9 letters that were written as early as '86 and as
10 recently as 1998 to the regulated community.

11 Now, let's go to the express language of
12 the regulation. A used material is deemed spent
13 when, as a result of its contamination, it can no
14 longer serve the purpose for which it, the used
15 material, was produced.

16 Now, we agree with Judge Stein that the
17 word "production" does, in fact, coincide with the
18 generated definition of 260.10 and 262.11. In
19 other words, this entire spent material definition
20 is ultimately linked to the definition and creation
21 of a solid and hazardous waste; therefore the word
22 "produced" does in fact speak to the production of

1 the used material by the generator.

2 Also, the language does not, because of
3 singular use of the word "purpose" allow or require
4 for an analysis of the multiple ways in which the
5 virgin predecessor of the contaminated material
6 might be used as Howmet maintains. This is, of
7 course, reinforced by the January 1985 preamble
8 which was signed by the then acting administrator.

9 Now, the preamble does two things: It
10 discusses the term "spent material," per se; and it
11 places it in context.

12 JUDGE STEIN: Before you go on, if I look
13 at the definition in the regulations, and I
14 substitute the word "generated" for "produced," so
15 that I say a spent material is any material that
16 has been used, and as a result of contamination can
17 no longer serve the purpose for which it was
18 generated without processing, that doesn't seem to
19 make much sense.

20 MS. CHESTER: Why not? I mean, actually
21 it does. I mean what's happening here, it's a used
22 material that is--a material that's used until it

1 can no longer serve that purpose.

2 In this case, Howmet used the material
3 until it was--

4 JUDGE STEIN: But if you're talking about
5 waste generation, doesn't the--it's the act or
6 process that produces the waste, and it seems like
7 if you substitute "generation" for "produced,"
8 you're--to talk about the purpose for which a waste
9 is being generated without processing doesn't seem
10 to quite fit either.

11 MS. CHESTER: We're not trying to
12 substitute the word "produced" for "generator." To
13 be clear, what we're trying--what I was trying to
14 state was that the concept of the production of the
15 waste is consistent with the regulatory esteem(ph)
16 in general. And in 260.10 we describe the
17 generation process. It's described as a reduction
18 of waste.

19 In 262.11 a generator is assigned to the
20 task of determining when a material is a waste.
21 Now, the spent material definition in the recycling
22 context is step one in determining when a material

1 is a solid waste. So it all flows together: It's
2 a joint regulatory picture.

3 JUDGE REICH: Now I'm having a little bit
4 of difficulty because if we focus, as I think
5 you're saying we should, on the material produced
6 by Howmet, which seems to be has to be the
7 ultimately contaminated material 'cause, clearly,
8 they didn't produce the virgin material, why do I
9 not think, conclude that their purpose is to send
10 as much of that to Royster as they can since that
11 presumably saves them disposal costs, and therefore
12 they meet that definition?

13 MS. CHESTER: What the regulation
14 does--and it's really highlighted and exemplified
15 and reinforced in the preamble--is it requires you
16 to look at the original use of the material by
17 Howmet.

18 Now, I probably erred in focusing on the
19 word "production," but I was trying to respond to
20 your point earlier and how it relates to the false
21 generator definition. Now, we, as the ALJ thought
22 the definition was clear on its face because of the

1 single use of the purpose and it's focus on the
2 used material and how it was used.

3 To the extent there's any ambiguity,
4 however, I'll bring you back and ask you to focus
5 on the preamble, per se.

6 Now, the preamble specifically states that
7 this regulation deals with the recycling of
8 secondary materials, and it specifically states
9 that EPA does not regulate unused or unreactive raw
10 materials. And I'll bring you page 624 for that
11 citation.

12 In fact, Table 1 of 240 CFR 261.2, which
13 sets forth specifically when spent materials are
14 solid waste, specifically lists, quote which types
15 of secondary materials are defined as solid and
16 hazardous waste when recycled.

17 In other words, as a preliminary matter,
18 to be a spent material you [sic] must be a
19 secondary and a used and contaminated material.
20 Now, this undermines Howmet's argument that you
21 look to the virgin product of the material.

22 The preamble also specifically goes on to

1 talk about the term "spent material," and as
2 highlighted by Howmet. In 1983 the definition
3 proposed that--put forth a proposal which was then
4 modified in 1985. In 1983 the Agency proposed that
5 spent material be defined as the used material that
6 has served its original purpose.

7 Now, in 1985 the Agency clarified its
8 regulation. It did not mean to change its intent.
9 You heard earlier Howmet state that they agreed
10 that under the 1983 wording of the regulation their
11 material would be spent. Now, of course, EPA
12 changed the wording of the regulation, but it did
13 so in order to clarify it.

14 THE WITNESS: Ms. Chester, can I interrupt
15 you? I had understood, perhaps incorrectly, that
16 the 1983 regulation was simply a proposal.

17 MS. CHESTER: Yes.

18 JUDGE STEIN: And that the 1985 regulation
19 in fact was the final. So the words that you're
20 suggesting was in the regulation was merely in a
21 regulatory proposal that was never finalized. Am I
22 correct?

1 MS. CHESTER: Yes, absolutely correct. I
2 apologize if I misapplied--if I implied otherwise.

3 JUDGE STEIN: Okay. Additionally, does
4 the record reflect in any way--and by record,
5 actually, is there anything in the materials for
6 the rulemaking that suggest why EPA used the word
7 "produced"? When it moved away from original
8 purpose, why is it that they chose "produced"? Is
9 there anything in the public record for that
10 rulemaking that would tell us that?

11 MS. CHESTER: As far as I know, there's
12 nothing specifically regarding the word "produced;"
13 however, talking about the modification from the
14 proposed definition to the current definition, the
15 Agency stated that they wanted to ensure that a
16 used material could be further used in a manner
17 similar to, but not identical to, quote, "its
18 initial use."

19 JUDGE REICH: Where does the similar come
20 in to those things that are not identical but
21 similar? Where does the similar come in in the
22 Federal Register preamble?

1 MS. CHESTER: Well, the phrase "initial
2 use" is in the sentence before the example. The
3 Agency's reference to original purpose--

4 JUDGE REICH: Not identical to. Not
5 identical to, to me, is the whole universe of
6 anything that's not the same. Not identical
7 doesn't necessarily mean not identical but similar.

8 MS. CHESTER: But they have an example
9 that specifically sets forth a very similar but not
10 identical use.

11 JUDGE REICH: Right--

12 [Simultaneous conversation.]

13 MS. CHESTER: (Off-mike.)

14 JUDGE REICH: So we have to--we have to
15 infer from the choice to the example that "not
16 identical" was intended to mean "not identical but
17 similar."

18 MS. CHESTER: I think--

19 JUDGE REICH: There's nothing more
20 explicit than that.

21 MS. CHESTER: And they were changing the
22 definition and modifying it from the proposed form

1 which would be original purpose--

2 JUDGE REICH: Um-hmm.

3 MS. CHESTER: --and they were afraid that
4 if you used it once to clean metal, degreased to
5 clean solvent(ph) or circuit boards, you could only
6 use it that way. And because EPA wanted to allow
7 you to continue to use a material that is
8 synonymously or equal to, or equivalent to a raw
9 material or a product, they wanted to broaden the
10 definition so that you could still use the material
11 as a solvent, but we don't care what kind of
12 solvent.

13 JUDGE FULTON: But I think the question
14 Judge Reich has asked is whether you can really
15 look at that as a confining illustration, which
16 seems to be what you're doing. It's offered as an
17 illustration of the justification for relaxing the
18 regulatory language to allow for a certain course
19 of conduct that might have been prohibited before.
20 But does it confine or bound--

21 MS. CHESTER: I agree it's an example that
22 sets forth, you know, a finite scenario. However,

1 in this particular case, Howmet used the material
2 as a solvent; Royster used it for a completely
3 different purpose. There was no continuous use, so
4 if you would apply this example, you will find that
5 on counsel's table that the material was spent. So
6 where there was continuous use of a solvent, in
7 this case the material was originally used by
8 Howmet as a solvent, when they could not use it
9 that way anymore, they shipped it off to Royster,
10 and Royster used it for a completely different
11 purpose and a purpose that, ultimately, was one
12 that the Agency wanted to regulate because it was a
13 use constituting disposal and is equivalent to
14 waste management.

15 JUDGE FULTON: But isn't there a
16 difference between saying that if Howmet did what
17 was in the example, the example tells you it would
18 not be spent, and saying that if Howmet did
19 anything different it would necessarily be spent?
20 Aren't you really equating the two and saying if it
21 varies from the example, that that's intended to
22 mean that it must be spent? And it doesn't really

1 say that.

2 MS. CHESTER: I understand your point and
3 appreciate your point, but the reg is quite clear
4 that it's clarifying the original purpose, and here
5 we're moving on to a completely different purpose.

6 JUDGE FULTON: So does your--your
7 arguments depends on our importing into the current
8 reg text this concept of originality that was
9 present in the proposed reg?

10 MS. CHESTER: Yes. And I think the
11 administrative--

12 JUDGE FULTON: That's a clarifying change.
13 That's your theory.

14 MS. CHESTER: That is my theory. That is
15 specifically what the preamble says. When talking
16 about the change in the proposal to the final rule
17 EPA focuses on, quote/unquote, "the initial use of
18 the material."

19 So why that example may be limited, it
20 does in fact say: Look at the initial use. It was
21 used as a solvent. Is it still used as a solvent?
22 If not, it's a spent material; it's a different

1 purpose.

2 JUDGE STEIN: What regulatory framework
3 was on the books prior to the 1983 proposal? I'm a
4 little rusty in my mind about the state of play in
5 light of some of the court decisions. Were
6 recycled materials at that point regulated, or had
7 those--had the courts effectively vacated those
8 regulations or determined that EPA had gone too far
9 in governing recycled materials?

10 MS. CHESTER: In 1983?

11 JUDGE STEIN: 1983. And in other words,
12 before the 1983 proposal, and if you don't know--

13 MS. CHESTER: Yeah, I do not know. The
14 only thing I could tell you is that when the 1985
15 rule came out, EPA specifically cited Congress'
16 mandate to promulgate regulations dealing with
17 recycling of secondary materials.

18 JUDGE STEIN: So prior to 1983 were
19 recycled materials unregulated?

20 MS. CHESTER: I don't know the answer. I
21 apologize.

22 I'd like to now move on to some of the

1 problems that the Agency sees with how much
2 understanding of the regulation. First and most
3 fundamentally, as we stated, this is a recycling
4 regulation, and virgin materials simply don't get
5 recycled. So going back to the virgin material is
6 simply nonsensical.

7 Second, the regulation itself uses the
8 word "purpose," not "a purpose," or "purposes."
9 And as I stated, this implies or mandates that we
10 look at the initial use of that material. The
11 preamble also specifically states that we're only
12 dealing with secondary materials and not virgin or
13 unreacted materials.

14 JUDGE REICH: So do you reject the idea
15 that you could have a singular purpose with
16 multiple uses?

17 MS. CHESTER: That's--yeah, I was looking
18 for that point. Howmet in its brief says the
19 purpose of KOH is to serve as a source of potassium
20 and hydroxide ions. Now, that's not a purpose,
21 that's what it consists of. It is potassium and
22 hydroxide ions.

1 At the same time Howmet then says there
2 are multiple uses, and it may be true that Howmet,
3 the KOH in its virgin form does have multiple uses,
4 but a few things: 1) Howmet in its brief didn't
5 submit any evidence regarding what those multiple
6 uses are; and 2) who would decide what those uses
7 are? Who'd be the final arbiter of when a material
8 is spent material under Howmet's regulation?

9 Let's take the example of a formulated
10 product like a cleanser, and it's manufactured by
11 Manufacturer A, Manufacturer B, and Manufacturer C,
12 and they all have different listed purposes for
13 that particular product. Is it Manufacturer, A, B,
14 or C that decides whether a material is regulated?
15 What if the ultimate purchaser uses it in a way
16 that was never conceived of by the original
17 manufacturer?

18 In other words, how much theory or
19 understanding of the regulation simply doesn't set
20 forth a standard, a regulatory standard that
21 provides any clarity whatsoever? It also
22 effectively shifts the hazardous waste

1 determination from the generator to some other
2 obviously unknown entity.

3 JUDGE STEIN: But isn't it EPA that's
4 introduced this ambiguity or potential confusion by
5 use of the word "production," or produced in the
6 regulations? I mean I have to confess that when I
7 read the regulation and I look at the word
8 "produced," it does leave a question in my mind as
9 to a) where that word came from, what it was
10 intended to mean, and somewhat surprising that
11 there's nothing in the preamble text that seems to
12 explain that.

13 We're left here, now trying to make sense
14 of the regulation in a specific context, but it
15 does strike me as somewhat perhaps unusual that
16 they're, then in using, in substituting the word
17 "produced" for this original purpose idea, that
18 there's no further explanation of what "produced"
19 could mean in that context.

20 MS. CHESTER: I would submit again that
21 the word "produced" does tie in very nicely to the
22 overall hazardous waste definitions and the

1 generation of hazardous mandate that generators are
2 responsible for determining when their materials
3 are solid and hazardous waste.

4 JUDGE FULTON: It would appear as though
5 the sort of redraft of the regulation that Howmet
6 put on the Board here a minute ago would more
7 neatly describe what you're suggesting the
8 regulation means, which really, you really are
9 looking at the purpose for which it was used.

10 MS. CHESTER: Exactly. And I think that's
11 exactly what the preamble states.

12 JUDGE FULTON: That's what--it was
13 produced. So "produced" equals "used."

14 MS. CHESTER: Well, purpose equals used,
15 but in the context of using a material that becomes
16 a spent material, you are ultimately
17 producing--depending on how it's recycled--a solid
18 waste.

19 JUDGE FULTON: Yeah, but I mean I
20 understand that you think that there's something in
21 the word "produced" that when you look at the
22 broader program contextually associates that idea

1 with the person that's using the material as
2 opposed to the manufacturer of the material in the
3 first instance. But it's not--it's not the easiest
4 to read.

5 MS. CHESTER: Okay, granted. And to the
6 extent you find that there's any ambiguity, I again
7 go back to the preamble where they talk about the
8 original purpose and that the gist of clarifying
9 that definition and they, in fact, looking at the
10 initial use of the material.

11 JUDGE FULTON: Do any of the
12 interpretative statements that you have pointed us
13 to, either the preambular text or the case specific
14 determinations that the Agency has made in response
15 to requests from the regulated community, do any of
16 them deal with interpreting this phrase, the
17 purpose for which it was produced?

18 MS. CHESTER: All of the letters--

19 JUDGE FULTON: What's the closest we can
20 get to that?

21 MS. CHESTER: Well, all of the letters--do
22 you want me to--hear about administrative cases or

1 the letters of both? Let's do--I could do both.

2 JUDGE FULTON: But in particular that that
3 purpose to interpret that phrase.

4 MS. CHESTER: No. Nothing exactly speaks
5 to that phrase whatsoever, but in each of
6 these--each letter that I cited and each
7 administrative case that I cited, they all apply
8 the definition, and in each case the application is
9 based on an examination of the initial use of the
10 material by the first user and how it is
11 subsequently used.

12 So thus, for example, in a 1988 letter to
13 American Cyanamid, EPA explores sulfuric acid, and
14 when that material becomes a spent material--and
15 that's particular instructive in this case, because
16 sulfuric acid like KOH is what Howmet has referred
17 to as an unformulated product.

18 Now, in examining the sulfuric acid, the
19 Agency in this letter states that when sulfuric
20 acid reduced to refined gasoline and
21 alkylation(ph), as long as it was continually
22 reused for that process over and over and over

1 again, the material did not become spent; however,
2 if it was used, for example, in dehydration and
3 then became too contaminated for that purpose it
4 was then sent off-site, like in this case to be
5 used in the production of fertilizer, it became a
6 spent material and a solid waste.

7 Now, --(off mike)--here, even the virgin
8 sulfuric acid could have been used in alkylation,
9 dehydration, and fertilizer production, in each
10 instance--again repeating myself--EPA looked at how
11 the material was originally used and compared it to
12 its subsequent uses to determine if it was a spent
13 material.

14 Let's go to the Brenntag case, an
15 administrative case that just came in in 2004. In
16 that case the court analyzed when aqueous isopropyl
17 alcohol, IPA, which is generated by 3M, became a
18 spent material, now 3M used a water-free isopropyl
19 alcohol as a water-extracting solvent until it
20 became so aqueous and hydrated it could no longer
21 be used for that purpose, and they sent it
22 off-site.

1 Now, then 3M sent it off-site, it was
2 reused by multiple--excuse me, a bunch of different
3 entities for reuse. When 3M sent the IPA to
4 Tradco, Tradco used that material as a carburetor
5 cleaner and windshield wash. Now carburetor
6 cleansers and windshield wash is a solvent use. So
7 like the preamble, you have the continued use of a
8 solvent, and therefore the court stated,
9 indicta(ph), that the material was not regulated.

10 Royster, in contrast to Howmet's brief and
11 Tradco, are not analogous because Royster did not
12 use the material received from Howmet as a solvent
13 whereas Tradco continually used the material it
14 received from 3M as a solvent.

15 And in contrast to Tradco, 3M also sent
16 its used aqueous material to Milsov. Now, Milsov
17 did not use the material as a spent material, hence
18 once it left 3M the court determined, because it
19 was no longer being used as a spent material
20 comparing the original use to the subsequent use,
21 it became a spent material and a solid waste.

22 Now, in its brief Howmet argues that this

1 is a different story because Milsov reclaimed the
2 material. But the reclamation or the processing of
3 the aqueous material by Milsov isn't what makes it
4 a spent material. It's already a spent material;
5 that's what made it a solid waste.

6 Going back down to the chart in Table 1,
7 spent materials as solid waste if--in this case use
8 in the manner constituting disposal, or for another
9 example--or reclaimed for example, which is what
10 happened in Milsov.

11 JUDGE STEIN: Does the record reflect
12 whether or not Howmet made any inquiry of the
13 Agency prior to the practice of sending the
14 material to Royster of whether or not its material
15 would be considered a spent material?

16 MS. CHESTER: As far as I know, no.

17 JUDGE STEIN: The record doesn't reflect
18 it, or they--

19 MS. CHESTER: The record doesn't reflect
20 it, and whether or not--the record does not reflect
21 it.

22 JUDGE STEIN: Okay.

1 JUDGE FULTON: The Agency's theory, then,
2 is one that relates the original use to subsequent
3 uses, and you're trying to determine whether
4 there's substantial similarity in use. It seems
5 like there's also another thread in some of the
6 Agency's statements on this relating to the level
7 of contamination in the used material. Is that
8 also part of the Agency's theory? Or is that a
9 different idea?

10 MS. CHESTER: It's not a different idea;
11 it's inherent and it's in fact part of the
12 regulation. The regulation preamble specifically
13 states that to be a spent material you need to be a
14 secondary material. We're only regulating
15 secondary materials.

16 So, for example, if you were to use the
17 material but, as in the 1986 letters in the
18 discussion with phosphoric acid there, the
19 material, even though it was used, remained pure or
20 equal to virgin material. It's simply not a
21 secondary material, and because it's not a
22 secondary material--and that phrase, quote/unquote,

1 "secondary material" is used in those 1986
2 letters--it cannot be a spent material.

3 So the overall analysis is really
4 threefold: 1) Is it a secondary material? Do you
5 have a use-contaminated product--contaminated
6 material, not product, excuse me? 2) If so, is it
7 a spent material? Has the purpose for which it's
8 being, was originally used, changed so that it is
9 no longer being used for that original purpose?

10 And the, ultimately, is it a solid waste?
11 As in this case, was it used in a manner
12 constituting disposal?

13 And then, of course, there's a fourth
14 point, whether or not it's a hazardous waste. In
15 this case it was, corrosively, characteristically,
16 hazardous.

17 JUDGE FULTON: But when you're in the
18 second tier of the analysis, you're no longer
19 preoccupying yourself with the nature of the
20 contamination in the material and whether it's near
21 virgin material, substantially equivalent to the
22 virgin product. At this point you're really just

1 looking at, is it being used for a similar purpose?

2 MS. CHESTER: Correct. But you need to
3 look at, was it used, and can it be used by the
4 entity or another entity in the same fashion from
5 then on?

6 JUDGE FULTON: Same. Similar. Similar is
7 really what you're saying, right?

8 MS. CHESTER: Similar. Not--yes, similar.
9 it could be the same.

10 JUDGE FULTON: Is that a clear enough
11 concept for the regulated community to understand
12 and work with? What's a similar--

13 MS. CHESTER: I think so. All these
14 scenarios, I mean every scenario that we had was
15 always it was used as a solvent; it wasn't used as
16 a solvent. Alkalization (ph), dehydration, they're
17 pretty clear scenarios. But importantly in this
18 particular case, it's quite clear it was used as a
19 solvent, it was used as a neutralizer and a source
20 of potassium, completely different purposes, no
21 question.

22 I would like to get to the fair notice

1 argument.

2 JUDGE STEIN: Before you do that, I do
3 have a couple of other questions. Has EPA
4 promulgated any guidance to the regulated
5 communities, specifically, as to the things we're
6 describing, that would focus on the things we're
7 describing here as the sole guidance that the
8 Agency has offered these case-specific letters?

9 MS. CHESTER: The case-specific letters
10 are not meant to be guidance, per se. They were
11 letters that were sent out to the regulated
12 community. There is no--there has been no
13 "promulgation," quote/unquote, or public notice of
14 any guidance, as you--I believe you're asking.

15 JUDGE STEIN: Okay. Secondly, the
16 material that goes to Royster--went to Royster--if
17 it's not a hazardous waste or spent material, what
18 happens when it's transported? Do DOT regulations
19 kick in as to that material or not?

20 MS. CHESTER: There are DOT regulations
21 that kick in. And, in fact, when they did
22 transport it, they sent--HAZMAT sent an MSDS sheet

1 and did use DOT-authorized transporters, I believe.

2 JUDGE STEIN: And then when it gets to
3 Royster--so there's some protection for the way
4 that it's transported on the road--what happens
5 when it gets to Royster if it's not a hazardous
6 waste? Are there any regulations that govern how
7 it's stored before it's used?

8 MS. CHESTER: Not as far as I know, but I
9 only know RCRA regulations; I don't know if there
10 are regulations that might apply from some other
11 source.

12 JUDGE STEIN: If it was a hazardous waste
13 and Royster was going to use it in its process,
14 would it have to be treated before it was disposed
15 of?

16 MS. CHESTER: No. Well, yes and no. Let
17 me clarify. What Royster would have to do if it
18 was a hazardous waste, they would have to receive
19 it and store it as a hazardous waste under 266.20.
20 That's 44 CFR 266.20, you can use secondary
21 materials such as the used KOH to produce
22 fertilizer. The requirement, however, is to ensure

1 that the product meets LDR standards. So it's not
2 reused KOH that's received, it's the ultimate
3 product because, after all, that's what's being
4 placed on the land. And that's--

5 JUDGE STEIN: So that product would have
6 to be tested or knowledge applied to determine
7 whether it would meet the LDRs?

8 MS. CHESTER: Either of those would work
9 based on the LDR regulation.

10 JUDGE STEIN: Thank you.

11 MS. CHESTER: A fair notice, Howmet, we
12 believe, received fair notice of the regulation
13 from the rule itself and the preamble. The rule
14 was public noticed, and the current definition of
15 spent material is modified based on comments
16 received from the public. As held by the ALJ the
17 spent material definition is especially clear;
18 however, if there is any ambiguity, we believe the
19 definition is reinforced by the preamble such that
20 the regulation is, and it's obligations are,
21 ascertainably certain.

22 I also want to highlight that EPA in some

1 cases where fair notice has not been found, there
2 have been inconsistent interpretations by the
3 Agency regarding the definition of the application
4 of a definition.

5 In this case EPA has consistently
6 interpreted and applied the spent material
7 definition. Every letter and case cited in this
8 case, in this action, reiterates and implements the
9 definition of spent material as set forth in the
10 re-regulation (ph), the preamble, and as
11 specifically applied in this case.

12 JUDGE FULTON: If we were to disagree with
13 you on the clarity with which this idea had been
14 expressed through either the rule itself or through
15 the preambular statement, that would invite the
16 question of how well communicated to Howmet and
17 other similarly situated this concept is. How
18 would one gain access to these case-specific
19 applicability determinations being made by
20 the--within the program?

21 And is there a difference from a fair
22 notice standpoint in materials being publicly

1 available as opposed to being publicly issued?

2 MS. CHESTER: First I want to highlight
3 that this Board has held that for fair notice to be
4 had the regulation doesn't need to be altogether
5 free from ambiguity; the obligations just need to
6 be ascertainable.

7 In terms of the availability of the public
8 documents that you speak of, I assume you're
9 talking about the advisory letters and such, these
10 were, we believe, publicly available from EPA
11 via--there's a long period of time here--but the
12 RCRA hotline, the RCRA policy compendium and/or
13 RCRA on-line.

14 And I want to be clear that we are not
15 stating that these letters themselves provide
16 notice. And the reason we're not stating that is
17 because they do not offer a new interpretation.
18 They're simply reiterations of the application of
19 spent material in various scenarios that were sent
20 to the regulating community

21 JUDGE FULTON: So if we're looking for
22 notice, we don't find it there. So we're--

1 MS. CHESTER: You'll find it in a--

2 JUDGE FULTON: --left in a position that
3 unless we think that we've got a clear enough
4 expression in the regulation or the preamble, we
5 are without?

6 MS. CHESTER: You could find notice
7 wherever you want to find notice. But we believe
8 that notice is sufficiently given in the preamble
9 and the regulation. And what these letters do,
10 which were publicly available, is demonstrate a
11 continuous interpretation that's a continuous and
12 consistent interpretation of the regulations.

13 JUDGE FULTON: But are the letters--I
14 guess what I'm asking, are the letters themselves
15 legally cognizable as notice for fair notice
16 purposes?

17 MS. CHESTER: In general, notice, the
18 court held, the D.C. Circuit held, that letters
19 that were public notice are fair notice, and
20 letters on EPA's computer are fair notice.

21 Now, having said that, I want to be clear
22 that while we believe these documents were publicly

1 available, and we were able to pull them off EPA's
2 web site in 2002, we can't ascertain exactly when
3 they were public noticed, i.e., when they were
4 exactly put on the computer. So even though they
5 were publicly available, we can't rely on them for
6 public notice.

7 JUDGE STEIN: D.C. Circuit holding was
8 directed to the issue of things that were on the
9 internet? Or things that people could obtain
10 publicly?

11 MS. CHESTER: In that particular case, the
12 issue was whether or not a particular letter
13 constituted notice, and D.C. Circuit stated that
14 even if it did provide notice, it was too late to
15 object to it as a regulation because it wasn't
16 timely. And timeliness, it wasn't--in other words,
17 you have to appeal a regulation within an X-amount
18 of time. This document was put on the computer on
19 X-date; they didn't appeal for two years later, and
20 then time had run.

21 JUDGE STEIN: If we were to conclude that
22 these regulations were less clear than EPA is

1 asserting that they are, and were to conclude that
2 in fact if EPA wants to regulate this process, it
3 needs to revise the regulations along the lines
4 suggested by Howmet, has the Agency--does the
5 Agency have a view as to what, if any,
6 ramifications this would have for cases outside of
7 the Howmet case?

8 MS. CHESTER: If you accepted Howmet's
9 interpretation? Is that the question?

10 JUDGE STEIN: Well, the question is let's
11 assume that the Board disagrees with you that if
12 you want to regulate this process you've got to
13 change your regulations; that "produced" and "used"
14 don't mean the same thing. What, if any,
15 ramifications would such a holding have on
16 enterprises other than Howmet? Do we know?

17 MS. CHESTER: I think for the regulated
18 community or for the environmental workings at
19 large, it would really be disastrous. You no
20 longer--suddenly, we're going to go back to the
21 sandbox example. Now, the sandbox example arguably
22 pulls at heartstrings because we're dealing with

1 children in a sandbox and children.

2 But let's say instead of putting the
3 contaminated material in a sandbox they use it for
4 a ball park. Suddenly, things--

5 JUDGE STEIN: Do you have any idea of the
6 magnitude of the entities that would be affected by
7 this interpretation?

8 MS. CHESTER: No. But I would imagine it
9 would be quite large.

10 JUDGE FULTON: Okay. Did you want to say
11 anything in terms of wrap up, real quickly?

12 MS. CHESTER: I just respectfully request
13 that this Board affirm the ALJ's decision and find
14 that Howmet use of KOH constituted spent material
15 and they violated the regs, as alleged in the
16 complaint.

17 Thank you.

18 JUDGE FULTON: Thank you, Ms. Chester.

19 Mr. Riley.

20 REBUTTAL ARGUMENT ON BEHALF OF APPELLANT

21 HOWMET CORPORATION

22 MR. RILEY: Good morning. First I want to

1 thank you all for taking your time this morning to
2 visit with us and discuss these matters. I guess
3 it is always astounding to me how a regulation
4 could be so clear, yet it still warrants this kind
5 of discussion and interplay.

6 I would like to use my rebuttal time to
7 discuss a concept that I don't find anywhere in the
8 regulations, and that is the concept of virgin
9 material. And because of the delicate age of some
10 of the members of the audience, I won't use a bad
11 pun, but I do think about virgin material as
12 unused.

13 And in the 1986 letter that counsel for
14 EPA relies upon, it refers to something becoming
15 more virginal or more pure. And I think
16 that's--it's a bit absurd. It is a material, as
17 referenced in the regulation, that is used as
18 referenced in the regulation. But if it somehow
19 becomes more characteristic, more pure, in other
20 words the characteristic of concern to EPA, more
21 corrosive, more acidic in that case, then it is
22 more virgin, and therefore unregulated.

1 My point is that the acid that is
2 discussed in the 1986 letter was more acidic as a
3 result of its first use, but it was okay to use it
4 on the fertilizer.

5 Similarly, here in the Howmet case,
6 presumably, if the corrosive material became more
7 basic through Howmet's use, it would become more
8 virgin and of less concern to EPA, or outside their
9 jurisdiction I think is probably the way they'd say
10 it. But certainly, the characteristic of concern
11 is corrosivity in these matters, so if you stay
12 with me on the idea that in the 1986 case the
13 material was clearly used, therefore, it was a
14 material that was produced, used for a purpose. It
15 was okay if it became core corrosive or pure, as
16 that letter says, and then used as a fertilizer.

17 So it doesn't hang together. The idea
18 that the first use defines how a used material can
19 be later used doesn't hang together as early as
20 1986. So my point is that it is not the first use
21 that seems to be of concern to EPA in this case,
22 and how they seek to distinguish the 1986 letter.

1 What seems to be of concern is not the
2 characteristic that is established that would cause
3 this to be hazardous waste, if indeed it is waste,
4 my urging is that you can't have it both ways. If
5 you find that a process uses a material and makes
6 that material more pure, none of these concepts are
7 addressed in the one sentence regulation that we
8 have before us to deal with.

9 There's nothing in this regulation that
10 talks about contamination material. There's
11 nothing in this regulation that talks about if the
12 first use makes it more pure. It is simply it is
13 allowed if the original purpose for which material
14 is produced, if that can be used in a subsequent
15 process that is not similar to again, the Board has
16 already pointed out you don't find any of those
17 words in the preamble, that there is no discussion
18 of a subsequent use being limited to a similar use.
19 It is simply not an identic of beliefs. All of
20 this is a creation, frankly, from the materials and
21 on behalf of EPA.

22 With that, I'd like to clarify one

1 question that Judge Stein had earlier. There was
2 question, I believe, about whether the original
3 material contained water, and it did. I believe
4 that's in stipulation, at least the Region II's
5 stipulations--I didn't find it quickly in the
6 Region VI stipulations--but in the Region II's
7 stipulations the original material is a liquid
8 potassium hydroxide in water solution.

9 I think it's interesting--at least I've
10 always found it interesting--that the title of this
11 Act that brings us all here today is the Resource
12 Conservation and Recovery Act. It is clear to me
13 from the 1983 discussion that the intent of these
14 regulations was to make full use of products and
15 not to cut off subsequent uses in some arbitrary
16 fashion such as how the material was originally
17 used.

18 Truly, assuming all of the protections are
19 in place and some of the questions of what other
20 protections are there?--what other regulatory
21 structures are there other than RCRA that would
22 protect the public in such a fashion?--the Resource

1 Conservation and Recovery Act is about reusing
2 materials and eliminating waste. That's what I
3 think is presented here. The materials were
4 conscientiously used by a subsequent company for a
5 purpose that was intended in the original material.

6 Thank you for your time.

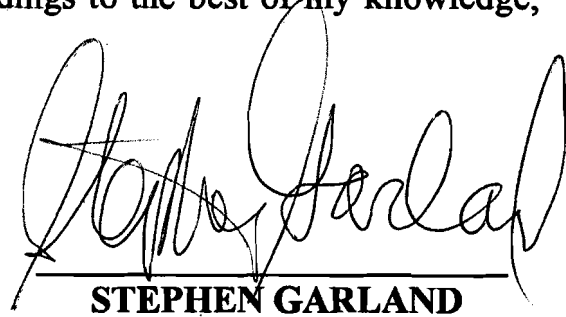
7 JUDGE FULTON: Thank you. Okay, that
8 concludes our hearing for today. We want to extend
9 our thanks to the parties for their contributions
10 and for your advocacy. We'll no doubt find it
11 helpful in reaching a decision in the case, so
12 thank you.

13 THE CLERK: All right. The Environmental
14 Appeals Board now stands adjourned.

15 [Whereupon, at 11:54 a.m., the oral
16 argument adjourned.]

REPORTER CERTIFICATE

I, **STEPHEN GARLAND**, the official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.



STEPHEN GARLAND