

In The Matter Of:

*Environmental Appeals Board
Howmet Corporation*

*U.S. Environmental Protection Agency
April 11, 2006*

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of: :
HOWMET CORPORATION, : RCRA Appeal No.
: (3008) 05-04

Appellant. :
Docket Numbers: :
RCRA-02-2004-7102 :
RCRA-06-2003-0912 :

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:

On behalf of the Appellee Environmental
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ALSO PRESENT:

JOHN EMERSON

PETE RAACK

CONTENTS

ORAL ARGUMENT	PAGE
On behalf of the Appellant	5
On behalf of the Appellee	34
Rebuttal on behalf of the Appellant	68

[1] PROCEEDINGS

[2] THE CLERK: All rise. This session, the
[3] Environmental Appeals Board of the United States
[4] Environmental Protection Agency is now in session
[5] for the oral argument in the matter of Howmet
[6] Corporation, Docket Numbers RCRA-06-2003-0912 and
[7] RCRA-02-2004-7102, Appeal Number RCRA (3008) 05-04;
[8] the Honorable Judges Scott Fulton, Kathie Stein, Ed
[9] Reich, presiding. Please be seated.

[10] JUDGE FULTON: Good morning and welcome.
[11] Argument this morning will proceed in accordance
[12] with the Board's Order dated February 10, 2006. As
[13] specified in that Order, each side will have 30
[14] minutes for argument. Howmet Corporation is the
[15] Appellant. This proceeding may reserve five
[16] minutes of its allotted time for rebuttal, if it
[17] wishes.

[18] We look forward to hearing the parties'
[19] arguments and perspectives on the issues presented
[20] in the case, and while we will no doubt benefit
[21] from your prepared remarks, we trust that you will
[22] appreciate that the primary value of oral argument

[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.

Page 5

[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

Page 6

[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

Page 7

[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

Page 8

[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

Page 9

[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.

Page 10

[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

Page 11

[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

Page 12

[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

Page 13

[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

Page 14

[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

Page 15

[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

Page 16

[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

Page 17

[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

Page 18

[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

Page 19

[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

Page 20

[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.

Page 21

[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

Page 22

[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?

Page 23

[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

Page 24

[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.

Page 29

[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

Page 30

[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.

Page 31

[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

Page 32

[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] linking 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] 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] 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] 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

Page 37

[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

Page 38

[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

Page 39

[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

Page 40

[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,

Page 45

[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

Page 46

[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

Page 47

[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

Page 48

[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

Page 53

[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

Page 54

[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.

Page 55

[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

Page 56

[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

Page 61

[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

Page 62

[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

Page 63

[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

Page 64

[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—

Page 65

[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

Page 66

[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

Page 67

[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

Page 68

[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

Page 69

[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.

Page 70

[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.

Page 71

[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

Page 72

[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.]

Lawyer's Notes

O

05-04 3:7

1

1 13:3; 26:5; 40:12; 49:4;
56:6; 58:4
10 3:12
11:54 73:15
14 35:5
15 33:9; 35:5
1983 11:20; 31:19; 32:7;
41:2, 4, 10, 16; 47:3, 10,
11, 12, 18; 72:13
1985 11:21; 21:2; 31:22;
36:1; 37:7; 41:4, 7, 18;
47:14
1986 57:17; 58:1; 69:13;
70:2, 12, 20, 22
1988 53:12
1998 36:10

2

2 49:6; 58:6
2002 66:2
2004 54:15
2006 3:12
240 40:12
260.10 14:5; 36:18; 38:16
261.1 32:3
261.1(c)(1) 6:9
261.2 40:12
262.11 36:18; 38:19
266.20 61:19, 20

3

30 3:13
3008 3:7
3M 54:17, 18; 55:1, 3, 14,
15, 18

4

4 21:2; 36:1
40 6:9; 32:3
44 61:20

6

61.2(c) 22:12
624 40:10
638 21:3

8

86 36:9

A

a.m 73:15
abandoned 12:19;
13:14, 15; 29:18, 20
able 23:17; 66:1
above 25:19
abrasive 25:8
absolutely 16:10; 22:5;
25:21; 42:1
absurd 69:16
accept 21:12; 23:2
accepted 67:8
access 63:18
accordance 3:11
Accordingly 5:12; 7:11;
21:12
account 30:7
accumulated 28:12
accumulation 20:12;
27:13
acid 21:14; 53:13, 16, 18,
20; 54:8; 57:18; 70:1
acidic 69:21; 70:2
Act 5:21; 14:6, 7, 11; 38:5;
72:11, 12; 73:1
acting 37:8
action 63:8
activity 26:3
acts 15:13
actually 28:21; 37:20;
42:5
ad 6:2
added 8:6, 13
addition 22:2
Additionally 42:3
address 11:1; 30:16, 20
addressed 71:7
addresses 12:18
adjourned 73:14, 16
administrative 36:8;
46:11; 52:22; 53:7; 54:15
administrator 37:8
adopted 11:13
adoption 11:21
advisory 36:8; 64:9
advocacy 73:10
affect 17:21
affected 68:6
affirm 34:15; 68:13
afraid 44:3
again 16:21; 19:15, 21;
24:11; 25:3; 28:4; 50:20;
52:6; 54:1; 71:15
against 15:12
age 69:9
Agency 3:4; 5:3, 17, 18;

6:14; 18:11; 27:14; 30:19;
34:13; 41:4, 7; 42:15;
45:12; 48:1; 52:14; 53:19;
56:13; 60:8; 63:3; 67:5
Agency's 43:3; 57:1, 6, 8
Agency--does 67:4
agent 22:2
agents 21:7
ago 51:6
agree 12:5; 18:2, 13;
24:12; 36:16; 44:21
agreed 41:9
agreement 20:19
alcohol 54:17, 19
ALJ 35:11; 39:21; 62:16
ALJ's 34:15; 68:13
Alkalization 59:16
alkylation 54:8
alkylation(ph 53:21
allege 35:3
alleged 68:15
allotted 3:16
allow 5:18; 37:3; 44:6, 18
allowed 71:13
along 9:11; 30:13; 67:3
altogether 64:4
always 27:3; 59:15; 69:3;
72:10
ambiguity 15:11; 19:5;
30:6; 40:3; 50:4; 52:6;
62:18; 64:5
American 53:13
amount 19:19; 30:8
Amy 4:18
analogous 55:11
analysis 7:19; 10:16;
15:4, 19; 16:4; 21:22;
24:14, 16; 25:17, 20, 22;
26:9; 27:12; 37:4; 58:3, 18
analyzed 54:16
and/or 64:12
anymore 45:9
apologize 42:2; 47:21
apparently 31:4
Appeal 3:7; 8:22; 30:18,
21; 66:17, 19
Appeals 3:3; 73:14
appear 51:4
Appellant 3:15; 4:7, 9;
5:5, 13; 68:20
Appellee 4:17; 34:12
applicability 63:19
application 5:8; 25:17;
28:14; 35:18, 19; 53:8;
63:3; 64:18
applications 7:17
applied 5:14; 26:13, 20;
36:5; 62:6; 63:6, 11
apply 5:16; 25:21; 28:8,
8; 30:5; 45:4; 53:7; 61:10
Applying 6:13; 10:19;
13:6
appreciate 3:22; 46:3

approach 32:2, 3
aqueous 14:12; 54:16,
20; 55:16; 56:3
arbiter 49:7
arbitrary 72:15
area 21:18
arguably 67:21
argue 15:7
argues 36:2; 55:22
argument 3:5, 11, 14, 22;
4:12, 13; 5:2, 5; 9:5, 21;
10:4, 6, 18; 11:5, 15; 20:1;
22:9, 21; 23:2, 7; 25:13,
17; 30:13; 31:11; 32:14;
34:12; 40:20; 60:1; 68:20;
73:16
argument--and 11:1
arguments 3:19; 4:2;
46:7
arm 20:13
arms 19:17
arrangement 27:19
as-is 9:14
ascertain 66:2
ascertainable 64:6
ascertainably 30:4;
62:21
asked--but 34:4
aspect 29:22
asserting 67:1
assigned 38:19
associated 24:6
associates 51:22
assume 23:15; 64:8;
67:11
assuming 72:18
astounding 69:3
atoms 7:16; 8:4
attempt 6:3; 32:11
audience 69:10
authority 5:22
availability 64:7
available 64:1, 10; 65:10;
66:1, 5
away 42:7

B

B 49:11, 13
back 10:8; 11:22; 12:14,
19; 32:7, 13; 40:4; 48:5;
52:7; 56:6; 67:20
backdrop 15:12
bad 69:10
ball 68:4
based 35:20; 53:9; 62:9,
15
basic 70:7
basis 9:14; 23:6
basket 21:8
became 34:21; 54:3, 5,
17, 20; 55:21; 70:6, 15

become 14:8; 16:17;
17:8; 54:1; 70:7
becomes 51:15; 53:14;
69:19
becoming 69:14
begin 4:5; 8:9
beginning 32:14
behalf 4:9; 5:5; 34:12;
68:20; 71:21
beliefs 71:19
benefit 3:20
best 4:4
better 25:5, 15; 35:15
bit 35:14; 39:3; 69:16
Board 3:3; 4:1; 5:18;
30:2, 7, 9, 22; 34:15, 17;
51:6; 64:3; 67:11; 68:13;
71:15; 73:14
Board's 3:12
boards 44:5
boil 12:13
books 47:3
both 4:11, 21; 53:1, 1;
71:4
bothering 34:11
bound 44:20
bounds 28:5
brass 25:8; 26:7
Brenntag 54:14
brief 4:22; 10:7, 13; 24:2;
25:5; 36:4; 48:18; 49:4;
55:10, 22
briefs 4:3; 6:20
bring 27:14; 40:4, 10
bringing 4:1
brings 72:11
broad 23:17
broaden 44:9
broader 51:22
brought 33:15
Bryan 4:8
bunch 55:2

C

C 49:11, 14
came 11:22; 32:1; 47:15;
50:9; 54:15
can 4:4; 6:1, 11; 9:20;
10:3; 13:22; 14:1, 13;
15:13; 16:3; 18:4, 4, 14;
19:22; 21:8; 24:17, 22;
25:2, 4; 26:5, 5, 18, 18, 20;
29:18, 21; 33:20; 34:10;
36:13; 37:16; 38:1; 39:10;
41:14; 44:14; 52:19; 59:3;
61:20; 70:18; 71:14
can't--l 9:17
capturing 26:3
carburetor 55:4, 5
care 44:11
case 3:20; 5:8, 9, 12, 13,
20; 6:4, 15, 18; 8:15; 9:12;

13:9, 21; 14:21; 24:16;
28:3; 29:5, 22; 30:1, 20;
31:12; 32:8, 12; 33:22;
35:2, 20; 36:6; 38:2; 45:1,
7; 52:13; 53:7, 8, 15; 54:4,
14, 15, 16; 56:7; 58:11, 15;
59:18; 63:5, 7, 8, 11;
66:11; 67:7; 69:21; 70:5,
12, 21; 73:11
case-specific 60:8, 9;
63:18
cases 52:22; 63:1; 67:6
castings 6:22; 7:7; 14:21;
17:8; 34:20
catch-all 22:19, 22; 23:4
category 22:19
cause 39:7; 71:2
causes 14:8
caustic 16:16; 21:14
caveat 21:18
ceramic 6:22; 7:6; 17:6,
7, 9, 18
certain 15:17; 30:4;
44:18; 62:21
Certainly 10:1, 1; 13:16;
16:1; 33:10; 70:10
CFR 32:3; 40:12; 61:20
challenges 8:22
change 18:9, 12; 21:10;
41:8; 46:12, 16; 67:13
changed 10:9; 41:12;
58:8
changing 43:21
characteristic 69:19, 20;
70:10; 71:2
characteristically 58:15
characterization 17:19;
24:13
charge 34:22
chart 56:6
chemical 12:15, 15;
23:13; 34:1
CHESTER 4:18, 18; 5:1;
34:8, 9, 14; 35:13, 15, 17;
37:20; 38:11; 39:13;
41:14, 17; 42:1, 11; 43:1,
8, 13, 18, 21; 44:3, 21;
46:2, 10, 14; 47:10, 13, 20;
48:17; 50:20; 51:10, 14;
52:5, 18, 21; 53:4; 56:16,
19; 57:10; 59:2, 8, 13;
60:9, 20; 61:8, 16; 62:8,
11; 64:2; 65:1, 6, 17;
66:11; 67:8, 17; 68:8, 12,
18
children 68:1, 1
choice 43:15
chose 42:8
circuit 44:5; 65:18; 66:7,
13
circumstance 28:9
citation 40:11
cite 14:6; 35:2
cited 47:15; 53:6, 7; 63:7
citing 10:8

claim 21:12
clarified 10:7; 11:21;
12:1; 41:7
clarify 19:4; 41:13; 61:17;
71:22
clarifying 18:12; 46:4,
12; 52:8
clarity 4:1; 49:21; 63:13
clean 7:6; 34:20; 44:4, 5
cleaner 55:5
cleaning 14:14
cleanser 49:10
cleansers 55:6
clear 6:7, 22; 8:16; 9:11;
17:12; 32:10; 38:13;
39:22; 46:3; 59:10, 17, 18;
62:17; 64:14; 65:3, 21;
66:22; 69:4; 72:12
clearly 18:12; 20:6; 39:7;
70:13
CLERK 3:2; 73:13
closest 52:19
Code 5:15
codified 5:15; 6:14
cognizable 65:15
coincide 36:17
column 21:3
comment 6:2
comments 62:15
commercial 20:16
commonly 6:19
communicated 63:16
communities 60:5
community 36:10; 52:15;
59:11; 60:12; 64:20; 67:18
company 73:4
comparable 10:19
compared 54:11
comparing 55:20
compendium 64:12
complaint 68:16
completely 45:2, 10;
46:5; 59:20
composition 12:15; 34:1
computer 65:20; 66:4, 18
conceived 49:16
concentrated 7:14
concentration 7:15; 8:4
concept 38:14; 46:8;
59:11; 63:17; 69:7, 8
concepts 71:6
concern 22:9; 24:20;
27:13; 32:15, 17; 69:20;
70:8, 10, 21; 71:1
concerned 20:2; 26:4
concerns 5:8, 10, 12;
22:1
conclude 30:2; 39:9;
66:21; 67:1
concludes 73:8
conduct 44:19
confess 50:6
confine 44:20

confined 9:2
confining 44:15
confirm 23:18
confusion 11:10; 50:4
Congress 47:15
conscientiously 73:4
Conservation 5:21;
72:12; 73:1
consider 18:14, 18
consideration 11:11;
19:14; 24:21; 30:5
considered 56:15
considering 9:9; 30:10
consistent 17:22; 38:15;
65:12
consistently 36:4; 63:5
consists 48:21
constituted 35:12;
66:13; 68:14
constitutes 34:17
constituting 22:14;
45:13; 56:8; 58:12
construction 13:7
consume 32:20
contained 72:3
contains 17:20
contaminant 18:4
contaminants 17:21
contaminated 18:6;
25:9; 34:21; 37:5; 39:7;
40:19; 54:3; 68:3
contamination 6:11;
36:13; 37:16; 57:7; 58:20;
71:10
contends 31:14
content 17:18
context 5:19; 6:2; 14:10,
11; 15:16; 18:3, 15; 37:11;
38:22; 50:14, 19; 51:15
contextually 51:22
continually 17:9; 53:21;
55:13
continue 7:10; 25:2;
26:18; 44:7
continued 55:7
continues 15:3
continuous 45:3, 6;
65:11, 11
contrast 55:10, 15
contributions 73:9
control 35:9
conversation 43:12
core 6:22; 7:6; 70:15
Corporation 3:6, 14; 4:7,
10; 5:6; 68:21
corrosive 16:12, 14, 18;
21:6, 13; 69:21; 70:6, 15
corrosively 58:15
corrosivity 70:11
costs 39:11
counsel 4:5, 7, 17; 69:13
counsel's 45:5
couple 60:3

course 5:22; 6:4; 9:8;
30:19; 32:12; 37:7; 41:11;
44:18; 58:13
court 47:5; 54:16; 55:8,
18; 65:18
courts 47:7
coverage 23:14
create 32:19
creation 36:20; 71:20
CRF 6:9
current 42:14; 46:7;
62:14
cut 72:15
Cyanamid 53:13

D

D.C 65:18; 66:7, 13
dated 3:12
deal 52:16; 71:8
dealing 47:16; 48:12;
67:22
deals 22:12; 40:7
decide 49:6
decides 49:14
decision 10:5; 27:22;
29:2; 34:15; 68:13; 73:11
decisions 36:8; 47:5
declaration 35:4
declarations--at 35:1
deemed 36:12
define 7:12
defined 11:17; 31:15;
40:15; 41:5
defines 33:11; 70:18
definition 5:10, 11, 14,
19; 6:3, 13, 17; 7:8; 14:4;
36:5, 18, 19, 20; 37:13;
38:21; 39:12, 21, 22; 41:2;
42:14, 14; 43:22; 44:10;
52:9; 53:8; 62:14, 17, 19;
63:3, 4, 7, 9
definitions 50:22
degreased 44:4
dehydration 54:2, 9;
59:16
delicate 69:9
demonstrate 65:10
depart 6:5
depends 46:7
describe 38:16; 51:7
described 38:17
describing 60:6, 7
determination 27:4;
28:16; 50:1
determinations 52:14;
63:19
determine 13:21; 15:20;
16:5; 27:5; 54:12; 57:3;
62:6
determined 47:8; 55:18
determines 27:9
determining 30:8; 33:2;

38:20, 22; 51:2
difference 33:19; 45:16;
63:21
different 7:17, 18; 10:6;
29:22; 45:3, 10, 19; 46:5,
22; 49:12; 55:2; 56:1; 57:9,
10; 59:20
difficult 33:21
difficulty 39:4
diluted 18:5
directed 66:8
disagree 63:12
disagrees 67:11
disallowing 19:7
disastrous 67:19
discarded 13:12, 13
discuss 69:2, 7
discussed 70:2
discusses 37:10
discussion 57:18; 69:5;
71:17; 72:13
disposal 21:7, 10; 22:14;
39:11; 45:13; 56:8; 58:12
disposed 27:17; 29:13,
20; 61:14
dissolve 17:7
dissolved 17:6
distinction 10:14
distinguish 70:22
distinguished 24:2
do--I 53:1
Docket 3:6
document 66:18
documents 64:8; 65:22
does--and 39:14
done 26:10; 36:6
DOT 60:18, 20
DOT-authorized 61:1
doubt 3:20; 73:10
down 12:13, 14; 31:7;
33:20; 34:10; 56:6
dumped 21:9
during 8:6; 9:4, 21; 19:22

E

earlier 10:16, 22; 33:2;
39:20; 41:9; 72:1
early 36:9; 70:19
easiest 52:3
Ed 3:8
effect 30:12, 14; 31:12,
17
effective 7:2, 16; 17:15
effectively 27:22; 28:12;
47:7; 49:22
either 38:10; 52:13; 62:8;
63:14
elemental 12:13; 33:20;
34:2
eliminating 73:2
Emerson 4:20

employed 6:21
enough 59:10; 65:3
ensure 42:15; 61:22
entered 9:3
enterprises 67:16
entire 5:2; 36:19
entities 55:3; 68:6
entity 50:2; 59:4, 4
Environmental 3:3, 4;
34:13; 67:18; 73:13
environmentally 20:20
EPA 5:16, 17, 22; 6:2;
11:13, 21; 13:8; 19:4, 8;
21:12, 18, 22; 22:1; 25:14,
22; 26:4, 10; 30:16; 31:11,
14; 32:1, 7; 36:4; 40:9;
41:11; 42:6; 44:6; 46:17;
47:8, 15; 50:3; 53:13; 60:3;
62:22; 63:5; 64:10; 66:22;
67:2; 69:14, 20; 70:8, 21;
71:21
EPA's 5:8; 9:21; 13:16,
17; 14:2; 19:22; 25:13;
35:17; 65:20; 66:1
equal 44:8; 57:20
equals 51:13, 14
equating 45:20
equivalent 44:8; 45:13;
58:21
erred 39:18
especially 62:17
essentially 10:14, 16;
22:22
established 71:2
esteem(ph 38:15
even 10:18; 15:20; 54:7;
57:19; 66:4, 14
evidence 20:4, 6; 49:5
evidenced 36:7
eviscerate 22:22
exactly 26:14; 51:10, 11;
53:4; 66:2, 4
examination 53:9
examining 53:18
example 12:10; 13:1;
43:2, 8, 15; 44:21; 45:4,
17, 17, 21; 46:19; 49:9;
53:12; 54:2; 56:9; 57:16;
67:21, 21
example--or 56:9
excuse 23:8; 35:13; 58:6
exemplified 35:22; 36:3;
39:14
exhibit 31:17
exists 20:4
explain 50:12
explanation 50:18
explicit 43:20
explores 53:13
express 18:12; 36:11
expressed 22:1; 63:14
expression 65:4
extend 73:8
extent 40:3; 52:6

F

face 6:7; 11:9; 13:6;
32:11; 39:22
facility 8:7
fact 9:2; 16:8; 18:11; 30:2,
3; 36:17, 22; 40:12; 41:19;
46:20; 52:9; 57:11; 60:21;
67:2
factors 30:9
factory 25:8
facts 6:15; 9:5, 9, 10;
16:22; 17:1, 2; 28:3
factual 9:1, 15, 19; 17:11,
13
fair 30:1, 4; 59:22; 62:11,
12; 63:1, 21; 64:3; 65:15,
19, 20
fairness 30:16
faith 30:18
fall 21:18, 22; 23:14
false 39:20
familiar 21:16, 20
far 42:11; 47:8; 56:16;
61:8
fashion 59:4; 72:16
fashion?--the 72:22
February 3:12
Federal 5:15; 10:8; 21:1;
42:22
feedstocks 24:9
feel 25:4, 15
fertilizer 7:4; 8:2, 3;
20:17; 22:3, 5; 35:6, 10;
54:5, 9; 61:22; 70:4, 16
few 49:4
fill 25:10
final 18:10; 24:15; 31:22;
41:19; 46:16; 49:7
finalized 41:21
find 9:3; 45:4; 52:6;
64:22; 65:1, 6, 7; 68:13;
69:7; 71:5, 16; 72:5; 73:10
finite 44:22
first 6:16, 16; 11:20; 14:8;
18:19; 31:16; 32:8, 16, 18;
33:4; 48:2; 52:3; 53:10;
64:2; 68:22; 70:3, 18, 20;
71:12
fit 12:3; 18:6; 26:19; 38:10
five 3:15; 4:15
floodgate's 24:20
flows 39:1
focus 15:17; 39:4; 40:1,
4; 60:6
focuses 46:17
focusing 39:18
follow 10:5; 25:22
following 33:9
forgive 34:3
form 20:5; 43:22; 49:3
formulated 24:3, 4, 6;
49:9

forth 10:10; 40:13; 41:3;
43:9; 44:22; 49:20; 63:9
forward 3:18; 31:12
found 63:1; 72:10
foundry 26:7
fourth 58:13
framed 11:20
framework 47:2
frankly 25:14; 71:20
free 34:22; 64:5
full 72:14
Fulton 3:8, 10; 4:11, 16;
5:1; 8:21; 9:20; 17:2, 11,
16; 18:8; 19:11; 22:8;
23:13, 21; 25:4; 26:21;
27:16; 28:7, 19; 29:1; 31:2,
6; 34:6, 8; 44:13; 45:15;
46:6, 12; 51:4, 12, 19;
52:11, 19; 53:2; 57:1;
58:17; 59:6, 10; 63:12;
64:21; 65:2, 13; 68:10, 18;
73:7
functional 17:18
fundamentally 48:3
further 4:1; 42:16; 50:18
Furthermore 6:5

G

gain 63:18
gasoline 53:20
general 38:16; 65:17
generated 36:18; 37:14,
18; 38:9; 54:17
generation 38:5, 7, 17;
51:1
generator 14:4, 11; 27:3,
5, 9; 28:20; 29:4; 37:1;
38:12, 19; 39:21; 50:1
generator's 13:1
generators 26:22; 51:1
gets 61:2, 5
gist 52:8
given 30:10; 65:8
goes 21:16; 40:22; 60:16
goes--EPA's 35:18
Good 3:10; 5:7; 12:10;
30:18; 34:9; 68:22
govern 61:6
governing 47:9
Government 4:20
granted 52:5
greatest 22:9
ground 25:20
guess 65:14; 69:2
guidance 60:4, 7, 10, 14

H

hands 7:9
hang 70:17, 19
happened 56:10

happening 37:21
happens 60:18; 61:4
hazard 28:8
hazardous 14:6, 8; 16:2,
8; 26:8; 27:7, 18, 20, 21;
28:11, 15, 17; 29:13, 19;
36:21; 40:16; 49:22;
50:22; 51:1, 3; 58:14, 16;
60:17; 61:5, 12, 18, 19;
71:3
heard 41:9
hearing 3:18; 73:8
heartstrings 25:13;
67:22
heavy 17:9
held 35:11; 62:16; 64:3;
65:18, 18
help 9:10
helpful 19:2; 73:11
hence 55:17
here--but 64:11
high 7:15; 8:4; 17:17;
21:8
highlight 62:22; 64:2
highlighted 39:14; 41:2
hinge 29:4
hoc 6:3
hold 5:20
holding 66:7; 67:15
Honor 9:17; 10:2; 16:11;
18:3; 21:20; 23:4; 25:12;
34:5
Honor's 11:1
Honorable 3:8
Honors 5:7
hope 11:1
hotline 64:12
Howmet 3:5, 14; 4:7, 9;
5:6, 13, 20; 6:21; 7:1, 2, 5,
21; 8:1, 9, 12; 12:10, 11;
16:18; 17:4; 19:13; 20:8,
15, 19; 30:2; 34:16, 19;
35:6, 8, 10; 36:2; 37:6;
38:2; 39:6, 17; 41:2, 9;
45:1, 8, 16, 18; 48:18;
49:1, 2, 4; 51:5; 53:16;
55:12, 22; 56:12; 62:11;
63:16; 67:4, 7, 16; 68:14,
21; 70:5
Howmet's 7:2; 8:7;
17:15; 25:10; 40:20; 49:8;
55:10; 67:8; 70:7
hydrated 54:20
hydroxide 6:19; 7:15;
8:4; 17:7; 48:20, 22; 72:8
hypothetical 25:6

I

i.e 66:3
idea 18:15; 48:14; 50:17;
51:22; 57:9, 10; 63:13;
68:5; 70:12, 17
identical 19:7, 10; 42:17,
20; 43:4, 5, 6, 7, 10, 16, 16
identified 14:7
identify 4:6; 9:10
if--in 56:7
II 4:19
II's 72:4, 6
illustration 44:15, 17
imagine 68:8
implements 63:8
implicated 24:10, 13, 16
implications 22:10;
23:22
implied 42:2
implies 48:9
importantly 59:17
importing 46:7
impression 22:18
impurities 17:21
incidental 21:10
includes 22:15
inconsistent 18:1; 63:2
incorrectly 41:15
incumbent 25:14; 27:5
indeed 71:3
indicate 17:3
indicated 9:13
indicates 20:6
indicating 17:17
indicia 21:15
indicta(ph 55:9
indulgent 4:3
industrial 26:12
infer 43:15
ingredients--those 25:1
inherent 57:11
initial 10:5; 18:19; 19:8,
10; 32:5; 42:18; 43:1;
46:17, 20; 48:10; 52:10;
53:9
inquiry 56:12
instance 29:5; 52:3
instance--again 54:10
instead 35:7; 68:2
instructive 53:15
intended 22:19; 26:11;
43:16; 45:21; 50:10; 73:5
intent 18:13; 28:12, 19;
29:4; 41:8; 72:13
interchangeable 32:20
interesting--at 72:9
interesting--that 72:10
internet 66:9
interplay 69:5
interpret 53:3
interpretation 24:10;
25:10; 30:3; 64:17; 65:11,
12; 67:9; 68:7
interpretations 63:2
interpretative 18:14;
52:12
interpreted 63:6

interpreting 52:16
interrupt 41:14
intertwined 12:10
into 8:13; 9:3; 11:11;
21:9; 24:21; 26:13; 30:7;
46:7
introduced 50:4
invite 63:15
involve 9:5
involves 21:6
ions 17:7; 48:20, 22
IPA 54:17; 55:3
irrelevant 10:17
is--a 37:22
isopropyl 54:16, 18
issue 6:9; 30:1, 17; 34:16;
66:8, 12
issued 64:1
issues 3:19

J

January 21:2; 35:22;
37:7
John 4:9, 20
joint 39:2
JUDGE 3:10; 4:11, 16;
5:1; 8:5, 11, 16, 21; 9:20;
10:3; 11:7, 13; 12:5, 8, 17,
22; 14:3; 15:5; 16:6, 12,
17; 17:2, 11, 16; 18:8;
19:11, 12, 19; 20:2, 14;
21:1; 22:7, 8; 23:13, 21;
25:4; 26:21; 27:16; 28:7,
19; 29:1, 9, 16, 21; 31:1, 2,
6; 32:13; 33:1, 16; 34:2, 6,
8; 35:13, 16; 36:16; 37:12;
38:4; 39:3; 41:18; 42:3, 19;
43:4, 11, 14, 19; 44:2, 13,
14; 45:15; 46:6, 12; 47:2,
11, 18; 48:14; 50:3; 51:4,
12, 19; 52:11, 19; 53:2;
56:11, 17, 22; 57:1; 58:17;
59:6, 10; 60:2, 15; 61:2,
12; 62:5, 10; 63:12; 64:21;
65:2, 13; 66:7, 21; 67:10;
68:5, 10, 18; 72:1; 73:7
Judges 3:8
jurisdiction 13:16, 17;
14:2; 70:9
justification 44:17

K

Kathie 3:8
keep 14:16
kick 60:19, 21
kind 9:13; 22:17; 44:11;
69:4
knowledge 62:6
known 6:19
KOH 6:19, 21; 7:1, 3, 5, 9,
13, 13, 16, 20, 22; 8:1, 6, 8,
13; 9:13; 11:3, 4, 4, 18;

13:22; 15:3; 17:3, 8; 18:5;
20:10, 12, 22; 33:14, 18,
21, 22; 34:17, 19, 20, 22;
35:10; 48:19; 49:3; 53:16;
61:21; 62:2; 68:14

L

land 25:17; 26:13, 20;
62:4
language 6:6, 7; 10:9;
35:20, 21; 36:11; 37:2;
44:18
large 67:19; 68:9
late 66:14
later 66:19; 70:19
LDR 62:1, 9
LDRs 62:7
leaking 32:18
least 15:10; 35:1; 36:7;
72:4, 9
leave 50:8
leaves 22:18
left 4:8; 6:8; 23:1, 6;
31:17; 50:13; 55:18; 65:2
legal 30:14
legally 65:15
legitimate 21:15
length 19:17; 20:13
less 66:22; 70:8
letter 53:6, 12, 19; 63:7;
66:12; 69:13; 70:2, 16, 22
letters 36:9; 52:18; 53:1;
57:17; 60:8, 9, 11; 64:9,
15; 65:9, 14, 18, 20
letters--do 52:21
letters--l 65:13
letters--it 58:2
level 57:6
liable 5:20; 30:3
light 18:10; 47:5
limit 12:2
limitations 27:21
limited 46:19; 71:18
lined 25:19
lines 30:13; 67:3
linked 36:20
linking 32:15, 16
liquid 8:9, 19; 72:7
list 22:15, 16, 17; 26:6
listed 14:7; 26:7; 49:12
lists 40:14
little 25:5; 35:14; 39:3;
47:4
load 28:13; 29:6
locate 19:22
long 6:11; 31:4; 53:21;
64:11
longer 7:1; 14:13; 17:3,
14, 18; 18:6; 36:14; 37:17;
38:1; 54:20; 55:19; 58:9,
18
longer--suddenly 67:20

look 3:18; 9:20; 12:6;
13:9, 19; 14:3, 9; 15:9;
18:20, 21, 21; 22:11; 33:3,
4; 37:12; 39:16; 40:21;
44:15; 46:20; 48:10; 50:7;
51:21; 59:3
looked 54:10
looking 12:6; 32:8; 48:17;
51:9; 52:9; 59:1; 64:21
loop 12:19
low 16:15

M

magnitude 68:6
maintains 37:6
makes 56:3; 71:5, 12
makeup 12:15
making 26:17; 27:4
management 45:14
mandate 47:16; 51:1
mandates 48:9
manner 22:14; 35:7;
42:16; 56:8; 58:11
manufactured 49:10
manufacturer 8:12;
15:8; 49:11, 11, 11, 13, 17;
52:2
manufacturer's 12:20
manufacturing 6:20;
7:4; 20:9
many 6:21
material 5:11, 14; 6:3, 9,
10, 17, 18; 7:5; 8:12; 13:4,
5, 10, 15, 18, 22; 14:13;
15:1, 1; 16:3, 7, 13, 15, 16,
19; 21:13; 24:1, 9; 25:11;
26:11; 27:11, 16, 20; 28:1,
22; 29:9, 13; 31:15, 16;
32:5, 6, 9; 33:8, 19; 34:18;
35:12, 12, 19; 36:5, 12, 15,
19; 37:1, 5, 10, 15, 15, 22,
22; 38:2, 20, 21, 22; 39:5,
7, 8, 16; 40:2, 18, 19, 21;
41:1, 5, 5, 11; 42:16; 44:7,
9, 10; 45:1, 5, 7; 46:18, 22;
48:5, 10; 49:7, 8, 14;
51:15, 16; 52:1, 2, 10;
53:10, 14; 54:1, 6, 11, 13,
18; 55:4, 9, 12, 13, 16, 17,
17, 19, 21; 56:2, 3, 4, 4, 14,
14, 15; 57:7, 13, 14, 17,
19, 20, 21; 58:1, 2, 4, 6, 7,
20, 21; 60:16, 17, 19;
62:15, 17; 63:6, 9; 64:19;
68:3, 14; 69:9, 11, 16;
70:6, 13, 14, 18; 71:5, 6,
10, 13; 72:3, 7, 16; 73:5
material--and 53:14;
57:22
materials 5:9, 19; 12:19;
13:12; 21:9; 22:13, 16, 19;
23:1, 4, 12; 26:2, 9, 15;
27:1; 31:20; 40:8, 10, 13,
15; 42:5; 47:6, 9, 17, 19;
48:4, 12, 13; 51:2; 56:7;
57:15; 61:21; 63:22;

71:20; 73:2, 3
matter 3:5; 4:20; 25:16;
40:17
matters 69:2; 70:11
may 3:15; 9:3; 19:6;
33:10; 46:19; 49:2
Maybe 9:20
McDonald's 25:20
me--a 23:8
mean 10:15; 15:11;
22:11; 37:20, 21; 41:8;
43:7, 16; 45:22; 50:6, 10,
19; 51:19; 59:14; 67:14
means 51:8
meant 11:21; 60:10
meet 39:12; 62:7
meets 62:1
members 69:10
mention 8:22
merely 41:20
met 20:15
metal 6:22; 7:6; 14:21;
17:22; 34:20; 44:4
method 26:3
might 9:5; 15:7, 11; 27:1;
30:7; 37:6; 44:19; 61:10
mike--here 54:7
Milsov 55:16, 16; 56:1, 3,
10
mind 14:17; 21:1; 47:4;
50:8
minute 31:7, 11; 51:6
minutes 3:14, 16; 4:15
misapplied--if 42:2
mix 8:3
mixture 22:3, 5, 6
modification 9:14; 42:13
modified 41:4; 62:15
modifying 43:22
monetary 19:13
money 19:20
MOORE 4:8, 8, 13; 5:4, 7;
8:5, 8, 14, 18, 21; 9:16;
10:1, 22; 11:19; 12:7, 9,
17, 21; 13:2; 14:16; 15:15;
16:10, 14, 20; 17:5, 13;
18:2, 17; 19:15, 21; 20:6,
18; 21:20; 22:8; 23:3, 16;
24:11; 25:12; 27:3; 28:2,
10, 21; 29:3, 15, 18; 30:14;
31:4, 10; 32:17; 33:6; 34:5,
6, 7, 11
Moran 11:7
Moran's 33:16
More 5:9; 11:12; 12:3;
16:17; 18:12; 24:5; 43:19;
51:6; 69:15, 15, 19, 19, 20,
21, 22; 70:2, 6, 7; 71:6, 12
more--typically 24:5
morning 3:10, 11; 4:12;
5:7; 34:9; 68:22; 69:1
most 48:2
move 47:22
moved 42:7

moving 46:5
MSDS 60:22
much 20:8; 37:19; 39:10;
48:1; 49:18
multiple 10:15; 12:11, 12;
33:22; 37:4; 48:16; 49:2, 3,
5
multiple--excuse 55:2
multiuse 11:4; 33:13
must 26:17; 40:18; 45:22
myself--EPA 54:10

N

name 4:18
narrow 15:7; 24:5
nature 58:19
near 58:20
neatly 51:7
necessarily 33:4; 43:7;
45:19
necessary 22:5
need 6:5; 18:21; 27:12,
14; 29:7, 11; 57:13; 59:2;
64:4, 5
need--we 14:22
needs 24:20; 67:3
neutralize 35:9
neutralized 8:3
neutralizer 59:19
neutralizing 21:6; 22:2
new 64:17
newly-cast 17:22
next 7:8, 19; 16:4; 30:20
nicely 50:21
no--there 60:12
none 71:6
nonetheless 22:13; 30:6
nonsensical 48:6
not--it's 52:3
not--the 56:20
Not--yes 59:8
noted 17:16
notice 6:2; 21:2, 2; 30:1,
5; 59:22; 60:13; 62:11, 12;
63:1, 22; 64:3, 16, 22;
65:6, 7, 8, 15, 15, 17, 19,
19, 20; 66:6, 13, 14
noticed 62:14; 66:3
notion 20:4; 24:4
Now,--(off) 54:7
Number 3:7; 22:16; 35:5
Numbers 3:6

O

object 66:15
obligations 62:20; 64:5
obtain 66:9
obviously 50:2
OECA 4:21

off 16:15, 21; 28:1, 4; 45:9; 66:1; 72:15
Off-mike 43:13
off-site 34:22; 54:4, 22; 55:1
offer 64:17
offered 44:16; 60:8
offside 27:17
on-line 64:13
Once 34:20; 44:4; 55:18
one 5:11; 6:21; 8:22; 9:7, 18; 11:12; 12:3; 13:12; 15:6; 20:2; 21:21; 32:21; 33:10; 38:22; 45:11; 57:2; 63:18; 71:7, 22
only 6:1; 19:4; 20:7; 23:19; 26:3; 29:4; 35:11; 44:5; 47:14; 48:11; 57:14; 61:9
operations 6:21; 7:2, 6; 8:1; 20:9
opposed 12:22; 52:2; 64:1
or--it's 31:7
oral 3:5, 22; 5:5; 34:12; 73:15
Order 3:12, 13; 5:20; 33:16; 41:13
original 10:10, 13, 19, 20; 11:14, 16, 22; 13:10; 14:14; 18:9, 21; 19:1, 5; 31:22; 39:16; 41:6; 42:7; 43:3; 44:1; 46:4; 49:16; 50:17; 52:8; 55:20; 57:2; 58:9; 71:13; 72:2, 7; 73:5
originality 18:15, 18; 46:8
originally 45:7; 54:11; 58:8; 72:16
otherwise 20:16; 30:7; 42:2
ourselves 9:3
out 11:7; 20:11; 32:1; 34:16; 47:15; 60:11; 71:16
outside 9:6, 9; 23:14; 28:5; 67:6; 70:8
over 13:11, 18; 25:2, 2, 2, 3, 3; 53:22, 22, 22
overall 50:22; 58:3

P

page 21:2; 40:10
paid 19:13
paragraph 35:5
park 68:4
part 6:16; 14:7; 18:13; 24:15; 57:8, 11
particular 45:1; 49:13; 53:2, 15; 59:18; 66:11, 12
particularly 15:12; 23:22
parties 3:18; 9:3; 34:3; 73:9
parts 14:15; 17:22

passage 21:17, 21; 22:12; 24:2
path 28:1
pay 30:21
penalty 30:8, 11, 19, 21
people 15:13; 66:9
per 37:10; 40:5; 60:10
perception 10:6
perhaps 41:15; 50:15
period 35:2, 3; 64:11
permitting 27:12
person 14:5; 52:1
perspectives 3:19
Pete 4:21
pH 8:3; 16:15; 21:10; 22:3; 35:9; 59:16; 63:10
phase 30:20
phosphoric 57:18
phrase 43:1; 52:16; 53:3, 5; 57:22
pick 17:5
picture 39:2
Pirkle 35:4
place 72:19
placed 21:19; 26:13; 62:4
places 37:11
plain 6:6; 35:20
plant 16:19
play 47:4
Please 3:9
plural 11:3, 8
podium 9:18
point 8:17; 9:12, 21; 11:7; 13:9, 17; 14:13; 15:22; 16:1, 2, 2; 28:18; 29:7; 39:20; 46:2, 3; 47:6; 48:18; 58:14, 22; 70:1, 20
point--and 13:8
pointed 34:16; 52:12; 71:16
points 13:3
policy 64:12
posed 25:6
posing 21:5
position 65:2
potassium 6:18; 7:15; 8:2; 17:6; 22:4; 35:9; 48:19, 21; 59:20; 72:8
potential 20:3; 21:4, 5, 7; 50:4
potentially 29:10
practice 56:13
preamble 10:9; 36:1; 37:7, 9; 40:5, 6, 22; 42:22; 46:15; 48:11; 50:11; 51:11; 52:7; 55:7; 57:12; 62:13, 19; 63:10; 65:4, 8; 71:17
preamble--is 39:15
preambular 52:13; 63:15
preclude 19:9
precluded 30:10
predecessor 37:5

preliminary 40:17
preoccupying 58:19
prepared 3:21; 30:16, 20
present 5:2; 21:15; 46:9
presented 3:19; 4:2; 73:3
presenting 4:11, 13, 14; 9:8
presiding 3:9
presumably 39:11; 70:6
pretty 59:17
prevail 30:22
previously 31:19
primary 3:22; 22:4; 34:16
prior 47:3, 18; 56:13
probably 22:8; 39:18; 70:9
problems 48:1
proceed 3:11
proceeding 3:15
PROCEEDINGS 3:1
process 6:15; 14:6, 12, 20; 15:8; 17:10, 15; 18:14; 26:12; 29:8; 38:6, 17; 53:22; 61:13; 67:2, 12; 71:5, 15
processed 7:20
processing 6:13; 7:11; 8:6; 14:2; 24:17, 18; 25:3; 37:18; 38:9; 56:2
produce 15:13; 32:19; 33:13; 39:8; 61:21
produced 6:12; 7:11, 13, 13; 11:3; 12:4; 13:5, 20; 14:10, 12, 18, 19; 15:1, 6, 10, 11; 18:22; 19:3; 23:7, 9; 29:17; 31:15; 32:5; 33:3, 18; 36:15, 22; 37:14; 38:7, 12; 39:5; 42:7, 8, 12; 50:5, 8, 17, 18, 21; 51:13, 13, 21; 52:17; 67:13; 70:14; 71:14
produces 14:6; 15:8; 38:6
producing--depending 51:17
product 11:5, 12; 13:20; 15:3, 9; 16:5; 18:20, 22; 19:3, 14; 20:7, 10, 15, 17, 20, 22; 23:7; 24:5, 7; 26:13, 19; 27:10, 10; 28:16; 33:11; 40:21; 44:9; 49:10, 13; 53:17; 58:6, 22; 62:1, 3, 5
product--contaminated 58:5
production 14:20, 21; 15:8, 16, 17, 18, 19; 32:19; 36:17, 22; 38:14; 39:19; 50:5; 54:5, 9
products 14:19; 23:19; 24:3; 26:18; 72:14
products--and 25:1
profound 23:22
profoundly 24:10, 13
program 51:22; 63:20

prohibited 44:19
promulgate 47:16
promulgated 5:17; 6:14; 26:16; 60:4
promulgating 26:15
promulgation 32:1; 36:6; 60:13
proposal 11:20; 31:19; 41:3, 16, 21; 46:16; 47:3, 12
proposed 11:14; 18:9; 23:10; 41:3, 4; 42:14; 43:22; 46:9
props 31:9
protect 72:22
Protection 3:4; 34:13; 61:3
protections 72:18, 20
provide 64:15; 66:14
provides 22:4; 49:21
providing 7:14; 22:2
provision 22:22; 23:4, 5, 6
provisions 23:14
public 42:9; 60:13; 62:14, 16; 64:7; 65:19; 66:3, 6; 72:22
publicly 63:22; 64:1, 10; 65:10, 22; 66:5, 10
pull 66:1
pulls 67:22
pun 69:11
purchased 20:11
purchaser 49:15
pure 57:19; 69:15, 19; 70:15; 71:6, 12
purporting 18:11
purpose 6:12; 7:10, 12, 14; 10:10, 13, 15, 21; 11:10, 15, 17, 18; 12:6, 9, 13, 14, 20; 13:1, 5, 10, 19; 14:14, 18, 19, 22; 15:16; 18:7, 9, 22; 19:2, 3, 5; 21:11; 23:8, 9, 10, 11, 12, 20; 24:6; 29:17; 31:14, 22; 32:4, 15, 18; 33:2, 7, 7, 12, 12, 19, 20; 34:1, 2, 21; 36:14; 37:3, 17; 38:1, 8; 39:9; 40:1; 41:6; 42:8; 43:3; 44:1; 45:3, 11, 11; 46:4, 5; 47:1; 48:8, 8, 15, 19, 20; 50:17; 51:9, 14; 52:8, 17; 53:3; 54:3, 21; 58:7, 9; 59:1; 70:14; 71:13; 73:5
purpose--and 33:15
purposes 10:3, 20; 11:2, 4, 8; 12:12; 14:1; 26:21; 29:11; 33:18; 48:8; 49:12; 59:20; 65:16
put 25:18; 51:6; 66:4, 18
putting 31:12; 68:2

Q

question's 34:4
question--we 11:2
quickly 68:11; 72:5
quite 25:14; 38:10; 46:3; 59:18; 68:9
quote 40:14; 42:17
quote/unquote 46:17; 57:22; 60:13

R

Raack 4:21
raised 30:17
ramifications 67:6, 15
raw 40:9; 44:8
RCRA 3:7; 5:21; 12:18; 14:10; 15:12; 26:2; 27:11; 30:9; 61:9; 64:12, 12, 13; 72:21
RCRA-02-2004-7102 3:7
RCRA-06-2003-0912 3:6
re-regulation 63:10
reaching 73:11
read 50:7; 52:4
reading 31:18; 32:10
real 68:11
really 20:5; 23:19; 29:22; 32:14; 39:14; 44:14; 45:20, 22; 51:8, 8; 58:3, 22; 59:7; 67:19
reason 13:18; 29:5; 64:16
reasons 21:21
rebuttal 3:16; 4:14, 15; 68:20; 69:6
recall 24:1; 25:7
receive 61:18
received 7:20, 22; 8:12; 35:6; 55:12, 14; 62:2, 12, 16
recently 36:10
reclaimed 56:1, 9
reclamation 56:2
recognize 18:3
record 4:6; 8:16, 19; 9:1, 6, 10; 19:12, 16; 20:4, 14, 18; 42:4, 4, 9; 56:11, 17, 19, 20
Recovery 5:21; 72:12; 73:1
recurring 21:4
recycled 22:12; 40:16; 47:6, 9, 19; 48:5
recycled--a 51:17
recycling 20:3, 5; 21:4, 5, 15; 27:19; 38:21; 40:7; 47:17; 48:3
redraft 51:5
reduced 53:20
reduction 38:17

reference 9:5; 22:15;
43:3
referenced 69:17, 18
referred 53:16
refers 69:14
refined 53:20
reflect 19:12; 20:14, 21;
42:4; 56:11, 17, 19, 20
reflected 34:3
reflects 19:16
refrain 28:6
refuses 5:16
refute 20:4
reg 30:3; 46:3, 8, 9
regarding 29:2; 42:12;
49:5; 63:3
Region 4:19, 21; 25:6;
72:4, 6, 6
Region's 17:19
Register 10:8; 21:2;
42:22
regs 68:15
regulate 40:9; 45:12;
67:2, 12
regulated 22:13; 25:11;
36:10; 47:6; 49:14; 52:15;
55:9; 59:11; 60:4, 11;
67:17
regulating 57:14; 64:20
regulation 5:9, 17; 6:6, 8;
11:9, 11; 13:4, 6, 11; 14:9;
17; 15:2; 18:4, 7, 10, 10,
16; 22:11; 23:12; 24:15;
26:2, 15; 31:13, 18, 20;
32:10, 12; 33:16; 36:3, 12;
39:13; 40:7; 41:8, 10, 12,
16, 18, 20; 48:2, 4, 7; 49:8,
19; 50:7, 14; 51:5, 8;
57:12, 12; 62:9, 12, 20;
64:4; 65:4, 9; 66:15, 17;
69:3, 17, 18; 71:7, 9, 11
regulation's 13:3
Regulations 5:16; 6:1;
11:14; 14:4; 35:21; 37:13;
47:8, 16; 50:6; 60:18, 20;
61:6, 9, 10; 65:12; 66:22;
67:3, 13; 69:8; 72:14
regulatory 5:10; 6:6; 7:8;
38:15; 39:2; 41:21; 44:18;
47:2; 49:20; 72:20
Reich 3:9; 10:3; 11:13;
12:5, 8; 29:21; 31:1; 32:13;
33:1; 39:3; 42:19; 43:4, 11,
14, 19; 44:2, 14; 48:14
reinforced 35:21; 37:7;
39:15; 62:19
reiterated 36:4
reiterates 63:8
reiterations 64:18
reject 48:14
relates 39:20; 57:2
relating 57:6
relaxing 44:17
relevance 10:11
relevant 35:2

relies 69:14
rely 66:5
remained 57:19
remaining 27:2
remains 19:2
remarks 3:21
remember 26:1
repeating 54:10
replace 32:21
representing 4:19
request 68:12
requesting 34:14
requests 52:15
require 37:3
requirement 61:22
requires 7:12; 39:15
researched 30:15
reserve 3:15
Resource 5:21; 72:11, 22
respectfully 68:12
respond 39:19
response 9:7; 52:14
responsible 51:2
responsive 4:4
rests 25:17
result 6:11; 14:20; 19:6;
36:13; 37:16; 70:3
resulting 21:9
results 7:16
reuse 55:3
reused 28:17; 53:22;
55:2; 62:2
reusing 73:1
revise 67:3
rewrite 5:18; 6:1; 32:12
rewriting 36:2
Right 16:6; 43:11; 59:7;
73:13
Riley 4:9, 14; 31:9; 68:19,
22
rise 3:2
road--what 61:4
Royster 7:4, 20, 21, 22,
22; 9:13; 11:16; 19:13;
20:7, 11, 16, 19, 22; 28:14;
29:6, 7, 10; 34:22; 39:10;
45:2, 9, 10; 55:10, 11;
56:14; 61:5, 13, 17
Royster's 7:9; 8:1, 3;
20:9; 22:3
Royster's--well 22:6
Royster--if 60:16
Royster--so 61:3
Royster--went 60:16
Royster-Clark 7:3
rule 46:16; 47:15; 62:13,
13; 63:14
rulemaking 6:2; 42:6, 10
rules 28:7, 8; 35:22
run 66:20
rusty 47:4

S

same 43:6; 49:1; 59:4, 6,
9; 67:14
sand 25:6, 8, 9, 18, 18;
26:7
sandbox 25:9, 19, 19, 20;
67:21, 21; 68:1, 3
saves 39:11
saying 39:5; 45:16, 18,
20; 59:7
scenario 10:11; 44:22;
59:14
scenarios 59:14, 17;
64:19
scheme 14:10
Scott 3:8
se 37:10; 40:5; 60:10
seated 3:9
second 26:4; 28:14; 48:7;
58:18
secondary 21:13; 40:8,
15, 19; 47:17; 48:12;
57:14, 15, 21, 22; 58:1, 4;
61:20
Secondly 60:15
see--it 17:20
seek 70:22
seem 10:13; 37:18; 38:9
seemed 10:10
seems 10:5; 15:5; 38:6;
39:6; 44:16; 50:11; 57:4;
70:21; 71:1
sees 48:1
send 28:1; 39:9
sending 56:13
sense 15:7, 7; 18:18;
37:19; 50:13
sent 34:21; 54:4, 21; 55:1,
3, 15; 60:11, 22; 64:19
sent--HAZMAT 60:22
sentence 5:11, 12; 43:2;
71:7
serve 6:11; 7:10; 11:3;
12:3, 4; 13:20; 14:1; 18:6;
29:16; 36:14; 37:17; 38:1;
48:19
served 41:6
session 3:2, 4
set 49:19; 63:9
sets 40:13; 43:9; 44:22
sham 20:3, 5; 21:4, 5
sheet 60:22
shelf 16:15
shifted 7:3
shifts 49:22
ship 28:13, 15
shipped 27:17; 29:6;
45:9
shows 31:17
sic 35:6; 40:18
side 3:13

signed 37:8
similar 42:17, 19, 21, 21;
43:7, 9, 17; 59:1, 6, 6, 8, 8,
12; 71:15, 18
similarity 57:4
similarly 63:17; 70:5
simply 18:5; 41:16; 48:4,
6; 49:19; 57:20; 64:18;
71:12, 19
Simultaneous 43:12
single 5:12; 12:2, 13, 16;
14:19; 23:8, 8, 8, 20, 20;
29:5; 33:11, 11, 14, 22;
40:1
singular 10:15; 37:3;
48:15
sit 31:7
site 28:15; 66:2
situated 63:17
situation 21:5, 17
situations 21:8
so-called 20:3
sold 27:18
sole 60:7
solid 15:21; 16:1; 27:6, 6;
36:21; 39:1; 40:14, 15;
51:3, 17; 54:6; 55:21; 56:5,
7; 58:10
solitary 12:14
solution 8:9, 20; 14:12;
72:8
solvent 34:20; 35:7, 11;
44:11, 12; 45:2, 6, 8;
46:21, 21; 54:19; 55:6, 8,
12, 14; 59:15, 16, 19
solvent(ph 44:5
somebody 28:13
somehow 69:18
somewhat 50:10, 15
sort 22:9; 51:5
sorts 22:20
sound 20:20
source 7:14; 8:2; 20:10;
22:4; 35:8; 48:19; 59:19;
61:11
speak 19:16; 24:22;
31:11; 33:17; 35:14;
36:22; 64:8
speaking 4:22; 32:4
speaks 6:17; 8:19; 11:9;
14:17; 20:18, 19; 53:4
specific 24:6; 50:14;
52:13
specifically 5:9; 19:8;
26:6; 40:6, 8, 13, 14, 22;
42:12; 43:9; 46:15; 47:15;
48:11; 57:12; 60:5; 63:11
specifically-defined
23:5
specifications 20:16, 21
specified 3:13
specify 19:19
speculative 20:12; 27:13
spent 5:8, 11, 14, 19; 6:3,

9; 13:13; 16:3, 8; 22:15,
18; 23:1, 3, 12; 26:2, 9, 15;
27:11; 31:20; 34:17;
35:12, 19; 36:5, 12, 19;
37:10, 15; 38:21; 40:13,
18; 41:1, 5, 11; 45:5, 18,
19, 22; 46:22; 49:8; 51:16;
53:14; 54:1, 6, 12, 18;
55:17, 19, 21; 56:4, 4, 7,
15; 57:13; 58:2, 7; 60:17;
62:15, 17; 63:6, 9; 64:19;
68:14
spent--there 35:18
spoke 11:2, 7; 31:21
standard 49:20, 20
standards 62:1
standpoint 63:22
stands 73:14
start 15:2
starting 4:6
state 38:14; 41:9; 47:4
stated 34:19; 42:15; 48:3,
9; 55:8; 66:13
statement 16:21; 17:2;
23:17; 26:17; 63:15
statements 18:1, 1;
52:12; 57:6
States 3:3; 40:6, 8; 48:11;
51:11; 53:19; 57:13
stating 64:15, 16
statute 12:18
statutory 30:9
stay 70:11
Stein 3:8; 8:5, 11, 16;
12:17, 22; 14:3; 15:5; 16:6,
12, 17; 19:12, 19; 20:2, 14;
21:1; 22:7; 29:9, 16; 34:2;
35:13, 16; 36:16; 37:12;
38:4; 41:18; 42:3; 47:2, 11,
18; 50:3; 56:11, 17, 22;
60:2, 15; 61:2, 12; 62:5,
10; 66:7, 21; 67:10; 68:5;
72:1
step 6:16; 7:8, 12, 19;
16:4; 38:22
still 10:20; 11:15; 12:3;
13:22; 18:14; 24:14, 20;
26:19; 29:16; 33:21;
44:10; 46:21; 69:4
stipulated 30:11, 18
stipulation 9:15; 17:11,
14; 30:12, 15; 35:5; 72:4
stipulation--and 34:3
stipulations 9:2, 17, 19;
19:16, 22; 28:5; 72:7
stipulations--but 72:6
stipulations--l 72:5
storage 27:21; 28:7, 8
store 27:19; 61:19
stored 61:7
storing 27:1
story 56:1
straightforward 6:15
strike 50:15
structure 22:10; 26:22

structures 72:21
subject 13:16; 14:2, 8;
27:20
submit 49:5; 50:20
subsequent 19:7, 9;
54:12; 55:20; 57:2; 71:14,
18; 72:15; 73:4
subsequently 53:11
substantial 57:4
substantially 58:21
substitute 21:14; 37:14;
38:7, 12
substituting 50:16
Suddenly 68:4
sufficiently 30:4; 65:8
suggest 42:6
suggested 67:4
suggesting 33:17;
41:20; 51:7
suggests 26:17
sulfuric 53:13, 16, 18, 19;
54:8
Sure 34:11; 35:15
surprising 50:10
synonymously 44:8
synonyms 32:21

T

Table 40:12; 45:5; 56:6
talk 15:15; 33:6, 14; 38:8;
41:1; 52:7
talked 30:1; 31:19
talking 15:13; 38:4;
42:13; 46:15; 64:9
talks 21:3; 71:10, 11
task 38:20
tasked 27:4
tells 45:17
term 35:19; 37:10; 41:1
terms 6:17; 8:19; 10:11;
11:2, 8, 9; 13:4; 14:17;
19:17; 20:18, 20; 31:21;
32:4; 33:6, 10, 13, 14, 17;
64:7; 68:11
tested 62:6
thanks 73:9
that's--it's 69:16
That's--yeah 48:17
that--let's 17:20
that--point 9:22
that--put 41:3
the--going 28:5
the--if 18:20
the--it 19:6
the--it's 38:5
the--thank 35:22
the--two 13:2
the--within 63:20
theory 46:13, 14; 49:18;
57:1, 8
there?--what 72:20

therefore 12:11; 18:5;
26:8; 27:11; 28:17; 29:12;
36:21; 39:11; 55:8; 69:22;
70:13
these--each 53:6
thinking 22:10; 27:1
third 21:3
those--had 47:7
though 33:2; 51:4; 57:19;
66:4
thought 33:1; 39:21
thread 57:5
threefold 58:4
throughout 15:3
thrown-away 12:19
thrust 11:5
thus 53:12
tie 50:21
tier 58:18
timeliness 66:16
timely 66:16
title 72:10
to--hear 52:22
to--that 25:16
to--we 43:14
tobacco(ph) 22:6
today 33:15; 34:14;
72:11; 73:8
together 39:1; 70:17, 19
too--I 23:16
took 20:7
Tradco 55:4, 4, 11, 13, 15
transaction 19:17;
20:13; 21:11
transport 60:22
transported 60:18; 61:4
transporters 61:1
treat 27:8
treated 27:21; 61:14
tribunal 36:8
true 49:2
Truly 72:18
trust 3:21; 4:3
truth 25:16
trying 13:21; 38:11, 13;
39:19; 50:13; 57:3
trying--what 38:13
turn 7:16
turns 28:19, 21
two 26:5; 36:7; 37:9;
45:20; 66:19
type 15:18; 21:4; 26:3, 6
types 25:1; 40:14

U

ultimate 49:15; 62:2
ultimately 36:20; 39:7;
45:11; 51:16; 58:10
Um-hmm 19:11; 44:2
Under 6:9; 18:7; 23:1, 12;
25:10; 27:18; 30:8, 9;

41:10; 49:8; 61:19
undermines 40:20
understood 41:15
undertaking 15:20
undisputed 7:21; 16:7
unformulated 23:13, 19;
24:3, 8, 22; 53:17
United 3:3
universe 24:1, 8, 22; 43:5
unknown 50:2
unlawful 6:4; 32:11
unless 21:14; 28:11, 12;
65:3
unreacted 48:13
unreactive 40:9
unreasonable 32:10
unregulated 47:19;
69:22
unused 13:19; 15:2;
20:11; 40:9; 69:12
unusual 50:15
up 14:22; 17:5; 31:6, 7;
35:14; 68:11
upon 25:14, 17; 27:5;
69:14
urging 71:4
usable 17:3
use 7:3, 5, 5; 11:4, 12, 22;
12:2, 6, 9, 16; 18:19, 19;
19:1, 5, 7, 8, 9, 10; 20:8;
23:20; 26:19; 28:14, 21;
29:2; 31:9, 16; 32:5, 8, 15,
16, 18, 19; 33:3, 4, 5, 7, 10,
11, 11; 37:3; 39:16; 40:1;
42:18; 43:2, 10; 44:6, 7,
10; 45:3, 6, 8, 13; 46:17,
20; 48:10; 50:5; 52:10;
53:9; 55:6, 7, 12, 17, 20,
20; 56:7; 57:2, 4, 16; 61:1,
13, 20; 68:3, 14; 69:6, 10;
70:3, 3, 7, 18, 20; 71:12,
18, 18; 72:14
use--a 23:8
use-contaminated 58:5
used 6:10, 18; 7:1, 3, 22;
8:9; 9:13; 10:12, 20; 11:16;
13:22, 22; 14:14, 18;
16:18; 17:9, 20; 20:7, 10,
15, 17; 21:13; 22:13; 23:9,
10, 11; 25:2, 9; 26:12, 18,
19; 29:11; 33:8; 34:17, 22;
35:8, 8, 11; 36:12, 14;
37:1, 6, 16, 21, 22; 38:2;
40:2, 2, 19; 41:5; 42:6, 16,
16; 44:4; 45:1, 2, 7, 10;
46:21, 21; 51:9, 13, 14;
53:11; 54:2, 5, 8, 11, 18,
21; 55:4, 13, 16, 19; 57:7,
19; 58:1, 8, 9, 11; 59:1, 3,
3, 15, 15, 18, 19; 61:7, 21;
67:13; 69:17; 70:13, 14,
16, 18, 19; 71:14; 72:17;
73:4
user 53:10
uses 6:22; 7:18; 10:15;
12:3, 11; 25:8; 27:2; 33:9,
9, 22; 48:7, 16; 49:2, 3, 6,

6, 15; 54:12; 57:3; 71:5;
72:15
using 15:6; 21:6; 35:7;
50:16; 51:15; 52:1
utilized 34:19

V

vacated 47:7
value 3:22
varies 45:21
various 7:17, 17; 64:19
versus 33:7, 18
VI 4:21; 72:6
via--there's 64:11
view 67:5
violated 68:15
violations 5:20; 35:3, 3
virgin 13:11, 15, 18, 20;
21:14; 25:8; 37:5; 39:8;
40:21; 48:4, 5, 12; 49:3;
54:7; 57:20; 58:21, 22;
69:8, 11, 22; 70:8
virginal 69:15
virtue 29:19
visit 69:2

W

waive 30:12
wants 67:2
warrants 69:4
wary 27:15
wash 55:5, 6
wasn't--in 66:16
waste 12:18; 13:1; 14:6,
8, 13; 15:14, 19, 21; 16:1,
2, 5, 8; 21:8; 26:6, 7, 8;
27:4, 6, 6, 7, 10, 18, 20, 22;
28:8, 11, 13, 15, 18; 29:6,
13, 19; 36:21; 38:5, 6, 8,
15, 18, 20; 39:1; 40:14, 16;
45:14; 49:22; 50:22; 51:3,
18; 54:6; 55:21; 56:5, 7;
58:10, 14; 60:17; 61:6, 12,
18, 19; 71:3, 3; 73:2
wastes 21:6
water 8:6, 13; 18:4; 72:3,
8
water-extracting 54:19
water-free 54:18
way 9:11; 11:17, 19; 13:3,
12, 13; 16:18; 26:16; 44:6;
45:9; 49:15; 61:3; 70:9
way--and 42:4
way--that's 35:1
ways 10:4; 15:9; 37:4;
71:4
web 66:2
welcome 3:10
what's 37:21; 52:19;
59:12; 62:3
what--it 51:12

whatsoever 49:21; 53:5
whereas 11:8; 55:13
Whereupon 73:15
wherever 65:7
Who'd 49:7
whole 10:16; 43:5
whose 14:6, 7, 11; 15:13
windshield 55:5, 6
wishes 3:17
within 21:18, 22; 66:17
without 6:12; 7:11; 9:14;
14:1; 24:18; 25:3; 26:16;
37:18; 38:9; 65:5
WITNESS 41:14
word 11:14; 14:9; 15:6,
10; 36:17, 21; 37:3, 14;
38:12; 39:19; 42:6, 12;
48:8; 50:5, 7, 9, 16, 21;
51:21
worded 13:3, 4; 18:16
wording 41:10, 12
words 8:11; 32:20; 36:19;
40:17; 41:19; 47:11;
49:18; 66:16; 69:20; 71:17
work 12:1; 22:17; 59:12;
62:8
worked 17:7
working 9:1
workings 67:18
wouldn't--I 18:17
wrap 31:6; 68:11
write 6:3
written 5:15; 6:13; 31:13;
36:9

X

X-amount 66:17
X-date 66:19

Y

years 66:19
yields 13:6
you're--to 38:8
you--how 26:22
you--I 60:14
you--in 35:22
your--a 24:2
your--your 46:6

Lawyer's Notes
