UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
290 BROADWAY
NEW YORK, NEW YORK 10007-1866

November 14, 2005

Priority Overnight Mail

Clerk of the Board
Environmental Appeals Board
United States Environmental Protection Agency
1341 G Street NW- Suite 600
Washington, DC 20005

Re: In the Matter of Howmet Corporation
Docket Nos. RCRA-06-2003-0912 and RCRA-02-2004-7102
Response Brief to Howmet's Notice of Appeal and Supporting Brief

Dear Sir or Madam:

Enclosed for filing in the above referenced docket, please find one original and three copies of EPA's Response Brief to Howmet's Appeal of Initial Decision.

Respectfully submitted,

Amy R. Chester
Assistant Regional Counsel

Enclosures

cc: Response Brief Certificate of Service List

SUPPLEMENTAL CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2005 a copy of EPA's Response Brief to Howmet's Appeal of Initial Decision (Docket Nos. RCRA-02-2004-7102 and RCRA-06-2003-0912) was sent to the following persons in the manner indicated:

By Hand Delivery:

Karen Maples
Regional Hearing Clerk
290 Broadway, 16th Floor
New York, New York 1007

By First Class Mail:

Lorena Vaughn
Regional Hearing Clerk
United States Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Date: November 14, 2005

Mildred Baez

Original

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD

In the Matter of :
Howmet Corporation

Appellant

Docket Nos. RCRA-02-2004-7102
RCRA-06-2003-0912

Proceeding Under Section 3008 of the
Solid Waste Disposal Act, as amended

EPA'S RESPONSE BRIEF
TO HOWMET'S APPEAL OF INITIAL DECISION

Submitted by:

Amy R. Chester
Assistant Regional Counsel
Region II
Environmental Protection Agency
New York, New York
Telephone 212 637-3213
Fax 212 637-3199

John Emerson
Assistant Regional Counsel
Region VI
Environmental Protection Agency
Dallas, Texas
Telephone 214 665-3137
Fax 214 665-3177

Of counsel:

Pete Raack
Office of Enforcement and Compliance Asssurance
Headquarters -Environmental Protection Agency
Washington, DC

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RELEVANT PROCEDURAL BACKGROUND AND STATEMENT OF ISSUES

Appellant, Howmet Corporation ("Howmet" or "Appellant"), filed an appeal of the Presiding Officer's (or "Court's") September 30, 2005 Initial Decision in the above captioned matter. The Court held that Howmet violated RCRA as alleged in complaints filed by Region II and VI of the Environmental Protection Agency ("EPA") and ordered that Appellant pay the stipulated penalty ($309,091) agreed to by the parties. Initial Decision at 3. The Court's Initial Decision followed its April 25, 2005 Order on Motions ("Order") which granted Complainants' Motions for Partial Accelerated Decision on Liability and to Strike Respondent's Affirmative Defenses ("Motion for Accelerated Decision"). Howmet's appeal focuses on the Court's Order and the liability determinations therein.

EPA's complaints were issued pursuant to Section 3008 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendment Act (commonly referred to as "RCRA" or the "Act"), 42 U.S.C. § 6928. The complaints alleged that Howmet violated RCRA and its implementing federal or authorized state regulations. They also sought injunctive relief and civil penalties.

While the case is presently consolidated, two actions were originally filed. Region II of EPA filed a complaint regarding Howmet's Dover, New Jersey facility in October, 2003 (Docket No. RCRA 02-2004-7102). Region VI of EPA filed a complaint regarding Howmet's Wichita Falls, Texas facility in September, 2003, and an unopposed motion to amend that complaint in August, 2004 (Docket No. RCRA-06-2003-0912). The complaints were consolidated on September 14, 2004 but each Region filed its own Memorandum of Law in Support of its Motion for Accelerated Decision on Liability and to Strike Respondent's Affirmative Defenses ("EPA

Accelerated Decision Memoranda").[1] Region II and Howmet entered factual Joint Stipulations regarding the New Jersey Howmet facility; Region VI and Howmet entered Stipulation of Facts regarding the Texas facility. The Joint Stipulations and Stipulation of Facts were respectively filed with each Region's Motion for Accelerated Decision. Thereafter, all pleadings/memoranda were jointly made by the Regions. The Court's Order and Initial Decision encompass Howmet's New Jersey and Texas facilities, reflecting the consolidation of these matters.

During the alleged time period, Howmet's New Jersey and Texas facilities manufactured corrosive resistant metal parts or castings for engines and generated a liquid potassium hydroxide and water solution waste stream in the manufacturing process. Prior to November 2000, Howmet sent a portion of this waste stream off-site to be used in the production of land applied fertilizer. As the Court held, the used potassium hydroxide/water solution sent to the fertilizer manufacturer constituted a solid and characteristic hazardous waste subject to RCRA jurisdiction. Howmet however: 1) sent this hazardous waste to facilities without EPA identification numbers, *i.e.*, facilities that were not authorized to receive or manage hazardous waste; 2) failed to utilize hazardous waste manifests, which would have informed both the transporter and the receiving fertilizer manufacturing facilities of the corrosive nature of the material; 3) failed to notify the receiving facilities whether the waste was too contaminated for land application without treatment; and 4) shipped the waste from its New Jersey facility to the fertilizer manufacturing facilities using a transporter that was not authorized by EPA to transport

[1] Region II filed its Motion and supporting memorandum and materials on or about August 26, 2004. Region VI filed its Motion and supporting memorandum and materials on or about October 1, 2004.

hazardous waste - all in violation of RCRA and the regulations cited in EPA's complaints. [2] Order at 21.

There are two issues before the Board. First, was the material in question a " spent material" and therefore, a RCRA regulated solid and hazardous waste? Second, if the material in question was a a spent material, did Appellant have fair notice of the regulations?

The Court correctly held that Howmet's used KOH constituted a spent material based on the plain wording of the regulation. Id at 21. Moreover, the plain language of the regulation is reinforced by the preamble, id at 15, consistent with precedential administrative case law, id at 11 n. 23, and supported by federal court decisions. Id. at 15, 21. The Court thus concluded that Respondent had fair notice of the disputed regulation. Id. at 9. Finally, although not contested by Appellant, the Court held that Howmet's spent material constituted a solid and hazardous waste and that Howmet violated the regulations as alleged in EPA's complaints. Id. at 21.

EPA will limit its response to the two issues raised by Appellant. However, if the Board adopts the Presiding Officer's ruling that Howmet's used KOH constituted a spent material and Howmet had fair notice of the regulations, the Board should further find that Howmet's used KOH constituted a solid and hazardous waste and that Howmet violated the regulations as alleged in EPA's complaints since these findings have not been appealed.

For the reasons set forth herein, EPA respectfully requests that the Board: 1) find that

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[2] Specifically, Howmet violated the following federal (or equivalent state authorized) regulations: 1) 40 C.F.R. § 262.12(c) by failing to send hazardous waste to facilities with EPA identification numbers; 2) 40 C.F.R. § 262.12(c) by failing to utilize a transporter with an EPA identification number; 3) 40 C.F.R. § 262.20 failing to prepare manifests for each shipment of hazardous waste sent off-site; and 4) 40 C.F.R. § 268.7 by failing to prepare and send land ban notifications for hazardous waste sent off-site to Royster. *See* n.6 *infra*.

Howmet's used KOH constituted a spent material; 2) find that Howmet violated the regulations as cited in EPA's complaints; and 3) order Appellant to i) manage the used KOH generated at its facilities as a hazardous waste and ii) pay a civil penalty in the amount of $309,091.[3]

RELEVANT STIPULATED FACTS

The Court's grant of accelerated decision was based on its application of the law to stipulated facts.[4] There were and remain no genuine issues of any material facts. Appellant has not raised any factual issue in its Appeal.

Because the focus of Howmet's appeal is whether its used KOH constitutes a spent material, EPA has only reiterated stipulations which relate to that point. [5]

I. Howmet's New Jersey Facility:

1. Howmet Corporation ("Howmet") owned and operated a manufacturing plant located at or near 9 Roy Street, Dover, New Jersey 07801- 4308 (the "Dover or New Jersey facility"). *See* Joint Stipulations (hereafter "Stip.") at ¶ 9.

2. Howmet manufactured precision investment castings for aerospace and industrial gas turbine applications at its New Jersey facility. Stip.¶ 4.

3. Howmet utilized a liquid potassium hydroxide ("KOH") and water ("H20") solution

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[3] *See* Joint Stipulation on Penalty Amount, filed August 25, 2005. The stipulated penalty amount consists of $151,433 for violations at Howmet's New Jersey facility and $157,658 for violations at Howmet's Texas facility.

[4] The Court's finding of liability was based solely on the parties' stipulations and admissions. Order at 9, n. 17. It should be noted, however, that EPA's filings in the underlying proceeding included three declarations, all of which the Court held were admissible and could have been considered by the Court had it been necessary. Id. EPA agrees with the Court that the facts set forth in the entered stipulations are sufficient for a finding of liability. The Declarations however are cited below (in the Statement of Facts) because they provide further support, depth and color to the action. They do not provide additional evidence necessary for a finding of liability.

[5] The Stipulations, in their entirety, are attached to Appellant's Brief as Exhibit A and B.

("KOH/H20") to leach out or remove (clean) ceramic core from metal castings during manufacturing operations at its New Jersey facility. Stip.¶ 11.

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

5. Howmet accumulated the used KOH in a storage tank at its New Jersey facility and then either: a) discarded the used KOH as a hazardous waste by sending it to an off-site authorized hazardous waste disposal facility; or b) sent its used KOH off-site to Royster-Clark ("Royster"), a fertilizer manufacturer. Stip.¶ 13.

6. Howmet's decision on whether to send the used KOH off-site to an authorized treatment storage or disposal facility or to fertilizer manufacturer Royster was entirely contingent upon Royster's need for the KOH in its fertilizer manufacturing process. The used KOH was generated using the same ingredients and process regardless whether Howmet sent the used KOH off site as a hazardous waste or to Royster. Stip. ¶ 14.

7. Howmet sent used KOH from its New Jersey facility to fertilizer manufacturer Royster-Clark, Inc. ("Royster") to be used in the production of land applied tobacco fertilizer at Royster's Plymouth and Rocky Mount, North Carolina facilities ("fertilizer manufacturing facilities").Stip. ¶ 16.

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

II. Howmet's Texas Facility:

1. Howmet owned and operated a manufacturing plant located at 6200 Central Freeway, Wichita Falls, Texas (Facility). *See* Stipulation of Facts ("Stip") ¶ 3.

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

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

4. Howmet continually used or re-used the KOH/H20 solution to clean metal castings until the solution could no longer be effectively employed by Howmet for this purpose without

being reclaimed or otherwise processed. Hereinafter, used KOH/H20 solution no longer used by Howmet to clean castings is referred to as "used KOH." Stip. ¶ 11.

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

6. Howmet's decision as to whether to send the used KOH off-site to an authorized hazardous waste treatment, storage or disposal facility or to Royster was entirely contingent upon Royster's need for the KOH in its fertilizer manufacturing process. The used KOH was generated using the same ingredients and process, regardless of whether Howmet sent the used KOH off-site as a hazardous waste or to Royster. Stip. ¶ 13.

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

STATEMENT OF THE CASE AND RELEVANT FACTS

I. Statutory and Regulatory Framework

Federal regulation of hazardous waste is primarily based on RCRA and its implementing regulations.

Sections 3001(a) and (b) of RCRA, 42 U.S.C. § 6921(a) and (b), direct the Administrator of EPA to promulgate criteria for identifying and listing hazardous waste, taking into consideration numerous factors including toxicity, corrosiveness and other hazardous characteristics. Section 1004(5) RCRA, 42 U.S.C. § 6903(5), defines hazardous waste as a subset of solid waste. The statute further defines solid waste to include any "discarded material." Section 1004(27) RCRA, 42 U.S.C. § 6903(27). Pursuant to these statutory provisions, EPA promulgated regulations for the identification and listing of solid and hazardous waste on May 19, 1980. 45 Fed. Reg. 33,073. These regulations, as amended, are codified in 40 C.F.R. Parts

260 and 261.

Section 3001(d)(2) of RCRA, 42 U.S.C. § 6921(d)(2), requires EPA to adopt standards applicable to the legitimate use, reuse and recycling of hazardous waste. Pursuant to this statutory authority, EPA promulgated regulations defining which secondary materials constitute solid and hazardous wastes subject to RCRA jurisdiction when recycled. 50 Fed. Reg. 614 (Jan. 4, 1985). These regulations, as amended, are codified in 40 C.F.R. Parts 260 and 261.

Under Section 3006(b) of the Act, 42 U.S.C. § 6926(b), EPA may authorize a state to operate a hazardous waste program in lieu of the federal program. EPA authorized New Jersey's hazardous waste programs pursuant to this statutory provision. *See* 64 Fed. Reg. 41823 (Aug. 2, 1999) and 67 Fed. Reg. 76995 (Dec. 16, 2002). EPA also authorized Texas' hazardous waste program. *See* 49 Fed. Reg. 48300 (Dec. 1, 1984). Section 3008 of RCRA, 42 U.S.C. § 6928, authorizes the Administrator of EPA to issue an order assessing a civil penalty and/or requiring compliance for any past or current violation of RCRA, including enforcement provisions of the authorized State program. The complaints issued in this action cite federal and state regulations.[6]

II. Applicable Regulatory Definitions of Solid and Hazardous Waste

Pursuant to RCRA, EPA promulgated regulations defining "hazardous waste." Consistent with the statutory definition of hazardous waste, the regulations define hazardous waste as a subset of solid waste. 42 U.S.C. § 6903(5); 40 C.F.R.§ 261.3. The definition of solid waste is the keystone in determining the parameters of EPA's Subtitle C jurisdiction. It is also

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[6] Because the state and federal regulations are essentially identical with respect to the issues in this proceeding, this memorandum will cite federal regulations. The Presiding Officer similarly cited federal regulations in his Order and Initial Decision. Appellant has not objected to limiting citations to the federal program.

the crux of Howmet's appeal.

A. Solid Waste

The regulatory definition of "solid waste" is set forth in 40 C.F.R. § 261.2. Subject to certain inapplicable exceptions, a solid waste is any discarded material including materials which are "recycled - or accumulated, stored, or treated before recycling" pursuant to 40 C.F.R. § 261.2(c)(1). 40 C.F.R. § § 261.2(a)(1)-(2) and 261.2(c). More specifically, certain secondary materials,[7] including "spent materials," are solid wastes if they are[8] to be "used in a manner constituting disposal" or "used to produce products that are applied to or placed on the land." 40 C.F.R. § 261.2(c)(1)(A) and (B).

EPA promulgated the current definition of "spent material" in the 1985 "definition of solid waste" (recycling) regulations. 50 Fed. Reg. 614 (Jan. 4, 1985). In that regulation, EPA classified the "universe of secondary materials [such as spent materials] that are [solid] wastes when recycled." Id. at 624. There, EPA defined a "spent material"as a "material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." Id. at 624, 663. This definition is found in 40 C.F.R. § 261.1 and has been incorporated by reference by the State of New Jersey at NJAC 7:26G-5.1(a) and adopted *verbatim* by the State of Texas at 30 T.A.C. § 335.17(a)(1).

EPA interpreted the definition of the term "spent materials" in the preamble of its 1985

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[7] The phrase "secondary materials" refers to used materials that can potentially be solid and hazardous wastes when recycled. 50 Fed. Reg. at 616, n.4. EPA does not regulate unused or unreacted raw materials; such materials are not subject to regulation unless they are discarded by being abandoned. Id. at 624.

[8] Prior to being able to determine if a material is a solid waste, "one must know what the material is and how it is being [or will be] recycled." 50 Fed. Reg. at 618.

rule.[9] EPA stated it was defining spent materials as those which have been used and are no longer fit for use without being regenerated, reclaimed or otherwise re-processed. EPA further stated that it was altering the wording of the language in the proposed regulation, 48 Fed. Reg. 14472 (April 4, 1983), to ensure that a material may be reused for *similar but not identical purposes* without being reclaimed. To clarify, EPA stated:

> An example of this is where solvents used to clean circuit boards are no longer pure enough for that continued use, but are still pure enough for use as metal degreasers. These solvents are not spent materials when used for metal degreasing. The practice is simply continued use of a solvent.

Id. at 624.

Thus, a used material can be reused without being deemed spent (remaining outside of the RCRA universe) as long as the subsequent use is similar to the original use, *i.e.*, the type of use is continuous ("continued use"). In simpler terms, once a material is used, for example, as a solvent, it may, barring any re-processing, be continually used as a solvent. However, once a used material is employed for a *different purpose* (*i.e.* not as a solvent), it is a spent material.

B. Hazardous Waste

The definition of hazardous waste is actually irrelevant to this appeal. Appellant has not disputed the Court's finding that its used KOH constituted a hazardous waste (once deemed a spent material). Briefly therefore, solid wastes, such as spent materials used in a manner constituting disposal, are hazardous wastes if they meet specified criteria, including exhibiting any of the hazardous characteristics identified in 40 C.F.R. § 261.3. Relevant to this case, a solid

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[9] EPA's preamble language is relevant since New Jersey's authorized program incorporated, without modification, the federal definition of spent materials and Texas adopted the definition *verbatim*.

waste exhibits the characteristic of corrosivity if it is aqueous and has a pH of less than or equal to 2 or greater than or equal to 12.5. A solid waste exhibiting the characteristic of corrosivity is assigned the EPA hazardous waste number D002. 40 C.F.R. § 261.22.[10]

III. Relevant Statement of Facts

Howmet's appeal focuses on the definition of spent material. This statement of facts is therefore accordingly limited.[11]

A. Howmet's New Jersey Facility

Howmet's New Jersey facility manufactures parts for engines by pouring molten metal into wax or ceramic shells. Once solidified, the engine parts are removed from the casting shells. A liquid potassium hydroxide and water ("KOH") solution is used to remove or leach out (clean) any ceramic from the metal parts. Stip. ¶11. The KOH solution is used until it contains impurities or contaminants which would affect the newly cast metal parts. Stip. ¶12. This "used or contaminated KOH" can no longer be utilized by Howmet to clean metal parts unless it is reclaimed or reprocessed. Id.

Howmet accumulates its used KOH on site in a tank. Once the tank nears capacity, Howmet sends the contaminated KOH off-site to be managed by a third party. Stip. ¶ 13.

From August 6, 1999 through September 27, 2000, Howmet sent the used KOH generated and accumulated at its New Jersey facility off-site to either: a permitted treatment,

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[10] A solid waste exhibits the characteristic of toxicity for chromium (D007) if a toxic characteristic leaching extract contains a concentration equal to or greater than 5.0 milligram per liter ("mg/l," the equivalent of 5 parts per million ("ppm")) of chromium. 40 C.F.R. § 261.24.

[11] *See* Section III of EPA's Accelerated Decision Memoranda for a more comprehensive statement, including facts related to Howmet's violations of RCRA and its implementing regulations.

storage and disposal facility ("TSD") to be disposed of as a hazardous waste; or the fertilizer manufacturer Royster Clark, Inc. ("Royster"), at its facilities in Plymouth and/or Rocky Mount, North Carolina, to be used as an ingredient or raw material in the production of land applied fertilizer. Stip. ¶¶ 13,16. Howmet's decision on whether to send the used KOH to a TSD as a hazardous waste or to Royster for the manufacture of fertilizer depended entirely on whether Royster had a demand for used KOH at the time Howmet needed to empty its used KOH tank(s). Stip. ¶14. The used KOH, whether it was sent off-site for disposal or to Royster for fertilizer production, was consistently generated using the same ingredients and process. Stip. ¶14. At a minimum, the used KOH was aqueous with a pH greater than 12.5. Stip.¶15.

Howmet had been sending shipments of used KOH to Royster (or its predecessor) since early 1994[12] to be used to make fertilizer or "potassium phosphate for growing tobacco."[13] Declaration of Ton Moy [14] ("Moy Decl.") ¶ 5; Pirkle Decl. ¶¶ 4, 12, 13. Each shipment of used KOH sent to Royster was described in a Material Safety Data Sheet ("MSDS") prepared by Howmet. Stip. ¶¶ 21, 25; Pirkle Decl. ¶¶ 7, 16. The MSDS stated that the "used potassium

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[12] In February 1994, Royster's predecessor (Lebanon Chemical Corporation) and Howmet entered into an "Agreement" where the fertilizer company agreed to take 100% of Howmet's "used potassium hydroxide solution, as long as the product is environmentally sound to use, for the period beginning February 8, 1994 ending February, 1997." Notwithstanding the dated terms of this Agreement, Howmet continued to send Royster used KOH through September 27, 2000. Stip.¶ 16; Moy Decl. ¶ 5; Pirkle Decl.¶¶ 4,7.

[13] In a 1994 Environmental Services Supplier Assessment prepared by Keith Shell, Manager, Environmental Engineering at Howmet, Mr. Shell wrote that "all the potassium hydroxide solution bought from Howmet will be used to make potassium phosphate for growing tobacco." Moy Decl.¶ 5.

[14] Mr. Ton Moy is an environmental engineer in the Division of Enforcement and Compliance Assistance, Region II, EPA. Mr. Moy's Declaration was filed with Region II's Motion for Accelerated Decision.

hydroxide solution" was generated by the "caustic cleaning of metal castings (including ceramic core removal)" and that it was a "mobile liquid" with a pH of "14+."[15] Stip. ¶ 25; Pirkle Decl. ¶ 16. Restated, Howmet was sending shipments of used KOH to Royster knowing that the used KOH: 1) would be employed in the production of land applied fertilizer; and 2) had the characteristic of a corrosive (D002) hazardous waste.

At each Royster facility, the used KOH was pumped from the tanker truck into a tank(s). Stip.¶18. Royster tank stored the used KOH at each of its facilities[16] for a temporary period of time until it was needed for the production of fertilizer. Stip.¶19; Pirkle Decl.¶ 11. The used KOH was then pumped from the tank into a fertilizer materials mixer. Stip.¶19; Pirkle Decl.¶ 11. The used KOH provided a source of a source of potassium for, and controlled the pH of, the fertilizer.[17] Stip. ¶19; Pirkle Decl. ¶ 12.

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[15] The MSDS sheet also indicated that there were trace amounts of metal constituents in the used KOH. For example, the MSDS stated the used KOH contained levels of chromium below 1 ppm. Stip. ¶ 25; Pirkle Decl. ¶ 16. This representation however is inconsistent with sampling results from the used KOH Howmet sent off site to a permitted TSD which indicated that levels of chromium reached as high as 51.5 ppm using a gross metals analysis. Stip. ¶ 26. *See* nn. 16 and 17, *infra*.

[16] EPA analyzed used KOH stored at Royster's Rocky Mount facility. While the sample was likely an aggregate of used KOH from several Howmet facilities and therefore not specific to the New Jersey or Texas facility, the analyzed sample exceeded regulatory limits for corrosivity and chromium, i.e., exhibiting characteristics of both D002 and D007 hazardous waste. Declaration of Kevin Simmons ("Simmons Decl.") ¶¶ 7-11, 13. (Mr. Simmon's Declaration was filed with Region II's Motion for Accelerated Decision.). *See* nn.15 and 17 herein.

[17] Pursuant to 40 C.F.R. § 266.20, recyclable materials that are hazardous wastes may be used in the production of fertilizer provided the product fertilizer meets the treatment standards set forth in Subpart D of 40 C.F.R. Part 268. The hazardous waste, however, must be managed as a hazardous waste subject to RCRA regulation until the product meeting treatment standards is produced. Not notified that it was receiving a hazardous waste, Pirkle Decl. ¶ 10, Royster at a minimum failed to test the fertilizer product to determine if it met appropriate treatment standards for underlying constituents such as chromium, id. ¶15, an especially salient

B. Howmet's Texas Facility

Like the New Jersey facility, Howmet's Texas facility generated used KOH during its manufacturing process. KOH was used as caustic cleansing agent until Howmet, due to use based contaminants, was no longer able to utilize the solution to clean the metal parts without reprocessing the solution. Stipulation of Facts ("Stip") ¶¶ 3,4. Unable to continue utilizing the used KOH for this (cleaning) purpose, Howmet accumulated the used KOH on-site and then ultimately sent it off-site either for disposal as a hazardous waste or to fertilizer manufacturer Royster to be used as an ingredient in the production of tobacco fertilizer. Stip.¶ 6; Pirkle Decl. ¶ 7, 12. Royster's manufacturing facilities employed the Howmet's used KOH to control the pH level of, and provided a source of potassium for, the fertilizer mixture. Id. ¶11. Royster never used the KOH solution as a solvent, caustic or cleansing agent. Id.

STANDARD OF REVIEW

The Environmental Appeals Board ("EAB" or "Board") has *de novo* review of an Initial Decision granting accelerated decision.[18] In re H.E.L.P.E.R., Inc., 8 E.A.D. 437, 447 (EAB 1999)(Board's review of ALJ's factual and legal conclusions is on a *de novo* basis). Accelerated decision under 40 C.F.R. § 22.20(a)[19] is similar to summary judgment under Rule 56(c) of the

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consideration given that used KOH from the New Jersey facility contained levels of chromium up to 51.5 ppm per gross metals analysis, Stip. ¶ 26, and that the used KOH analyzed at the Royster facility tested hazardous for chromium. Simmons Decl. ¶13.

[18] 40 C.F.R. § 22.30(f) provides the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision ... being reviewed."

[19] 40 C.F.R. § 22.20(a) provides the "Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgement as a matter of law."

Federal Rules of Civil Procedure ("FRCP"). As such, Rule 56(c) case law provides appropriate guidance for accelerated decisions. CWM Chemical Services, Inc., 6 E.A.D.1, 12 (EAB 1995).

Under Rule 56(c), the movant has the initial burden of showing that there exists no genuine issue of material fact by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (*quoting* FRCP 56(c)). An issue of fact is "material" for these purposes if it "might affect the outcome of the suit under governing law." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. Evidence that is "merely colorable" or not "significantly probative" is incapable of overcoming the standard for denying summary judgment. Id. at 249-50. Once the moving party meets its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." Id. at 587. Applying the undisputed facts to the law in this case, the EAB should adopt the Presiding Officer's conclusions of law granting accelerated decision.

SUMMARY OF ARGUMENT

The Presiding Officer properly granted accelerated decision. There are no genuine issues of material fact and, as a matter of law, Howmet violated RCRA and its implementing federal or state authorized regulations. Accordingly, applying the same standards for summary judgment

and accelerated decision *de novo*, the EAB must adopt the liability determination set forth in the Presiding Officer's Initial Decision.

Appellant argues that its used KOH was not a spent material and alternatively, that it was not provided fair notice of the regulations. In the underlying proceeding, EPA demonstrated that Howmet's used KOH was a spent material and, because it was used in a manner constituting disposal, a solid waste. EPA further demonstrated that Howmet's used KOH constituted a characteristic hazardous waste and that Howmet violated the regulations cited in EPA's complaints. Order at 14, 21. In this proceeding, however, EPA will limit its discussion to the two points raised by Howmet.[20] [21]

Based on a plain reading of the regulations (a reading which is reaffirmed by the rule's preamble, precedential case law and other publically available materials), the used KOH generated by Howmet and sent off-site to be used in the production of a land applied fertilizer constituted a spent material (and solid waste) subject to RCRA. Order at 14, 21. Howmet's misguided reading of the regulation effectively morphs its used contaminated KOH into virgin/pure KOH.[22] Virgin materials however are not regulated by EPA's solid waste recycling rule, making Appellant's reading of the regulations, at best, implausible. The regulatory

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[20]The Board is referred to EPA's Accelerated Decision Memoranda for facts and argument regarding the classification of Howmet's used KOH as hazardous waste and Howmet's violation of RCRA and hazardous waste regulations as cited in EPA's complaints.

[21] If the Board rules in EPA's favor regarding the matters appealed, it should consequently find Howmet's used KOH constituted a hazardous waste and Howmet violated the regulations as alleged in EPA's complaints. 40 C.F.R. § 22.30(c)(scope of appeal is limited to issues raised).

[22] *See* n. 26 *infra.*

requirements at issue in this case are facially clear and, as such, Appellant's fair notice argument simply lacks merit. Id. n.16 at 9.

ARGUMENT

I. Howmet's Used KOH Constituted a Spent Material [23]

A. Howmet's Used KOH was a Spent Material Based on a Plain Reading of the Regulations

Howmet's used KOH constituted a spent material based on the "plain wording of the regulation." Order at 20; Strong Steel Products, 2003 WL 22534560 at 18 (regulatory analysis starts with the plain language of the regulations). The regulatory language clearly defines a "spent material" as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. § 261.1(c)(1) (and incorporated by reference by NJAC 7:26G-5.1(a) and quoted *verbatim* by Texas at 30 T.A.C. § 335.17(a)(1)). This definition allows for the "continued use" of a material as, for example, a solvent. The material only becomes "spent" when the original use, *i.e.*, as a solvent, ceases. 50 Fed. Reg. at 624.

The used KOH generated by Howmet clearly constitutes a spent material under the definition. Howmet utilized KOH solution to clean or leach out remnant ceramic from metal castings used to produce engine parts. Howmet utilized the KOH solution until, as a result of its use, it contained a level of impurities such that Howmet could no longer effectively utilize the

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[23] A spent material constitutes a solid waste under specific recycling scenarios. In this case, Howmet's used KOH constituted a solid waste because it was a spent material used in a manner constituting disposal (*i.e.*, as fertilizer). 40 C.F.R.§ 261.2(a)-(c). Because Howmet has not disputed that its used KOH was used in a manner constituting disposal, EPA will not make that demonstration here but refers the Board to its Accelerated Decision Memoranda, Argument, Section I.

KOH solution to clean the castings without processing the solution. Prohibited from continued solvent usage, Howmet accumulated its contaminated KOH solution on site. Howmet then shipped portions of its contaminated KOH off-site to a fertilizer manufacturer.

In contrast to Howmet, the receiving fertilizer manufacturer did not utilize Howmet's contaminated KOH as cleansing agent, solvent, or any such similar purpose. The fertilizer manufacturer utilized the contaminated KOH as an ingredient in the production of a land applied fertilizer. The used KOH provided a source of potassium to, and controlled the pH level of, the fertilizer mixture. Howmet and the fertilizer manufacturer did not share a "continued use" of the KOH solution; each entity employed the KOH for their own distinct, and wholly different, purposes.

The Presiding Officer therefore correctly held that Howmet's used KOH constituted a "spent material" under the "plain wording of the regulation." Order at 20-21. Howmet's used KOH clearly constituted a "material that ha[d] been used and as a result of contamination [could] no longer serve [and ceased serving] the [cleaning] purpose for which it was produced." 40 C.F.R. §261.1(c)(1). [24]

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[24] *See* Brenntag Great Lakes, Docket No. RCRA-5-2002-0001(ALJ, 2004) at 15-17 (contaminated isopropyl alcohol, originally used as a water extracting solvent, constitutes a spent material when no longer used as a solvent); In the Matter of Royster Co., Docket No. RCRA-III-195 (ALJ, 1993) at 42 (contaminated sulfuric acid from refining gasoline, used as an ingredient in fertilizer, constitutes a spent material).

B. EPA's Preamble to the Final Rule Reinforces the Plain Wording of the Definition of Spent Material, Confirming Howmet's Used KOH is a Spent Material Under the Regulations.

While the Presiding Officer held that the plain language *alone* mandates a finding that Howmet's used KOH is regulated, he also held that "EPA's preamble to the final rule ... serves to reinforce the plain wording of the [spent material] definition." Order at 15. Moreover, because the definition of spent material has never been "superseded by a subsequent rulemaking, the preamble is as much a current statement of what the regulation means today" as when it was published. U.S. v. Hoechst Celanese Corp. 964 F.Supp. 967, 980 (D.S.C.1996) *rev'd in part on other grounds* 128 F3rd 216 (4th Cir.1997).[25]

In the preamble, EPA stated that it was continuing to define spent materials as those "which have been used and are no longer fit for use without being ... reprocessed," 50 Fed. Reg. 614 at 624, but that it had modified the proposed language to ensure that a material could be re-used, *ad infinitum*, prior to being deemed spent as long as the material was used in a similar, if not identical fashion. To concretize its intent, EPA stated:

> An example of this is where solvents used to clean circuit boards are no longer pure enough for that continued use, but are still pure enough for use as metal degreasers. These solvents are not spent materials when used for metal degreasing. The practice is simply continued use of a solvent.

Id. at 624.

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[25] *See also* Gardebring v. Jenkins, 485 U.S. 415, 429-430 (1988)(comments by Secretary in rule's federal register notice demonstrate Secretary's intent); Wyoming Outdoor Council v. U.S. Forest Serv., 100 F.3d 43, 53 (D.C. Cir. 1999) (preamble is a source of evidence concerning contemporaneous agency intent); United States v. Eastern of New Jersey, 770 F. Supp 964, 976 (D.N.J. 1991) (preamble is a controlling EPA interpretation); Harpoon Partnership, Docket No. TSCA 05-2002-0004, at 12 n.11 (ALJ, 2003) (appropriate to use the preamble to determine regulation's meaning and the promulgating agency's intent).

The example in the preamble is particularly instructive in this case. Howmet utilized virgin KOH as a solvent to clean castings (analogous to the cleaning of circuit boards) until, too contaminated and no longer useable, it was sent off-site to be used as an ingredient in fertilizer. In contrast to the preamble's continued use example, there is no contention that Howmet's contaminated KOH was reused as a solvent by Howmet or any othe party. Order at 15. Hence, as stated by the Presiding Officer, the preamble reinforces the plain wording of the regulation and mandates Howmet's used KOH be deemed a spent material.

II. Howmet's Reading of the Regulation is Untenable

Howmet's so called "plain reading" of the regulations is untenable. According to Howmet, whether a secondary material is deemed "spent" is dependent on how the virgin material *could* be used. Employing this line of creative thinking, Howmet maintains that its used KOH is not spent because *virgin* KOH could be used to manufacture fertilizer.

While EPA maintains that Appellant's reading of the regulation is neither plausible nor consistent with the regulation, to the extent Respondent's interpretation of spent material calls into question the clarity of the regulation itself, courts must defer to the Agency's interpretation of its own regulation unless plainly erroneous, "even where a petitioner advances a more plausible reading" of the regulation. General Electric Co. v. EPA, 53 F.3rd 1324, 1327 (D.C. Cir.1995) *quoting* Rollins Envtl. Services, Inc. v EPA, 937 F.2d 649, 652 (D.C. Cir.1991). Below are the fatal flaws in Respondent's reading of the regulation.

First, Howmet's reading of the term "spent material" is inconsistent with the very language defining the term. A spent material is defined as a used material that can no longer "serve the *purpose* for which it was produced." 40 C.F.R. § 261.1 (italics added). EPA's rule

does not state that a spent material is one that could no longer serve the *purposes*, plural, for which it was produced. The regulation's singular use of the word "purpose" mandates that we look at how the used material was produced (*i.e.*, its particular purpose) rather than the myriad of ways its virgin predecessor could have been used.

The Presiding Officer held Howmet "mischaracterized the language" defining spent material in "a manner that makes a difference." Order at 14. In attempt to make the regulatory language appear to authorize the continued use of a material, no matter how contaminated the material or different the uses, Howmet modified the phrase "**the** purpose for which" the material was produced to "a purpose" for which the material was produced. Id. In so doing, Howmet effectively rewrote the regulation and inappropriately broadened the regulatory language to include all "potential uses"of the virgin material. Id.

Appellant now suggests that substituting the phrase "the purpose" with "a purpose" may have caused the Presiding Officer to misunderstand its position. Appellant Brief, at 21. While Appellant thus rephrases its interpretation of the regulation, it continues to argue that the definition of spent material requires an analysis of the virgin material rather than the used material. Id. Putting aside Appellant's word smithing, the Presiding Officer clearly understood and summarily rejected Howmet's "novel" argument that "a spent material is measured according to whatever the potential uses are" for the virgin material. Order at 20.

Second, as acknowledged by Appellant, the solid waste recycling rule regulates secondary material. Appellant Brief at 14. The regulation does not apply to virgin or unreacted materials. Accordingly, when the regulation states a spent material is one that can no longer serve the purpose for which it was "produced," it is by definition referencing the used/secondary material.

Pursuant to the regulation, therefore, once a secondary material, *e.g.*, used KOH solvent, ceases being used for the (solvent) "purpose for which it was produced," it constitutes a "spent material."

It is illogical to determine if a used/secondary material constitutes a spent material by analyzing the attributes of the used material's virgin status. Used material is often contaminated by its use and therefore different from the virgin material.[26] Moreover, Respondent's reading of the regulation effectively shifts the responsibility for hazardous waste determinations from the generator[27] of the used material, *i.e*,. Howmet, to the manufacturer of the virgin material. Clearly, hazardous waste classifications cannot be dependent upon how a commercial product manufacturer expects its product to be used.

Missing the point, Appellant criticizes the Agency for failing to discuss the "commercial purposes for which the KOH purchased by Appellant was produced to serve." Appellant Brief at 9. While it *may be* that KOH is manufactured as a source of potassium and neutralizing agent in the manufacture of fertilizer,[28] it is also axiomatic that a fertilizer manufacturer would not purchase used KOH that contains high levels of contaminants such as chromium - even if, as

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[26] Howmet has neither argued, nor submitted evidence demonstrating, that its used KOH is equal to or purer than virgin KOH.

[27] Persons who generate solid waste must determine if that waste is hazardous. 40 C.F.R. § 262.11.

[28] Although EPA maintains the commercial purposes of virgin KOH are irrelevant, Howmet offered no evidence in the underlying proceedings supporting its statement that KOH is manufactured "as a source of potassium and neutralizing agent in the manufacture of fertilizer." Appellant Brief at 10. While Howmet references an "internet search" in its appeal, an internet does not constitute evidence and even if it did, Howmet is precluded from introducing new evidence in an appeal. Id. n. 30.

Howmet maintains, the used material could still "serve as a source of hydroxide ions and potassium without being processed." Appellant Brief at 10, 22. Indeed, Howmet and Royster entered into an agreement which limited their transactions to used KOH that was "environmentally sound to use," containing only trace amounts of metal constituents.[29] Regardless of whether this agreement was complied with, the RCRA regulations ensure that use-based contaminated material is appropriately managed as a hazardous waste by requiring the generator to determine if its waste is a solid/hazardous waste by examining the used material it generated and its subsequent uses.

Appellant wrongly argues that EPA created a doomsday scenario in the proceeding below. Appellant Brief at 25. EPA correctly stated that under Appellant's "interpretation" of the definition of spent material, virgin sand employed in a brass foundry as an abrasive until too contaminated for that purpose could be used to fill children's sandboxes without being deemed a spent material. While EPA agrees with Appellant, id, that the contaminated sand (like Howmet's used KOH) only becomes a regulated solid waste if it is used in a manner constituting disposal (or any of the other ways a recycled spent material becomes a solid waste),[30] EPA's point is that contaminated material is different from virgin material. EPA's sandbox example demonstrates why it is nonsensical to examine the uses of a virgin material, which can differ so dramatically from a used material, to determine if a secondary material is regulated under the recycling rule.

Finally, Respondent wrongly argues that EPA's interpretation of the spent material regulation language limits recycling. Specifically, Appellant contends that the definition of spent

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[29] *See* nn. 12, 15-17 *supra.*

[30] *See generally* 40 C.F.R. § 261.2(a)(2)(ii).

material, as interpreted by the Agency, would "prohibit reuse of the [secondary] material for any use other than the initial use that was made of the [virgin] product." Appellant Brief at 14. Appellant's claim, however, highlights its misunderstanding of the regulation.

Materials are not RCRA regulated simply because they are "spent." A material is only regulated if it constitutes a solid and hazardous waste. In this case, the used KOH, a spent material, constitutes a solid waste because it is being used in a manner constituting disposal, *i.e.*, as land applied fertilizer. If Respondent sent the used KOH off-site to be used in the manufacture of a non-land applied product such as alkaline batteries, it would neither constitute a solid waste nor be RCRA regulated. *See* 40 C.F.R. 40 C.F.R. § 261.2(c). Further, not all solid wastes are hazardous wastes. Respondent's KOH constituted a regulated hazardous waste because it was characteristically (corrosive) hazardous. If Respondent removed the characteristic, the material would not be RCRA regulated. *See* 40 C.F.R. § 261.3. And lastly, a hazardous waste classification does not bar reuse of the material - even if land disposed. Fertilizer manufacturers such as Royster are legally permitted to employ used KOH in the production of fertilizer as long as they comply with all applicable hazardous waste regulations.[31] EPA's plain reading of the regulation, therefore, does not prohibit the reuse of material, rather it ensures that used material is reused in manner that is protective of human health and the environment.

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[31] *See* n.17 *supra*.

III. EPA's Has Consistently Reiterated and Applied the Definition of Spent Material [32]

A. EPA's Plain Reading of the Term Spent Material is Supported by Precedential Administrative Case Law

As the Presiding Officer held, a plain reading of the term spent material dictates a finding that Howmet's used KOH constituted a spent material. While no further analysis is necessary, "applicable case precedent" supports the Presiding Officer's holding, as well as demonstrates the Agency's consistent application of the term spent material. Strong Steel Products, 2003 WL 22534560 at 18.

In Brenntag Great Lakes, LLC ("Brenntag"), the Presiding Officer examined the regulatory definition of spent material and related language in the rule's preamble to determine if aqueous isopropyl alcohol ("IPA"), generated from anhydrous (or largely water free) IPA, constituted a spent material. Relying on the solid waste rule, the Brenntag Presiding Officer held that anhydrous isopropyl alcohol, used by 3M as a water extracting solvent, constituted a spent material when it: i) became contaminated with water (aqueous) due to its use as a solvent; and ii) was sent off-site to be used for a non-solvent purpose. Brenntag Great Lakes, Docket No. RCRA-5-2002-0001 at 15-17.

Appellant argues that the Brenntag facts are not applicable to the present case because the material at issue in Brenntag was reprocessed whereas the material at issue in this case, used KOH, was not processed or treated prior to Royster's use. Appellant Brief at 19. This argument is merely an attempt to obscure the holding in Brenntag. The Brenntag decision focused on the

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[32] Article III Courts have long given greater amounts of deference to an Agency when its rulings, legal interpretations and opinions are consistent over long periods of time. *See e.g.* Skidmore v. Swift, 322 U.S. 134, 140 (1944).

illegal *storage* and treatment of IPA purchased by Respondent Mislov from the 3M Company ("3M"). Brenntag at 6. The Brenntag Presiding Officer found that the aqueous IPA was a spent material and hazardous waste when it left 3M,[33] which is why Mislov needed a RCRA permit to receive, store and ultimately treat 3M's aqueous IPA. Id. at 17. Comparing Brenntag to the present case, Howmet is akin to 3M and Royster to Mislov. Applying the same "principles pertaining to the designation of 'spent materials,'" the Presiding Officers in Brenntag and Howmet both found that used solvents constituted spent materials when they were sent off-site to be used for non-solvent purposes. Id.; Order at 8, n.14. EPA's application of the term spent material to Howmet's used KOH is "consistent" with Brenntag. Order at 12, n. 23.

Brenntag is not an isolated case. In Royster, the Presiding Officer held that, based on the definition of spent material, used sulfuric acid generated from alkalyation constituted a spent material when it was sent off-site be used as an ingredient in fertilizer. Royster, Docket No. RCRA-III-195 at 42-45.

In short, EPA has consistently applied the definition of spent material to regulated facilities. That application has been upheld by the Howmet, Brenntag and Royster Courts and should be affirmed here.

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[33] EPA and 3M settled a related enforcement action. Brenntag, n 9.

B. EPA's Plain Reading of Spent Material Is Supported by Advisory Letters to the Regulated Community and A Director's Memorandum.

In publically available advisory letters to the regulated community and in a Director's memorandum,[34] EPA, in a period of time spanning more than a decade, repeatedly affirmed its reading of the term spent material. These letters and memorandum, while not binding, support EPA's position that Howmet's used KOH constituted a spent material.

In a 1998 letter to Safety-Kleen, EPA states the following regarding a used parts cleaning solvent that Safety-Kleen wants to collect and re-use for drum washing:

> The Agency has previously stated that when a used solvent is employed for another solvent use, this continued use indicates that the solvent remains a product. The used solvent in this case is a material continuing to be used as a solvent, the purpose for which it is intended, rather than a spent material being reused. Consequently, the used solvent to be employed for drum washing would not be considered a solid waste.

Letter from D. Brussard, EPA to C. McCord, Safety-Kleen (Aug. 1998). Annexed to Moy Decl.¶ 8. In short, because Safety Kleen was continuing to use the used solvent as a solvent, that material did not constitute a spent material subject to RCRA regulation.

A decade earlier, in letter to American Cyanamid discussing whether the secondary material, used sulfuric acid, constitutes a solid waste, EPA states:

> If the secondary use of the acid has the same purpose as the primary use (*e.g.*, once-used sulfuric acid from isoparaffin-olefin alkylation can be directly reused in that or another alkylation reaction) then there may be a basis for claiming that the once used sulfuric acid is "leftover, unreacted" catalyst. ... However, in other instances, *e.g.*, sulfuric acid from chlorine dehydration is too dilute for reuse in that reaction, the acid may fit the definition

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[34] All letters and memorandum referenced herein are in the administrative record as referenced. They are and have been publically available through EPA's web site. *See* Moy Decl. ¶ 8.

> of spent material; that is, the used acid is too dilute for reuse in dehydration ... and ... can no longer serve the purpose for which it was produced without reprocessing. (See Section 261.1(c)(1)). If the spent acid is then used to make fertilizer, it is a solid waste.

Letter from D. Barnes, EPA to M. Tribble, American Cyanamid Company (Aug. 1988). Annexed to Moy Decl.¶ 8. As in the later letter to Safety-Kleen, the Agency reiterates that if a used material is continually used in the same fashion, *e.g.*, in alkylation reactions, it is equivalent to a product or unreacted catalyst and not a spent material. However if a used material (originally used for dehydration for example) is subsequently used for a different purpose (other than dehydration) it is a spent material.

EPA's reiteration of its continued use analysis was not limited to advisory letters. In 1994, the Director of EPA's Office of Solid Waste sent a memorandum to the regions reaffirming the "Agency's consistent interpretation" of the term spent material. In this publically available memorandum, the Director stated that the Agency had crafted its regulatory definition of "spent material" to allow for the continued use and reuse of a solvent [35] regardless of how the material was originally used as a solvent. Once the material ceases being used as a solvent, however, it is a spent material. Memorandum from Michael Shapiro, Director, EPA's Office of Solid Waste to EPA's Regional Hazardous Waste Management Dirs. at 1-2, (March 24, 1994). Annexed to Moy Decl. ¶ 8.

Significantly, EPA's advisory letters not only affirm the regulatory interpretation applied in this action but also negate Respondent's "look to the virgin product of the used material" reading of the regulations. In a 1986 letter EPA writes:

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[35] The memorandum clarified that the *mere potential* for continued use as a solvent would not preclude the material from being defined as spent.

> We do not think anodizing phosphoric acid that is purer in acid content, and no more contaminated than virgin phosphoric acid can be viewed as a secondary material. Thus such acid would not be considered a solid or hazardous waste under RCRA ....

Steven E. Silverman, Attorney, Solid Waste & Emergency Response Division of EPA letter to D. McCaskill, Van Waters & Rogers (June 4, 1986).[36] In other words, a used but uncontaminated material is, in practical effect, a virgin material, rather than a secondary or used material, and therefore not subject to regulation. Since virgin (or used but uncontaminated) material is not regulated by EPA's solid waste recycling rule, the definition of spent material cannot logically hinge on the potential uses of a virgin commercial product, as Howmet claims.

Because EPA determined the materials in the "1986 letters" were equal to virgin material and therefore not regulated, Appellant oddly concludes that these letters support its notion that potential uses of a virgin material determine whether a used material is spent. Appellant Brief at 16. Appellant, of course, is again ignoring the fact that a material must be used to constitute a spent material. EPA only regulates used/secondary materials under its solid waste recycling rule.

EPA's assessment of the 1986 letters is supported by the preamble to the solid waste rule. In discussing the term spent material, EPA states "that leftover, unreacted raw materials from a process are not spent materials, since they have never been used." 50 Fed. Reg. at 624. Moreover, EPA is not asserting, as Appellant claims, that "the agency does not have authority ro regulate virgin materials under RCRA." Appellant Brief, 18. EPA is merely stating that virgin

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[36] See also Letter from Mathew A. Straus, Chief Waste Characterization Branch, EPA to Mr. Horner of Albright and Wilson (Oct. 20, 1986)(phosphoric acid generated from polishing aluminum that is purer in acid content and no more contaminated than the virgin phosphoric acid is not a secondary material and thus would not be considered a solid waste). These 1986 letters were filed with the Court as an attachment to EPA's Reply Brief and resubmitted here with Appellant's Brief.

materials are not spent materials.[37]

In sum, the 1986 letters, as well all of the subsequent letters and memorandum referenced above which were not challenged by Appellant, support EPA's reading of the solid waste recycling rule and the Presiding Officer's finding that Howmet's contaminated KOH constituted an EPA regulated material.

IV. EPA's Regulatory Definition and Interpretation of Spent Material are Reasonable and Consistent with RCRA's Statutory Definition of Solid Waste and Mandate to Regulate Recycled Hazardous Waste

EPA's regulatory definition and corresponding interpretation of the term "spent material" are reasonable and consistent with EPA's statutory authority to regulate solid and hazardous waste. American Mining Congress v. EPA ("AMC II"), 907 F.2d 1179, 1186-87 (D.C. Cir.1990) (EPA's interpretation of 'discarded' is permissible when it "is reasonable and consistent with the statutory purpose"). Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), defines solid wastes to include any "discarded material." Section 3001 of RCRA, 42 U.S.C. § 6921, requires EPA to adopt standards applicable to the legitimate recycling of hazardous waste.

The Court of Appeals for the District of Columbia Circuit has consistently held that materials destined for recycling by another industry may be "discarded" and that the statutory definition of solid waste "does not preclude the application of RCRA to such materials if they can reasonably be considered part of the waste problem." Safe Food and Fertilizer v. EPA, 350

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[37]EPA agrees that it has the authority to regulate discarded virgin materials. However, discarded virgin materials are subject to EPA's jurisdiction because they are "discarded by being abandoned," 50 Fed. Reg. at 624, whereas Howmet's material is subject to EPA's jurisdiction because it was discarded by being "recycled." *Compare* 40 C.F.R.§ 261.2(a)(i) and 40 C.F.R.§ 261.2(a)(ii).

F.3rd 1263, at 1268 (D.C. Cir. 2003) *citing* Am. Petroleum Institute v. EPA, 906 F.2d 729, 740-41 (D.C. Cir. 1990) and AMC II, 907 F.2d at 1186-87. EPA's regulatory definition and interpretation of solid waste, and more specifically spent material destined for land disposal, ensure that only secondary material that: a) is contaminated by its original use; b) can no be longer be employed for such use; but c) will become part of the waste problem by virtue of land application, is subject to regulation. Moreover, the regulation and EPA's consistent application of the regulation allow a material to be used and re-used continually, even by different entities, outside the universe of RCRA regulation, until it is deemed a spent material and solid waste because it can no longer be used for its original purpose and is destined for land disposal. The regulation and its application to the present case are consistent with RCRA's statutory framework authorizing the both the regulation of discarded material and the recycling of hazardous waste, as well as reasonably limited to secondary materials which will be land disposed and thereby likely to affect human health and the environment. Order at 15-21; Safe Food, 350 F.3d at 1268. [38]

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[38]In response to Howmet's Brief in Opposition, the Presiding Officer analyzed American Mining Congress v. EPA (AMC I), 824 F.2d 1177 (D.C. Cir. 1987) and Ass'n of Battery Recyclers, Inc. v. EPA, 208 F.3rd. 1047 (D.C. Cir. 2000). Order at 15-20. The Presiding Officer correctly found that these cases are factually irrelevant to Howmet because they examine whether secondary materials destined for reuse "in an ongoing industry process" are discarded, AMC I, 907 F.2d 1179, 1186; Battery Recyclers, 208 F.3d 1047 at1052, and Howmet was not reusing its "material within any *ongoing industrial process*." Order at 18.

As noted by Appellant, the D.C. Circuit has clarified that "'materials destined for future recycling by another industry may be considered discarded' if the materials meet one or more of the regulatory conditions for 'discarded materials,' such as the spent materials regulation." Appeals Brief at 24 *citing* Safe Food, 350 F.3rd at 1268. EPA agrees with Appellant that its "used KOH did not become discarded simply because it was reused by another company in a different industry." Id. Rather, Howmet's used KOH was discarded and subject to RCRA because it was a spent material used in a manner constituting disposal. Safe Food at 1268.

V. Howmet Had Fair Notice of the Regulations.

EPA maintains that Howmet's used KOH constitutes a spent material under a plain reading of the regulations. EPA further reiterates that its reading of the regulations is reinforced by the preamble, precedential administrative case law and publically available agency letters and memorandum. To the extent, however, EPA's application of any of these materials constitutes an interpretation of regulatory requirements, Appellant had fair notice. Appellant "received or should have received" notice of the Agency's interpretation "by reviewing the regulations and other public statements issued by the Agency." General Electric, 53 F.3d at 1328-29.

Notwithstanding the plain language of the regulation, EPA explicitly discussed its interpretation of the term "spent material" in the final rule's preamble. 50 Fed. Reg. 614, 663 (Jan. 4, 1985). As acknowledged by Respondent, the proposed definition of spent material was changed based on comments received by the regulated community during the public notice and comment period. Appellant Brief at 11-12. Moreover, administrative decisions, predating the present action, reiterate the same definition/interpretation of spent materials. *See* Section III.A *supra*. And if that weren't enough, the Agency issued numerous letters to the regulated community setting forth again the same interpretation of spent material. These letters are and have been publically available on EPA's web-site. *See* Section III.B *supra*; General Motors v. EPA, 363 F.3d 442, 451 (D.C. Cir. 2004) (EPA's posting of advisory letters on its website constitutes notice). Finally, Appellant has not offered any evidence of inconsistent public statements or interpretations made by the Agency. *Compare* General Electric, 53 F.3d at 1332 and Rollins Envtl., 937 F.2d at 653 (lack of notice found when EPA offices disagreed regarding

interpretation of regulations).[39] As held by the Presiding Officer, Howmet's regulatory obligations were "ascertainably certain," U.S. v. Hoechst Celanese Corp., 964 F. Supp. 967, 979 (D.S.C. 1996), and its fair notice claim without merit. Order, n.16 at 9

CONCLUSIONS AND RELIEF SOUGHT

For the foregoing reasons, EPA respectfully requests that this Board affirm the Presiding Officer's Order granting accelerated decision on all counts as alleged in EPA complaints, and order Appellant to i) manage its used KOH as a hazardous waste and ii) pay a civil penalty of $309,091, as stipulated to by the parties.

Dated: November 14, 2005

Respectfully submitted,

Amy R. Chester
Assistant Regional Counsel
Region II
U.S. Environmetal Protection Agency

John Emerson
Assistant Regional Counsel
Region VI
U.S. Environmental Protection Agency

Of Counsel:

Pete Raack
Office of Enforcement and Compliance Assurance
Headquarters
Environmental Protection Agency
Washington, D.C.

[39] *Compare also* In re CWM Chemical Services, Inc. 6 E.A.D.1(EAB 1995) (regulations silent on how to measure PCB concentrations failed to provide notice that dry weight measurements were required; due process precluded the Board from finding a violation).

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2005 a copy of EPA's Response Brief to Howmet's Appeal of Initial Decision (Docket Nos. RCRA-02-2004-7102 and RCRA-06-2003-0912) was sent to the following persons in the manner indicated:

By Express Mail (Three Copies and an Original):

Clerk of the Board
Environmental Appeals Board
United States Environmental Protection Agency
1341 G Street NW- Suite 600
Washington, DC 2005

By Express Mail and Facsimile:

John A. Riley, Esq.
Vinson & Elkins, LLP
The Terrace 7
2801 Via Fortuna, Suite 100
Austin, Texas 78746
Fax (512) 236-3329

Date: November 14, 2005

Mildred Baez