UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	*	
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PETRO PROCESSORS, INC.,	*	Docket No. RCRA-VI-639-H
	*	
Respondent	*	

ORDER

This matter is before me on a motion for a partial accelerated decision filed by the Complainant seeking a determination by the Court that the oil emulsions purchased by the Respondent from several petroleum refiners are, in fact, the listed hazardous waste "slop oil emulsion solids, K049."

Although identified by the sellers by various names, there is no dispute in the record that the Respondent purchased large quantities from the refineries of an oil emulsion which is essentially the identical substance. Therefore, the issue before me is a strictly legal one since no essential facts are in dispute.

The record is also clear that the emulsions sold to the Respondent were sold for a price which reflects the quantity of oil contained therein which over time amounted to several hundred thousand dollars and that the Respondent, by utilizing a special process was able to sell the oil acquired therefrom at a substantial profit. In other words, this venture did not involve a sham sale but rather a bonafide commercial transaction involving large sums of money.

Given the language of the statute, my first task is to determine whether or not the substance involved is, in fact, a

solid waste since a hazardous waste is a subset of the term solid waste and if it is not a solid waste it cannot be a hazardous waste.

In this regard, the Respondent relies for the most part on the holding of the United States Court of Appeals for the District of Columbus in the case of American Mining Congress, et al v. the U.S. EPA., 824 F.2d 1177 (1987), (hereafter AMC). In that case, the petitioners were challenging an EPA regulation which stated that if a material constitutes "solid waste" it is subject to RCRA regulation unless it is directly reused as an ingredient or as an effective substitute for a commercial product, or is returned as a raw material substitute to its original manufacturing process. In either case, the material must not be "reclaimed" (processed to recover a usable product or regenerated). In the AMC case, the petitioners contended that EPA's authority under RCRA is limited to controlling materials that are discarded or intended for discard and that the Agency's reuse or recycle rules, as applied to in-process secondary materials, regulate materials that have not been discarded and therefore exceed EPA's jurisdiction.

The Court then briefly described the petroleum industries processes as they regard the substances at issue, as follows:

> "Petroleum refineries vary greatly both in respect of their products and their processes. Most of their products, however, are complex mixtures of hydrocarbons produced through a number of inter-dependent and sometimes repetitious processing steps. In general, the refining process starts by "distilling" crude oil into various hydrocarbon streams or "fractions." The "fractions" are then subjected to a number of processing steps. Various hydrocarbon materials derived from virtually all stages of processing are combined or

blended in order to produce products such as gasoline, fuel oil, and lubricating oil. Any hydrocarbons that are not usable in a particular form or state are returned to an appropriate stage in the refining process so they can eventually be used. Likewise, the hydrocarbons and materials which escape from a refinery's production vessels are gathered and, by a complex retrieval system, returned to appropriate parts of the refining process. Under EPA's final rule, this reuse and recycling of materials is subject to regulation under RCRA."

After a lengthy discussion concerning statutory construction the Court ultimately concluded that:

"We are constrained to conclude that, in light of the language and structure of RCRA, the problems animating Congress to enact it, and the relevant portions of the legislative history, Congress clearly and unambiguously expressed its intent that "solid waste" (and therefore EPA's regulatory authority) be limited to materials that are "discarded" by virtue of being disposed of, abandoned, or thrown away. While we do not lightly overturn an Agency's reading of its own statute, we are persuaded that the regulating in-process secondary materials, EPA has acted in contravention of Congress' intent. Accordingly, the petition for review is Granted."

The Court based its conclusion on the language of the statute defining solid waste as:

"any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material, resulting from industrial, commercial, mining, and agricultural operations, and from community activities...."

The Court then went on to say that "this case turns on the meaning of the phrase, "and other discarded materials." On that issue the Court ruled that the term "discarded" as used in the statute should be accorded its ordinary, plain-english meaning of the word "discarded" as "disposed of," "thrown away" or "abandoned."

Following a discussion of the intent of RCRA the Court concluded that:

> "The question we face, then, is whether, in light of the National Legislature's expressly stated objectives and the underlying problems that motivated it to enact RCRA in the first instance, Congress was using the term "discarded" in its ordinary sense --"disposed of" or "abandoned"-- or whether Congress was using it in a much more open-ended way, so as to encompass materials no longer useful in their original capacity though destined for immediate reuse in another phase of the industry's ongoing production process.
>
> For the following reasons, we believe the former to be the case. RCRA was enacted, as the Congressional objectives and findings make clear, in an effort to help States deal with the ever-increasing problem of solid waste disposal by encouraging the search for and use of alternatives to exist methods of disposal (including recycling) and protecting health and the environment by regulating hazardous wastes. To fulfill these purposes, it seems clear that EPA need to regulate "spent" materials that are recycled and reused in an ongoing manufacturing or industrial process. These materials have not yet become part of the waste disposal problem; rather, they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself."

Thus it would appear that while the Court had precluded EPA from regulating materials that were not "discarded" they did so in a limited manner consistent with the specific issue before it, ie the reuse of materials "in a continuous process by the generating industry itself." If the Court were faced with the issue before me, one can only speculate as to what their decision would be. Although I am inclined to think that they would have excluded the materials here at issue from RCRA's reach, I am not at liberty to indulge in such speculation. Consequently, I am of the opinion that the oil emulsions sold to the Respondent are solid waste.

This interpretation was later supported by the EPA when it was

obliged to re-write its RCRA rules to comply with the Court's ruling in AMC. (See 53 Fed. Reg. 519 (1988) in the Preamble to the new rules, the Agency stated that in order for a material to escape the reach of RCRA, the following criteria must be met:

> "(1) The oil bearing residue must be generated and reinserted on-site.
> (2) It must be inserted into the petroleum refining process; and
> (3) The process must be ongoing and continuous, and not characterized by any element of discard."

Although this interpretation by the Agency of the meaning of the decision in AMC is not binding on me, coming as it did after the actions identified in the instant complaint, it lends support to this Court's above-stated evaluation of the reach of the AMC opinion.

The Agency also looks for support of its position in this matter to the rather ridiculous definition of solid waste which existed in the regulations from 1980 till 1983. This definition stated, in essence, that a material was a solid waste if it is discarded or "sometimes discarded." The Agency itself recognized the absurdity of this definition in the Preamble to its 1983 RCRA Amendments by stating that:

> "....[T]he "sometimes discarded" test sweeps many product-like materials into the solid waste net -- unless the material is never thrown away. Although the Agency never intended to call these "legitimate by-products" solid wastes, a zealous but literal reading of the regulation yields this result.
>
> Some critics took this point even further; since all materials are eventually thrown away, everything is "sometimes discarded" and potentially a solid waste. Another criticism was that under this standard generators may have to find out how all other generators are managing the same material -- an often difficult or

even impossible undertaking."

The Court in the AMC case was also critical of this notion. It said that:

> "We observe at the outset of our inquiry that EPA's interpretation of the scope of its authority under RCRA has been unclear and unsteady. As previously recounted, EPA has shifted from its vague "sometimes discarded" approach of 1980 to a proposed exclusion from regulation of all materials used or reused as effective substitutes for raw materials in 1983, and finally, to a very narrow exclusion of essentially only materials processed within the meaning of the "closed-loop" exception under the final rule."

The Briefs filed on this issue contained several affidavits from Agency personnel and representatives of the selling refiners that were in conflict over whether K049 was or was not "sometimes discarded." This issue was clearly a matter of concern to Judge Harwood, who originally had this case. In his Order of October 20, 1988, he said that:

> "As a consequence, Respondent filed a motion for accelerated dismissal of complaint, with prejudice, pursuant to 40 CFR § 22.20. Respondent essentially contends that the emulsions are not hazardous wastes under the regulations during the times in question because the emulsions, which were neither discarded nor "sometimes discarded," could not be considered solid wastes. Respondent submitted four affidavits to support the position.
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> In its response to Respondent's motion, Complainant contends the emulsions were solid wastes under existing EPA Regulations and listed hazardous waste under 40 CFR § 261.32. Complainant argues Respondent's exhibits are irrelevant because the EPA had already determined, in adopting the listings in 40 CFR Part 261, Subpart D, for listed hazardous wastes Nos. K048 through K052, that such materials were sometimes discarded by persons in the petroleum industry. It is not at all clear, however, that these emulsions in themselves constitute a hazardous waste listed under Nos. K048 through K052 or are a hazardous

waste because they are solid wastes mixed with a listed waste.

Respondent has submitted a reply to Complainant's response. Respondent reiterates arguments previously made, but also contends that even if any of the listed wastes K048 through K052 were present in the emulsion purchased by Respondent, the emulsion itself would still not be a solid waste because it is not sometimes discarded.

Because no material can be a hazardous waste without first being a solid waste, what constitutes a solid waste is a definitional and factual starting point for resolving the pending motions. The determination of whether the subject emulsions are solid wastes requires a finding of whether such materials are sometimes discarded. Complainant is requested to clarify its position as to this factual question."

Since I am of the opinion that K049, under the AMC ruling is a solid waste it is not necessary for me to attempt to sort out the conflicting affidavits presented on the issue of "sometimes discarded." It does appear however that when the "slop oil emulsions K049" do not contain sufficient quantities of oil, they are in fact discarded as being without economical value.

Another authority cited by the Complainant to bolster her claim is the case of Lee Brass Co., RCRA (3308) Appeal No. 87-12. The lessons taught by that case are of limited value in this matter with two exceptions: (1) recyclable materials containing hazardous components placed on the ground are hazardous wastes since they threaten the environment due to the possibility of leachate reaching ground waters and (2) the fact that a material has great economic value is irrelevant to the issue of whether or not it is "discarded." The latter lesson is of importance here since the record shows that the emulsions involved do have substantial economic value. One reason why the case is otherwise

of limited import is that it was decided to large measure upon the language of the 1988 regulations which were not in existence at the time the complaint herein alleged that violations occurred. Further it is not alleged in this record that the Respondent at any time deposited the emulsions in question on the ground. The issue of whether or not the fact that the materials involved have great commercial value as a measure of whether or not they were "discarded" is however binding upon this Court.

The Respondent also argues that the case of Commonwealth Oil Refining Co., Inc., II RCRA-85-0301 (CORCO) is supportive of their position. In that case the Court held that "slop oil emulsions K049" were hazardous solid wastes, but would not be so considered while the refinery was in operation since the emulsion was used in a closed loop system as a continuous part of the refining process. Such is not the case here. In this case the emulsions are separated from the other constituents in the API separator and sold to an off-site processor who by using a special process was able to extract usable oil from the emulsion. The reason why the Court held that the emulsions in the CORCO case were hazardous wastes was that the refinery was shut down for several years and the K049 emulsion was prospectively stored in tanks in violation of the regulations and during such shut down were not used by CORCO as feed stock in its ongoing refining process. Thus CORCO provides no support to the Respondent in this matter.

The next issue to be resolved is whether or not the materials sold to the Respondent were slop oil emulsion solids K049. In

arguing that they are, the Agency relies, in part, upon the November 1980, listing background document which describes K049 as being:

> "the skimmings from the primary soil/solids waste separator generally consist of a three-phase mixture of oil, waste and a third emulsified layer. The oil is referred to crude storage, the water discharged to the water treatment system, while the emulsion (oil, water and solids) becomes a process waste stream."

As one can see by the facts in this case, the Agency was not accurate in calling the emulsion layer a "process waste stream" since it is in many cases actually collected and later sold.

In any event, the Respondent argues that since the published regulations to not specifically classify "refinery emulsions" as hazardous wastes, it may not properly rely on a definition in an unpublished background document to prove that the terms "slop oil emulsion solids" and "refinery emulsions" are synonymous since such an attempt would violate the provisions of the Administrative Procedures Act (APA).

The Complainant responds to this argument by stating that:

> "The Amicus Brief's repeated assertions that EPA is relying on an unpublished background document to create a rule are without merit. The existence of the RCRA background documents are disclosed during the rule-making process and the documents were available to the public. 43 Fed. Reg. 58946 at 58954 (December 18, 1978). Comments on the document were received and responded to in the final document. Notice of the revised documents was published with the Interim Final hazardous waste lists. 45 Fed. Reg. 33084 at 33088, and further comments were invited. Notice of the existence, availability and purpose of the final background documents was published with the "Final" hazardous waste lists. 45 Fed. Reg. 74884 at 74885 (november 12, 1980). As part of the rule-making record, the documents are appropriately used to assist in the interpretation of the regulations they support.

The Complainant also cites the Court's attention to the case of United States of America v. Ethyl Corporation, 761 F.2d 1153.

Under the circumstances in this case, I do not feel that the use of a background document to bolster the language of the regulations violates either the terms or the spirit of the APA. The use of background documents such as is involved here is a common practice of the EPA, utilized not only as to RCRA matters but to all other statutes administered by the Agency as well. The existence and importance of these documents is well known to the regulated community and have been used by them on many instances to challenge EPA enforcement actions.

That the regulated community knows exactly what slop oil emulsion solids are is made clear by a report prepared by the American Petroleum Institute in 1982, where in the exact tonnage of slop oil emulsion solids produced on an annual basis is listed along with the other hazardous wastes produced by the petroleum refinery industry. The number listed for K049 is 144,000 tons. Clearly this number could not represent the small portion of slop oil emulsion solids which are present in the emulsion. On page 4-1 of the report the definition of slop oil emulsion solids is a follows:

> "Slop oil emulsion solids is the residual left in the emulsion layer after treatment in the slop oil tank, i.e. the emulsion which cannot be broken."

The definition produced by the petroleum industry itself is almost identical to the one set forth in the background document published by the EPA. Therefore to suggest that the Agency is

relying on some secret unpublished document to prove its case borders on the ludicrous.

The Respondent also attempts to bolster this argument by reference to the EPA listing document which states that the basis for the listings of petroleum industry products are the sludges contained therein. The documents states that:

> "The listed wastes discussed in this document are sludges which arise either from the treatment of wastewater generated during petroleum refining operations (i.e., primary oil/solids/water separation sludge, secondary (emulsified) oil/solids/water separator sludge and slop oil emulsions solids) or from the clean-up of equipment/storage tanks used in the refinery (i.e., heat exchanger bundle cleaning sludge and tank bottoms (leaded)). The Administrator has determined that these sludges are solid wastes which may pose a substantial present or potential hazard to human health or the environment when improperly transported, treated, stored, disposed of, or otherwise managed, and therefore should be subject to management under Subtitle C of RCRA. (Emphasis supplied.)

The Respondent therefore argues that it is not the emulsion which is hazardous but rather the solids contained therein are the listed wastes since it is the solids which contain the elements and compounds determined by the EPA to be hazardous. The oil and water which comprise the balance of the emulsion are not hazardous substances.

As any student of RCRA knows, the hazardous wastes involved are divided into two categories, ie characteristic wastes which are those that are inherently hazardous due to their observed characteristics, for example corrosivity, ignitability, reactivity and toxicity. The other universe of hazardous wastes are referred to as listed wastes on the basis that, due to the source, product

method or industrial process produce a material that normally contains a hazardous constituent. Those wastes are identified by a description of their source, for example: "decanter tank tar sludge from coking operators," or "spent potliners from primary aluminum reduction." These terms are, of course, familiar to the industry that produces them and there is normally no question as to just what they are.

Since the waste are listed as to the source, the Administrator is obliged to publish a background listing document to explain what constituents typically found in these materials form the basis for their inclusion in the list. In this instance the identity of slop oil emulsion solids is a substance well known to the petroleum refining industry and the background document further defines them and then lists them components traditionally found therein which justifies their inclusion. In this case they are the toxic metals lead and chromium both of which have been found to be carcinogenic. Obviously, these metals are found in the sludges which form a constituent of the material since the balance of refining wastes usually consist of oil and water. As stated in the AMC case supra, the Court found that the skimming from the API separator are usually reintroduced into the refining process and not discarded while the slop oil emulsion is not.

Why this is true it is not known to the writer, since he is not that familiar with the complexities of the refining process. The discussions above would suggest that the reason is that being an emulsion and not capable of being broken down it is therefore not

usable as a raw feed material in the continuous refining process. It appears however that the Respondent is capable of performing this separation and end up with a sellable oil product with the sludge portion remaining as an unusable waste which is disposed of through an approved hazardous waste handler.

Although it is the sludge portion of the slop oil emulsion that makes it hazardous, to suggest that the Agency only meant to include the sludge as the listed waste is not consistent with the observations above made nor common sense. Since the toxic sludge is inexorably bound to the oil/water emulsion as it is produced at the refinery it is clear that the described emulsion is the hazardous waste of concern.

I am therefore of the opinion that the materials sold to the Respondent by the various refiners involved are, in fact, the listed waste slop oil emulsion solids (K049) and is therefore a hazardous waste.

Dated: 11/14/91

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, EPA Region VI (service by first class U.S. mail); and that the following parties were served a copy by certified mail, return-receipt requested. Dated in Atlanta, Georgia this 17th day of January, 1991.

Jo Ann Brown
Secretary, Hon. Thomas B. Yost

ADDRESSEES:

Renee V. Holmes, Esq.
Assistant Regional Counsel
U.S. EPA - Region VI
1445 Ross Avenue
Dallas, Texas 75202

Randall W. Wilson, Esq.
Susman Godfrey
5100 First Interstate Bank Building
1000 Louisiana
Houston, Texas 77002

James E. Smith
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, Texas 77002

HONORABLE THOMAS B. YOST
U.S. ENVIRONMENTAL PROTECTION AGENCY
345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

404/347-2681, Comm. 257-2681, FTS