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RECENT DEVELOPMENTS IN RCRA CASE LAW

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**I. INTRODUCTION**

Several judicial and administrative decisions of the last year will have a significant effect on implementation and enforcement of the Resource Conservation and Recovery Act (“RCRA”) program. The most significant decisions relate to the application of the definition of solid waste, federal preemption of state laws, and discharge of RCRA claims in bankruptcy. While these course materials are not intended to be a comprehensive survey of RCRA decisions of the past year, this outline summarizes key federal, state, and administrative decisions.

**II. FEDERAL DECISIONS**

**A. Definition of Solid Waste Applied at Shooting Ranges in RCRA § 7002 Cases**

Several cases address whether past or present owners or operators of track and skeet shooting clubs can be liable under RCRA’s “imminent and substantial endangerment” authority in RCRA Section 7002 due to “management” of lead shot and clay disks that fall to the ground.

**1. *Otay Land Company v. U.E. Limited, L.P.*, Case No. 03cv2488, 2006 U.S. Dist. LEXIS 53433 (S.D. Cal. July 18, 2006)**

- a. Current owners of a track and skeet shooting range sued former owners of the range for response costs under CERCLA § 107(a) and for cleanup under RCRA’s citizen suit provision, RCRA § 7002(a)(1)(B). Plaintiffs alleged that the lead shot and clay target debris were hazardous “solid wastes” that posed an “imminent and substantial endangerment to health or the environment.” The district court held that the former owners of the track and skeet shooting range were not liable under CERCLA or RCRA.
- b. Under CERCLA, the district court held that the track and skeet range used for recreational purposes fell within the “consumer product” exception to CERCLA’s definition of “facility.” See 42 U.S.C. § 9601(9)(B). The court noted that law enforcement or military shooting ranges would not fall under this exception.

- c. Under RCRA, the district court held that clay target debris and lead shot are not “solid wastes,” when used as intended, and, therefore, do not fall under the jurisdiction of RCRA.
- d. The district court deferred to a prior U.S. Environmental Protection Agency (“EPA”) interpretation that clay target debris and lead shot are not “discarded” when used as intended at a shooting range. RCRA defines solid waste to include “other discarded material.” RCRA § 1004(27). However, in the Military Munitions Rule, EPA concluded that the deposit of lead on a site resulting from the use of ammunition as intended is not “discarding” lead, and, therefore, the lead is not a “solid waste.” 62 Fed. Reg. 6622, 6626-30 (February 12, 1997) (“munitions that are fired are products used for their intended purpose, even when they hit the ground since hitting the ground is a normal expectation for their use . . . [but] fired military munitions that land off-range become a statutory solid waste at a certain point, potentially subject to RCRA remedial authorities”).
- e. The court did not address lead shot or target debris that may have landed off-site. However, citing *Connecticut Coastal Fisherman’s Association v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2d Cir. 1993) (finding lead shot accumulating on range and in Long Island Sound for 70 years was solid waste), the district court acknowledged that, at some point, enough time would pass that the lead shot and target debris on-site would become solid wastes. In this case, there was evidence that the lead shot and clay targets had been culled from the range and recycled on several occasions. Therefore, the court found no genuine issue of material fact as to whether the materials had accumulated on the range long enough to become solid wastes.
- f. In reaching its decision, the district court discussed several recent shooting range decisions including the following:
  - (1) *Simsbury-Avon Preservation Society, LLC, et al. v. Metacon Gun Club*, Case No. 3:04cv803, 2005 U.S. Dist. LEXIS 11699 (D. Conn. June 14, 2005) (holding lead shot on range not a solid waste because shooter does not intend to abandon the bullet) (this opinion and a subsequent opinion in the same case are discussed below);
  - (2) *Water Keeper Alliance v. U.S. Dep’t of Defense*, 152 F.Supp. 2d 163 (D.P.R. 2001), *aff’d*, 271 F.3d 21 (1st Cir. 2001) (deferring to EPA and Military Munitions Rule in holding that firing ammunition does not constitute disposal of solid or hazardous waste);

- (3) *Long Island Soundkeepers Fund, Inc. v. New York Athletic Club of the City of New York*, Case No. 94 Civ. 0436, 1996 U.S. Dist. LEXIS 3383 (S.D.N.Y. Mar. 22, 1996) (following the reasoning in an amicus brief submitted by EPA prior to EPA’s Military Munitions Rule that spent shot and target debris do not fall under the regulatory definition of solid waste);
  - (4) *Potomac Riverkeeper, Inc. v. National Capital Skeet and Trap Club, Inc.*, 388 F.Supp.2d 582 (D.Md. 2005) (without analyzing case law or EPA guidance, finding on summary judgment that a genuine issue of material existed as to whether lead shot on a shooting range presented an imminent and substantial endangerment) (this opinion is discussed below).
2. ***Simsbury-Avon Preservation Society, LLC, et al. v. Metacon Gun Club, Inc.*, Civil No. 3:04cv803, 2005 U.S. Dist. LEXIS 11699 (D. Conn. June 14, 2005) and 2006 U.S. Dist. LEXIS 53466 (D. Conn. Aug. 2, 2006)**
- a. In this citizen suit, Plaintiffs alleged that because the lead shot on a shooting range was a hazardous “solid waste,” the range required a permit under RCRA Section 3005. Plaintiffs also alleged that the lead shot posed an “imminent and substantial endangerment to health or the environment” under RCRA Section 7002. The district court held that lead shot from the shooting range was not a solid waste, and that, therefore, no RCRA permit was required for the range and the Section 7002 claim did not lie.
  - b. On the permit claim,
    - (1) The district court deferred to EPA’s interpretation that lead shot is not discarded, and, therefore, not a solid waste or hazardous waste requiring a RCRA permit. The court observed that at the time of firing, the target shooter is not intending to “abandon” the bullet, but to hit a target with the bullet.
    - (2) The district court deferred to EPA’s position that lead deposited from a shooting range is not a “solid waste,” as set forth in EPA’s Military Munitions rule as well as EPA’s amicus briefs in *Connecticut Coastal Fishermen’s Assoc. v. Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993) and *Long Island Soundkeeper Fund v. New York Athletic Club*, No. 94 Civ. 0436 (PRP), 1996 U.S. Dist. LEXIS 3383 (S.D.N.Y. March 22, 1996).

- (3) In reaching its decision that a permit was not required, the district court used the narrower regulatory definition of “solid wastes” that includes the terms “abandoned” or “disposed of.” 40 C.F.R. 261.2. RCRA’s statutory definition of “solid waste” includes the concept of discarded material, but does not include the terms “abandoned” or “disposed of.” RCRA § 1004(27).
- c. On the imminent and substantial endangerment claim,
- (1) As in *Otay*, the district court acknowledged that at some point, lead shot may be on the ground long enough that it becomes solid waste. See *Connecticut Coastal Fishermen’s Assoc. v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993) (finding lead shot accumulating on range and in Long Island Sound for 70 years was solid waste).
  - (2) The court referenced EPA’s guidance booklet, Best Management Practices for Lead at Outdoor Shooting Ranges, EPA Pub. EPA-902-B-01-001, which instructs that although “shooting lead shot (or bullets) is not regulated nor is a RCRA permit required to operate a shooting range,” “spent lead shot (or bullets) left in the environment is subject to the broader definition of solid waste written by Congress and used in sections 7002 and 7003 of the RCRA statute.”
  - (3) In this case, the district court found no evidence that the materials landed off-site. Also, the Court found that regardless of the precise amount of time on the ground required for the lead shot to become a solid waste, the lead shot had not spent sufficient time on the ground in this case. The club members regularly collected and sent the lead bullets for recycling. Therefore, the district court concluded that the lead shot on the range was not a “solid waste” for the purposes of the Plaintiff’s imminent and substantial endangerment claim.

3. ***Potomac Riverkeeper, Inc. v. National Capital Skeet and Trap Club, Inc.*, 388 F.Supp. 2d (D.Md. Sept. 27, 2005)**

- a. In this citizen suit, Plaintiff alleged that lead shot on the soil posed an “imminent and substantial endangerment” to health or the environment. On a summary judgment motion, the district court found a genuine issue of material fact as to whether the lead shot posed such an endangerment.

- b. The district court did not analyze the question of whether the lead shot could be a “solid waste” under RCRA. Instead, the district court simply assumed that the lead shot was a “solid waste,” relying on *Safe Air v. Meyer*, 373 F.3d 1035, 1042 (9th Cir. 2004) (holding grass residue not a “solid waste” because it was not discarded or abandoned and therefore RCRA did not prohibit growers’ general practice of open burning) for the proposition that lead shot has been abandoned, and so is solid waste. The district court did not address the distinction between the more narrow regulatory definition of solid waste and the broader statutory definition. Nor did the district court appear to have considered EPA guidance or case law discussing this point.
- c. The Southern District of California’s decision in *Otay*, discussed above, criticized *Potomac Riverkeeper*’s reliance on the Ninth Circuit’s decision in *Safe Air v. Meyer*, which did not directly address lead shot and instead centered on whether grass residue left in farm field and burned was a solid waste.
- d. The *Potomac Riverkeeper* court concluded there was a genuine issue of material fact as to whether the lead shot from the shooting range was the source of elevated levels of lead in the soil and whether lead shot threatens the environment. As such, the court denied Plaintiff’s summary judgment motion.

**B. Effect of Bankruptcy on RCRA § 7003 Claims**

***U.S. v. Apex Oil Company, Inc.*, No. 05-CV-242-DRH, 2006 U.S. Dist. LEXIS 52608 (S.D. Ill. July 6, 2006)**

- 1. The district court concluded that the federal government’s claims for injunctive relief under the “imminent and substantial endangerment” provisions of Section 7003 of RCRA were not discharged in a Chapter 11 bankruptcy proceeding against the former operator of a refinery.
  - a. In reaching its decision, the district court relied on the Bankruptcy Code’s definition of a “claim,” which includes a “right to payment” or a “right to an equitable remedy for breach of performance if such breach gives rise to a right of payment.” 11 U.S.C. § 101(5).
  - b. The government had only alleged that the refinery’s operations posed an “imminent and substantial endangerment” to health or the environment, consistent with Section 7003 of RCRA. This provision of RCRA allows for only two remedies: (1) a court may enjoin a party from further violating RCRA or (2) a court may require a party to take affirmative action to clean up and properly

dispose of or otherwise manage solid or hazardous waste. Because Section 7003 does not allow for monetary relief, the district court held that the government's Section 7003 claims were not "claims" that were discharged in Chapter 11 proceedings.

2. In reaching its decision, the district court relied on the U.S. Supreme Court's decision in *Mehrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), that RCRA's citizen suit provision in Section 7002, whose language is similar to Section 7003, does not allow a private party to obtain a monetary remedy. The *Apex* court recognized that the outcome may be different in the context of a CERCLA cleanup order, where the statute allows a creditor to do the work itself and then sue for response costs. *See, e.g., In re Udell*, 18 F.3d 403 (7th Cir. 1994).

**C. Nature and Scope of Liability and Jurisdiction Under RCRA Citizen Suit Provision**

***City of Bangor v. Citizens Communications Co.*, 437 F.Supp. 2d 180 (D.Me. June 27, 2006); Civil No. 02-183-B-S, 2006 U.S. Dist. LEXIS 61152 (D. Me. Aug. 28, 2006)**

1. The City of Bangor, Maine, sued the Defendant corporation alleging that its operation of a manufactured gas plant resulted in discharges of tar-laden wastewater into a cove, which posed an "imminent and substantial endangerment to health or the environment" under RCRA Section 7002(a)(1)(B). The City also sued for response costs under CERCLA Section 107.
2. The Defendant corporation brought counter-claims against the city alleging that it was at least in part responsible for any "imminent and substantial endangerment" that may exist within the meaning of RCRA Section 7002.
3. After trial, the district court held that the cove was contaminated with tar and polycyclic aromatic hydrocarbons ("PAHs") that were "solid wastes" under RCRA Section 1004(27). The court also found that certain tar wastes located in the cove that were periodically exposed during low tide were prone to conditions whereby the PAH-containing tar might come to the surface and stick to other objects on or in the water and that this presented "an imminent and substantial endangerment to health and to the environment."
4. RCRA Liability:
  - a. After trial, the district court found that both the City and the Defendant were jointly and severally liable under RCRA for the "imminent and substantial endangerment" created by the tar

wastes. The Defendant corporation was liable as a past generator of the wastes, and the Plaintiff city was liable because it contributed to past handling, transporting, and disposal of the wastes.

- b. The court concluded that while RCRA allows the court to issue an injunctive order for cleanup, it does not allow the court to order a party to reimburse another entity for cleanup costs. Because both parties were liable under RCRA, the court acknowledged that it could order either party to abate the imminent and substantial endangerment in the cove, but it held that the parties were jointly and severally liable under RCRA, citing *Maine People's Alliance v. Holtrachem Manuf. Co., LLC*, 211 F. Supp. 2d 237, 252-54 (D. Me. 2002).
- c. While the court recognized that one party may be able to demonstrate that the harm was divisible, it also found little case law on allocation of RCRA liability, citing *Cox v. City of Dallas*, 256 F.3d 281, 301 n.37 (5th Cir. 2001) (collecting cases). Therefore, the district court looked to CERCLA case law to hold that there was no "concrete and specific" evidence that would support a finding that the "imminent and substantial" harm was divisible. *See, e.g., United States v. Hercules*, 247 F.3d 706, 716-18 (8th Cir. 2001); *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 74-75 (1st Cir. 1999); *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989). In particular, the harm was not divisible because the parties shared responsibility for the same tar. The district court also declined to allocate the harm between the parties because it recognized the difficulty in crafting a RCRA remedial order that requires a party to clean up only its allocated percentage share of contamination.

5. RCRA Jurisdiction:

- a. After the court's decision on RCRA liability, the Plaintiff city asked the court to reconsider its jurisdiction over the Defendant corporation's RCRA counter-claims since the corporation had not provided prior notice of its claims as required by law. RCRA Section 7002(b)(1)(A) requires a party to give notice of the alleged RCRA violations to the potential violator, EPA, and the relevant state agency at least 60 days prior to filing suit. The U.S. Supreme Court has held that complying with RCRA's notice requirement is a prerequisite to jurisdiction. *See Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).
- b. Upon review of the facts before it, the court found no evidence that the corporation had given prior notice of its counter-claims. The

court concluded, however, that the prior notice requirement under RCRA Section 7002(b)(1)(A) does not apply to counter-claims because only plaintiffs are required to give notice, citing the language that prohibits an action filed “prior to 60 days after the *plaintiff* has given notice of the violation.” RCRA Section 7002(b)(1)(A) (emphasis added).

- c. Notwithstanding *Portsmouth Redevelopment & Housing Auth. v. BMI Apartments Assocs.*, 847 F.Supp. 380, 386 (E.D.Va. 1994) (holding that RCRA counter-claims must comply with the notice prerequisite where plaintiff’s original claims did not include RCRA claims), the court reasoned that applying the notice requirement to counter-claims in this case would not serve the purposes of the notice requirement, which are to (i) give government agencies the opportunity to bring an enforcement action and (ii) allow the alleged violator to bring itself into compliance. Since government agencies had already received notice of the Plaintiff’s claim, notice of the counter-claim would be duplicative. Also, the Plaintiff had already commenced a suit, so giving it prior notice of a counter-claim would be unlikely to prompt the Plaintiff into coming into compliance with RCRA.
- d. The court found support in its ruling in Federal Rules of Civil Procedure 12 and 13(a) regarding compulsory counter-claims as well as *AM Int’l, Inc. v. Datacard Corp., DBS, Inc.*, 106 F.3d 1342, 1353-54 (7th Cir. 1997) (Ripple, J., concurring) (suggesting compulsory counter-claims need not meet RCRA Section 7002(b)(1)(A) notice requirements because a defendant is not in control of the timing of the lawsuit).

### III. STATE DECISIONS

#### **Federal Preemption of Civil Penalties for Hazardous Waste Transportation Incidents**

Although RCRA generally allows states to administer their own hazardous waste programs that can be more stringent than the federal program, courts must occasionally deal with questions of when other federal laws dealing with hazardous materials or wastes preempt state hazardous waste programs. The case below demonstrates how a state court in California recently addressed this issue with respect to the federal Hazardous Materials Transportation Act.

***The People v. Union Pacific Railroad Co.*, 141 Cal. App. 4th 1228, 2006 Cal. App. LEXIS 1189 (Aug. 2, 2006 Cal. App.)**

- A. In a state enforcement action for releases of hazardous materials (lime) being shipped by rail in California, a California appeals court ruled that certain state law

claims regarding the failure to report and remediate those releases were not preempted by the federal Hazardous Materials Transportation Act (“HMTA”). However, other claims for liability for the releases themselves were preempted by the HMTA because the state’s imposition of civil penalties for the release would amount to regulation of the manner in which the materials were shipped, which is preempted by the HMTA, even though the HMTA did not regulate the materials in question when shipped by rail.

1. Scope of the Federal Hazardous Materials Transportation Act, 49 U.S.C. § 5101, *et seq.*
  - a. The HMTA governs transportation of hazardous materials (including hazardous wastes). The HMTA directs the Secretary of Transportation to prescribe regulations to direct the safe transportation of hazardous materials in commerce. U.S. Department of Transportation (“DOT”) regulations are broad and cover nearly all aspects of transportation, including classification of materials, packaging, documentation, training, reporting of releases, and security.
  - b. The HMTA preempts state laws that directly or indirectly conflict with the HMTA and DOT’s hazardous materials regulations, with limited exceptions, including some circumstances when the state law is authorized by another federal law. Specifically, states are preempted from regulating the following aspects of hazardous materials transportation: designating and classifying hazardous materials, packing, labeling, marking, and handling hazardous materials, preparation and use of shipping documents for hazardous materials, written notification of releases of hazardous materials in transportation, and the design and condition of packaging and containers for hazardous materials transport. 49 U.S.C. § 5125(a), (b).
  - c. Under the HMTA, DOT does not regulate the lime involved in this case when it is transported by rail, unless it is a hazardous waste. The lime involved here was transported by rail as a commodity, and not as a hazardous waste.
2. Regulation of Hazardous Waste Transportation Under RCRA
  - a. RCRA governs limited aspects of transportation of hazardous wastes, including requiring use of a hazardous waste manifest and an authorized hazardous waste transporter. RCRA requires EPA regulations on transportation of hazardous wastes to be consistent with the HMTA. *See* RCRA § 6003(b).

- b. RCRA authorizes states to implement their own hazardous waste management programs in lieu of the federal RCRA program as long as the state requirements are at least as stringent as the federal standards and the state program is approved by EPA. Because RCRA expressly authorizes more stringent regulation of hazardous wastes by states, RCRA does not preempt such regulation.
3. Regulation of the Transport of Hazardous Materials Under California Law
  - a. California law requires that any handler of hazardous materials immediately provide an oral report of a release or threatened release of any such material. Handlers must also have a plan for responding to a release or threatened release and must train employees in safety procedures in the event of a release or threatened release.
  - b. In most instances, California law imposes cleanup obligations on anyone who deposits or discharges hazardous substances or wastes. California also imposes civil liability on anyone who negligently disposes or causes the disposal of hazardous waste that is not otherwise authorized.
  - c. Under California's RCRA-authorized hazardous waste program, calcium oxide (*i.e.*, lime), the material at issue in this case, is considered hazardous when it is a waste because the California Department of Toxic Substances Control (DTSC) has determined calcium oxide meets EPA's corrosivity criteria for a hazardous waste.
4. California's State Law Claims
  - a. The State charged the railroad with failure to immediately provide oral notification to state and local officials of the releases involved.
  - b. The State also charged the railroad with civil penalties for causing the release.
  - c. Finally, the State asked the court to order the railroad to clean up the hazardous substances and wastes deposited in California as a result of the releases from the railroad.
5. The Railroad Asserted California's Claims Were Preempted by the HMTA
  - a. The railroad argued that the state's claims were preempted by the HMTA because they concerned transportation of a material that DOT does not regulate as hazardous when transported by rail. As such, DOT's decision not to regulate calcium oxide resulted in preemption of all state laws that could affect its transportation.

- b. Although Congress generally has exclusive power to regulate interstate commerce, there is a rebuttable presumption that state laws are not preempted by federal laws governing interstate commerce where the state's police power to regulate health and welfare within the state is implicated. *See Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960). The district court recognized the HMTA could only displace California law governing health and safety within the state where Congress' intent to do so was "clear and manifest." *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

6. Disposition of California's Claims

- a. Failure to provide oral notification claims were not preempted by HMTA. The court found that oral notification of a release under California law was not preempted by the HMTA because the HMTA specifically preempted written notification of releases, *see* 49 U.S.C. § 5125(b), and oral notification under California law did not conflict with the HMTA or DOT regulations. In fact, oral notification required by state law was consistent with the HMTA's goal of immediate emergency response in order to minimize injury. Moreover, other federal laws, such as CERCLA and EPCRA, would require such notification. The court noted that state requirements for written notification, however, may be preempted by the HMTA.
- b. Claims for cleanup were not preempted by the HMTA. The court recognized that California laws tailored to provide for the cleanup hazardous materials spills were within the state's police power to regulate health and welfare within the state. These laws were the State's attempt to remedy injuries in the State that resulted from transportation of hazardous materials. Therefore, the court found that while the HMTA preempts state regulation of the safety aspects of hazardous materials transportation, it did not preempt state remedies for hazardous material spills, such as abatement and cleanup of hazardous materials releases or payment for cleanup and assessment and remediation of damages to natural resources. The court found nothing in the HMTA that clearly and manifestly established an intent that transporters of hazardous materials be immune from state remedies for injuries resulting from their activities. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (requiring "clear and manifest" statutory language that a federal statute regulating safety aspects of an activity also preempted state remedies for injuries associated with that activity).

As noted above, Defendants argued that remedial claims were preempted because DOT did not regulate calcium oxide when

transported by rail, and that DOT's decision not to regulate calcium oxide resulted in preemption of all state laws that could affect its transportation. The court, however, found no affirmative decision under the HMTA to provide immunity to rail transporters of calcium oxide for injuries caused during transportation, citing *Waering v. BASF Corp.*, 146 F.Supp. 2d 675, 681-82 (M.D.Pa. 2001).

Moreover, the court noted that state cleanup obligations are part of the state hazardous waste program authorized under RCRA. The fact that transportation of calcium oxide by rail is not regulated at the federal level by DOT does not prevent California's designation of calcium oxide as a hazardous waste under the state's RCRA-authorized program. Therefore, the remedies imposed by California's hazardous waste program for cleanup of the hazardous waste resulting from the release of the hazardous material were not preempted by the HMTA.

- c. Claims for civil penalties for releases without regard to injury were preempted by the HMTA. The court found that California's assertion of civil penalties for the release of the calcium oxide was an attempt to regulate the transportation of calcium oxide. In explaining its decision, the court stated that civil penalties are inherently regulatory, and to impose a civil penalty on an incident without regard to remedying the consequences of the incident is to regulate the activity giving rise to the incident. *See Southern R. Co. v. Reid*, 222 U.S. 424, 441-43 (1911). The court distinguished imposition of civil penalties for the spill itself, which was preempted, from the imposition of remedies targeted to cleanup activities after the spill occurred. As discussed in paragraph b. above, the court found no intent that the HMTA preempt state remedies targeted to abatement or cleanup of the spill. These remedies were within the state's police power to protect health and welfare and were consistent with the state's RCRA-authorized program. Civil penalties for the spill, however, concerned the activities that led up to the spill, such as how the materials were packaged or handled. State regulation of these activities was specifically preempted by the HMTA. *See* 49 U.S.C. § 5125(b)(1)(B) & (E).

#### **IV. ADMINISTRATIVE DECISIONS**

In the last year, EPA's Administrative Law Judges ("ALJs") and Environmental Appeals Board issued about twenty decisions in RCRA cases, most of which involved preliminary procedural matters. Of the substantive decisions, the most salient for purposes of administration and enforcement of the RCRA program are summarized below.

**A. Definition of Solid Waste Applied to Recycled Acid Materials—Whether a Material is “Spent” and “Reclaimed”**

***In the Matter of Zaclon, Inc., Docket No. RCRA-05-2004-0019, EPA Office of Administrative Law Judges, 2006 EPA ALJ LEXIS 24 (May 18, 2006)***

1. EPA brought this action under RCRA Section 3008 alleging that Zaclon violated Section 3005(a) of RCRA by receiving, storing, and treating a hazardous waste, spent stripping acid, without a permit or interim status. In deciding a motion for accelerated decision, the ALJ found that the acid was a “spent material,” but found genuine issues of material fact warranting an evidentiary hearing as to whether the acid was reclaimed, such that it would be classified as a “solid waste” as a “spent material being reclaimed.”
2. The key issue in this case was whether the spent stripping acid was a “solid waste,” and therefore a corrosive hazardous waste subject to RCRA (there was no dispute over the hazardous nature of the material in question). “Spent materials” are solid wastes if they are recycled by being “reclaimed.” 40 C.F.R. § 261.2(c)(3), Table 1. “Spent materials” are defined 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). A material is “reclaimed” if it is processed to recover a usable product, or if it is regenerated.” 40 C.F.R. § 261.1(c)(4).
3. Zaclon received spent stripping acid from several galvanizing facilities and used it as an ingredient in manufacturing zinc ammonium chloride. The acid was contaminated with zinc and iron in the form of various compounds and also with various heavy metals.
4. Zaclon asserted that the stripping acid was a “co-product,” not a spent material, because the acid was used as an ingredient in its manufacturing process. A “co-product” is defined as something “produced for the general public’s use and is ordinarily used in the form it is produced in the process.” 40 C.F.R. § 261.1(c)(3). Zaclon argued in the alternative that even if the acid was a “spent material,” it was not reclaimed because it was used as an ingredient in a manufacturing process to make a product. *See* 40 C.F.R. § 261.2(e)(i).
5. EPA countered that the stripping acid was not a “product” that anyone might buy. EPA noted that there was no evidence that anyone bought the acid involved other than Zaclon, and that Zaclon did not pay for it; instead, Zaclon required the galvanizer to pay freight charges. Moreover, the acid was not used in the form in which it was produced during galvanizing. Instead, chemical reactions had to be induced to remove iron and other impurities before its use in Zaclon’s manufacturing process.

6. The ALJ found that the acid was a spent material, but that there were genuine issues of material fact as to whether the acid was being reclaimed, and, therefore, whether it was a solid waste.
  - a. Spent material: The ALJ found that the acid was produced for the purpose of stripping coatings, including metals from objects. Once that virgin material was contaminated through the stripping process, the solution could no longer be used for its purpose and was “spent” within the regulatory meaning of that term. This “spent material” was then shipped to Zaclon. The facts before the ALJ did not show that Zaclon was paying for a valuable product, rather that Zaclon was relieving the galvanizers of a waste that was no longer usable for their purposes and that they must get rid of.
  - b. Reclaimed: EPA’s regulations state that materials “are not solid wastes when they can be shown to be recycled by being “[u]sed . . . as ingredients in an industrial process to make a product, provided the materials are not being reclaimed.” 40 C.F.R. § 261.2(e)(1)(i). The ALJ found that the stripping acid was used as an ingredient in an industrial process, but it could not conclude that the acid was reclaimed because the facts before the ALJ were not sufficient to conclude that the stripping acid had to be processed to recover a useable product, *i.e.*, reclaimed, as opposed to it being a “distinct component” or “material value” that was “recovered as an end-product of a process,” in which case the material might not be regulated as a solid waste. *See* 50 Fed. Reg. 614, 633, 637 (Jan. 4, 1985). Therefore, the ALJ reserved that issue for an evidentiary hearing.

**B. Definition of Solid Waste Applied to Auto Paint Spraying Operations—Point of Generation of Solid Wastes**

***In the Matter of General Motors Automotive—North America, Docket No. RCRA-05-2004-0001, EPA Office of Administrative Law Judges, 2006 EPA ALJ LEXIS 17 (March 30, 2006)***

1. EPA brought this action under RCRA Section 3008 alleging that General Motors (“GM”) violated RCRA Section 3005 by improperly managing hazardous wastes generated by its auto paint spraying operations without a permit. EPA’s proposed penalty was \$568,116. The key question before the ALJ was at what point the purge solvent or purge solvent/paint mixture resulting from cleaning spray-paint applicators in auto manufacturing paint booths became a “solid waste.” An EPA ALJ found that the spray paint operations generated a “solid waste” under RCRA at the point the purge solvent/paint mixture was no longer used to clean the spray-paint applicators, and the purge solvent mixture remained a “solid waste” as it moved through pipes, lines, valves, and recirculation loops that were all

part of the same process. The ALJ rested its decision on the conclusion that the purge solvent mixture became a “spent material” that no longer served its “predominant purpose,” after cleaning the spray-paint applicators, even though GM claimed the purge solvent mixture was a product performing one of its intended solvent functions of dispersing and diluting paint downstream of its initial use.

2. GM used purge solvent to remove paint from paint applicators and other equipment when one paint color was substituted for another. After the solvent performed this cleaning function, the mixture of paint and solvent traveled through a series of pipes and loops and eventually entered the purge mixture storage tanks, which was the location at which GM considered the waste generated. GM asserted that when traveling through the pipes and other equipment, the purge solvent served a secondary function of keeping the solids from the paint dissolved in solution in the pipes. GM labeled the storage tanks at issue as containing “hazardous waste,” and sent the contents of these tanks to an off-site solvent recycler.
3. GM had previously petitioned the D.C. Circuit for review of May 2002 letters from EPA to the Alliance of Automobile Manufacturers and several of its members, which included an adverse regulatory interpretation on the paint booth operations that GM did not believe was lawful. The key language from the regulatory interpretation is as follows:

“The EPA continues to stand by its 1997 determination on the point of generation for hazardous waste at spray paint operations and, as such, ancillary equipment transporting the hazardous waste purge solvent from the painting operations and the storage tanks to which the mixture is conveyed are subject to RCRA.” Letter from Steven Shimberg, EPA, OECA Assoc. Asst. Admin. (May 7, 2002).

The DC Circuit dismissed GM’s petition on the grounds that the letters did not constitute final agency action.

4. Consistent with its previous statements, EPA asserted in this case before the ALJ that once the solvent became contaminated with the paint and was no longer used to clean the spray-paint applicators, the resulting purge solvent mixture was a “spent material.” Because the purge solvent mixture in GM’s storage tanks was sent off-site for reclamation, EPA contended that the mixture was a “spent material” being reclaimed and, therefore, a RCRA “solid waste.” As noted above, “spent materials” are defined 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). “Spent materials” are solid wastes if they are recycled by being “reclaimed.” 40 C.F.R. § 261.2(c)(3),

Table 1. A material is “reclaimed” if it is processed to recover a usable product, or if it is regenerated.” 40 C.F.R. § 261.1(c)(4).

5. EPA argued that the purge solvent mixture was a “spent material” because the solvent mixture served essentially no purpose after being used on the paint guns (*i.e.*, it was not necessary to keep the materials flowing in the pipes because the pipes were subject to external agitation and pumping for that purpose) and was not a part of any manufacturing process.
6. GM argued that the solvent mixture was not a “spent material” after leaving the paint guns because at that point it was still a product performing one of its intended solvent functions, which was to keep the solvent mixture moving by keeping the paint solids dissolved and allowing the mixture to flow to the storage tanks. GM argued that spent solvent materials can have several functions, and that the purge solvent mixture continued to serve its solvent purpose by keeping the mixture dissolved as it flowed to the storage tanks.
7. In support of its position, GM invoked EPA’s “continued use” doctrine. Under that doctrine, a material is not a solid waste if it can be used further without being reclaimed, and the further use need not be identical to the initial use. For example, solvents used to clean circuit boards could become too contaminated for that purpose, but they could later be used as metal degreasers. GM argued that after cleaning the paint guns, the purge solvent continued to be used as a solvent, keeping the mixture dissolved and flowing through the pipes until it reached the storage tanks. Instead of simply evaluating whether the material at issue continued to be beneficially used, the ALJ focused on whether the used solvent continued to pick up additional contaminants. In the ALJ’s view, in past EPA interpretations where EPA concluded that a solvent was not a spent material, EPA found that a previously used solvent was used in a different application to pick up additional contaminants. Because the purge solvent was used to re-dissolve and re-suspend itself, rather than pick up additional contaminants, the ALJ found that EPA’s continued use doctrine did not apply.
8. In ruling that the purge solvent mixture became a solid waste immediately after cleaning the paint applicators, the ALJ opinion does not stray from EPA’s previously articulated statements on that subject. However, the ALJ appeared to go further than the previous interpretations and found that the solvent mixture was a “spent material” because it could no longer serve its “*predominant purpose*” without processing, even though the pertinent regulatory definition refers to “*the purpose for which [a material] was produced.*” *See* 40 C.F.R. § 261.1(c)(1) (emphasis added).
9. The ALJ concluded that in order to determine whether the purge solvent mixture is a spent material, the appropriate test is to look at the material’s

“predominant purpose.” In doing so, the ALJ pointed to the “predominant purpose” test employed by the D.C. Circuit in *American Petroleum Inst. v. EPA*, 216 F.3d 50, 57-58 (D.C. Cir. 2000) to decide when a material had been discarded, *i.e.*, whether the predominant purpose of an activity was discard. Although the ALJ did not flesh out the parameters of “predominant purpose,” the test, as applied, appeared to be tied to the significance of the use. For example, the ALJ indicated that a material’s original purpose in a process may not be its “predominant purpose” where the original purpose was relatively less significant than a subsequent purpose.

10. The ALJ concluded that the “predominant purpose” of the purge solvent was to clean paint from the spray-paint applicators, and the purge solvent mixture would have no purpose in GM’s system had the solvent not first been used to clean the paint applicators. The ALJ found that the solvent mixture was kept flowing in part due to external agitation, pressure and volume, not the solvent properties of the purge mixture. The ALJ found that the limited cleaning power of the contaminated solvents in the purge mixture was “secondary to this [paint cleaning] purpose, by far.” Therefore, under its own “predominant purpose” test, the ALJ concluded that the solvent mixture was a “spent material” because it was no longer fit to serve its predominant purpose without further processing.
11. The ALJ was manifestly concerned that adopting GM’s reasoning would create a loophole for facilities to add solvents to waste lines, which would ostensibly keep lines flowing, but would allow contaminated material to remain outside RCRA jurisdiction.
12. GM is appealing the ALJ’s ruling, and oral argument before the Environmental Appeals Board was set for September 28, 2006.

**C. Prior Notice to State of EPA Enforcement Action under RCRA Section 3008**

***In the Matter of Minnesota Metal Finishing, Inc., Docket No. RCRA-05-2005-0013, EPA Office of Administrative Law Judges, 2006 EPA ALJ LEXIS 7 (March 15, 2006)***

1. EPA brought this action under RCRA Section 3008 alleging that a metal finishing facility improperly maintained its employee training program and documentation related to emergency preparedness, as required by 40 C.F.R. § 264.16, 40 C.F.R. Part 264, Subpart C and analogous provisions of Minnesota law. The metal finishing company argued that EPA did not give the State of Minnesota -- which had been authorized by EPA to administer and enforce its base hazardous waste program in lieu of the federal program -- proper notice of the alleged violations, and that the case should therefore be dismissed so that the State of Minnesota could

exercise its primary enforcement authority in lieu of EPA's residual enforcement authority under Section 3008(a).

2. RCRA Section 3008(a)(2) provides that when a state is authorized to carry out a hazardous waste program in lieu of the federal program, EPA "shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section."
3. The ALJ found that the State of Minnesota had ample actual notice of the alleged violations before EPA filed the case. In particular, the state received "notice-in-fact" because EPA informed the Minnesota Pollution Control Agency ("MPCA") that it intended to inspect the metal finishing plant and invited MPCA to participate. MPCA declined to participate in the inspection and declined subsequent opportunities provided by EPA over the course of four years to stay informed of the progress of the investigation conducted by EPA and the County Department of Environmental Services. During this time, EPA also sent MPCA copies of EPA's correspondence with the facility that contained references to the alleged violations. Given those circumstances, the ALJ found that MPCA had ample opportunity to enforce the alleged violations under state law. The ALJ held that notice to states need not take any particular form and that notice-in-fact was sufficient to satisfy the prerequisites of RCRA Section 3008(a)(2).