

C O M M E N T

The Saga Continues—*Howmet* and the Ongoing Uncertainty of Solid Waste Regulation Under RCRA

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It is said that nothing is constant except change. For industry trying to keep up with its environmental obligations, perhaps the more appropriate saying would be that nothing is constant except regulatory uncertainty. Under President Barack Obama, the U.S. Environmental Protection Agency (EPA) has pursued wide-sweeping regulatory initiatives under virtually every major environmental statute. These include the Agency's groundbreaking efforts to monitor and regulate mobile and stationary sources of greenhouse gases (GHGs) under the Clean Air Act (CAA).¹ Complicating the regulatory landscape, the courts have overturned many of the George W. Bush EPA's rulemaking initiatives, sending the Agency back to the drawing board on a host of significant and broad-reaching rulemakings. As a result, industry faces perhaps the most uncertain environmental regulatory landscape in 20 years.

I. Ongoing Initiatives to Regulate Solid Waste Under the Resource Conservation and Recovery Act

The regulation of "recycling" under the Resource Conservation and Recovery Act (RCRA)² is one such environmental area seemingly mired in perpetual uncertainty. On October 30, 2008, the Agency promulgated its long-awaited Subtitle C Definition of Solid Waste Rulemaking (DSW Rule). Over 15 years in the making, the final rule clarified the rules of the road for the legitimate recycling of secondary hazardous materials within and across industrial processes. In order to comply with a long line of legal challenges to the scope of the Agency's RCRA authority, the DSW rule was premised on the concept of "discard." That is, EPA self-limited its jurisdiction under the rule, as it must, only to those materials that had been abandoned, disposed of, or thrown away. The final rule seemingly provided the regulatory certainty necessary to make the legitimate recycling of a variety of secondary hazardous material streams economically viable.

Shortly after the rule's publication, however, the Sierra Club filed litigation challenging the final rule, and also filed an administrative petition for reconsideration before EPA requesting the Agency scrap the rule and start again. As part of its review of Sierra Club's petition, the Obama EPA announced a major, first-of-its-kind pilot study designed to improve and increase environmental justice considerations during rulemakings.³ The results of EPA's final environmental justice are expected sometime in fall 2010. And in September 2010, EPA and the Sierra Club announced a settlement, requesting that the court indefinitely hold the DSW litigation in abeyance while EPA begins a new rulemaking to address some or all of the Sierra Club's issues. (This motion is currently pending before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, and in all likelihood will be granted.) The settlement means that another DSW rule will be proposed by June 2011—extending this rulemaking process at least several more years.

EPA also has moved forward recently with its rulemaking to define the waste characteristics of secondary nonhazardous materials for purposes of regulation under §129 of the CAA, which subjects solid waste incineration units to CAA emissions standards. Because the definition of solid waste for purposes of regulation under §129 is based on RCRA's definition of solid waste, this rule too has implications for the broader definition of solid waste under RCRA (hazardous or nonhazardous).

Like the DSW rule, EPA focused the CAA §129 proposed rule on the concept of discard. However, some of its provisions arguably extend EPA's jurisdiction beyond the judicially prescribed limitation to regulate only abandoned, disposed of, or thrown-away materials. For example, under the §129 proposal, EPA proposed to characterize scrap tires—which are beneficially reused in whole and shredded form for their

1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

2. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

3. Recent guidance on EPA's environmental justice initiative signals that the Agency has moved beyond the anticipated scope of the study. Initially, EPA indicated the environmental justice component was designed to be incorporated into rulemakings. The recent guidance indicates that EPA now intends the new environmental justice process to apply also to rule implementation, arguably subjecting every existing EPA regulation to the new process.

thermal value and metal content in a variety of industrial processes—as per se solid waste, despite the fact that reused scrap tires are never discarded. Indeed, because of industry's beneficial reuse, the number of scrap tires stockpiled and landfilled has decreased by approximately 90% over the past 20 years—a remarkable environmental success story.

In short, between the seemingly never ending uncertainty surrounding the DSW rule and the Agency's recent §129 proposal concerning the definition of nonhazardous solid waste, administrative clarification regarding the regulation of solid waste under RCRA seems nowhere in sight. This administrative quagmire has now been complicated by a recent decision from the D.C. Circuit.

II. The *Howmet* Decision

On August 6, 2010, the D.C. Circuit handed down its 2-1 decision in *Howmet Corp. v. EPA*⁴—a decision with implications for the broader issue of EPA's jurisdiction over solid waste under RCRA. While the ultimate holding in *Howmet* was not surprising, the court's rationale for reaching its decision is potentially troubling.

At issue in the case was the RCRA definition of “spent material,” and whether under that definition used liquid potassium hydroxide (KOH), originally used by Howmet as a cleaning agent for various aerospace and industrial gas turbines, was a spent material once it was sent to a fertilizer manufacturer for use as a fertilizer ingredient. Spent material, defined as “any material that has been used and as a result of the contamination can no longer serve the purpose for which it was produced without processing,”⁵ is subject to RCRA's hazardous waste regulations.

The resolution of the issue in *Howmet* turned on the interpretation of the latter part of the spent material definition: “the purpose for which it was produced.” Howmet argued that its KOH was not a spent material because its fundamental “purpose” as a concentrated source of hydroxide ions and potassium was not changed when it was reused as an ingredient in the fertilizer manufacturing process. Conversely, EPA argued that a product's “purpose” for production must be related to its original use, and that the KOH was a spent material, because as an ingredient in the fertilizer manufacturing process, it was no longer being used as a cleaning agent, its original use. That the court sided with EPA was not a shock, given that an administrative law judge, the EPA's Environmental Appeals Board, and the D.C. Circuit all held that EPA's interpretation was reasonable and that the KOH was a spent material. Indeed, much of the circuit court's opinion, like its predecessor opinions, centered on noncontroversial principles of administrative law, including deference to agency interpretation.

More perplexing was the court's narrow focus on certain RCRA provisions to the exclusion of others and its cursory treatment of the “discard” concept. The court stated that

“EPA's overall regulatory framework under RCRA”⁶ and the concept of discard were guiding factors. Yet, it found Howmet's position to be “incompatible with the overall thrust of RCRA and its implementing regulations,”⁷ citing to the national policy objectives of RCRA in §6902(b), i.e., to reduce or eliminate the generation of hazardous waste and ensure that hazardous waste that is generated is managed in a manner protective of human health and the environment.

The court, however, glossed over several competing and fundamental objectives of RCRA, including §6902(a)'s prescription to “conserve valuable material and energy resources,” and §6902(a)(6), which “encourag[es] process substitution, materials recovery, properly conducted recycling and reuse, and treatment.”⁸ Perhaps most importantly, the court did not explain how the concept of discard factored into, or was consistent with, its holding, i.e., whether the KOH was abandoned, disposed of, or thrown away, or whether long-standing Lowrance legitimacy criteria were met or not.⁹

Such basic deficiencies in the majority opinion were not lost on one member of the court's panel. In his dissent, Judge Brett M. Kavanaugh stated that “EPA's current interpretation contravenes EPA's explicit statement in the preamble to the 1985 [spent material] regulations—namely, that it was not extending its regulatory authority to ‘situations where a material can be used further without being reclaimed, but the further use is not identical to the initial use.’”¹⁰ As Judge Kavanaugh explained, this limitation in the 1985 preamble was there for “good reason,” as extending such regulatory authority “would violate the text of RCRA, the governing statute, which as relevant here confines EPA's authority to regulation of ‘discarded material.’”¹¹ In a potentially prescient statement, which may forecast the substantial confusion the *Howmet* decision may cause for the pending solid waste rulemakings, Judge Kavanaugh concluded his dissent by stating:

In our Court, Howmet has raised a challenge based only on the 1985 regulations, not on RCRA, so there is no basis here for further exploring the statutory boundaries. *But in light of today's decision, we may have to consider in a future case whether EPA's expansion of its regulatory authority transgresses RCRA's limits.*¹²

6. *Howmet*, 614 F.3d at 550.

7. *Id.* at 552.

8. *Id.*

9. In 1989, EPA's Office of Solid Waste issued a memorandum consolidating criteria previously used to define legitimate recycling. This document, known as the Lowrance Memo, has generally controlled legitimacy evaluations since. The DSW rule borrowed almost exclusively from the Lowrance Memo in codifying the legitimacy criteria. For example, questions posed by the Lowrance Memo include whether the secondary material is similar in use and economic value to an analogous raw material, whether there is a market for the reclaimed secondary material, whether the secondary material is managed in a manner consistent with the raw material, and whether the end product contains toxic constituents not found in the raw material. *See, e.g.*, 73 Fed. Reg. 64700-10 (Oct. 30, 2008).

10. *Howmet*, 614 F.3d at 555.

11. *Id.*

12. *Id.* at 556 (emphasis added).

4. 614 F.3d 544, 41 ELR 20211 (D.C. Cir. 2010).

5. *See* 40 C.F.R. §261.1(c)(1).

III. The Uncertain Future of RCRA Solid Waste Regulation

It is difficult to predict the precise impact *Howmet* will have on the ongoing Agency efforts to define both hazardous and nonhazardous solid waste under RCRA. On one hand, *Howmet* may be distinguishable. The facts, as in most RCRA cases, are unique. Notwithstanding the court's omission of certain fundamental RCRA provisions, due to the unique process and use of KOH, the court stands on solid ground (even though the opinion did not discuss land disposal restriction in detail) in relying, in part, on the land disposal restrictions in 40 C.F.R. §261.2. Further, as Judge Kavanaugh noted, *Howmet's* challenge was narrowly confined to the 1985 "spent material" regulations. A future court could avoid applying *Howmet* more broadly.

On the other hand, it is troubling that the court reached its decision without explaining how the result squares with EPA's limited RCRA jurisdiction over only discarded hazardous material. As the dissent accurately noted, EPA, through a subsequent regulatory interpretation, effectively enlarged its regulatory authority to materials that are not discarded. Omission of this fundamental discussion may signal a willingness by at least some members of the court to dispense with such analysis in future cases.

The majority's ratification of EPA's position also lends credence to the types of arguments the Sierra Club made in its administrative and judicial challenges to the DSW rule and some of the positions the Agency advanced in its §129 proposed rule. Indeed, as EPA did in *Howmet*, the Sierra Club's petition to EPA for reconsideration of the DSW rule selectively cites only those RCRA objectives that focus on limiting the generation of hazardous waste, and fails to mention EPA's limited RCRA jurisdiction over only discarded material.

Now that EPA and the Sierra Club have reached a settlement whereby EPA will undertake a new DSW rulemaking, the *Howmet* decision could embolden EPA to take positions contrary to its limited RCRA jurisdiction. Indeed, in a new DSW rulemaking, EPA has few meaningful avenues but to overstep its RCRA authority. The Agency already determined that the conditions imposed in the final DSW rule were sufficient to ensure no discard. Any additional requirements or conditions imposed in a new rulemaking would per se exceed the Agency's RCRA authority. Yet, the most likely path for EPA's new DSW rulemaking appears to be additional conditions under the transfer-based exclusion—particularly if the Agency's environmental justice analysis somehow shows that the DSW rule has more impacts to low-income and minority communities than initially forecast (which, incidentally, were "no impacts," given that the DSW rule encourages secondary material recycling and decreases volumes being landfilled).

Regardless of the outcome in EPA's newest DSW rulemaking or its CAA §129 rulemaking, it appears litigation will be inevitable. The *Howmet* decision shows that at least some of the members of the court that may preside over such litigation tend to sanction an enlargement of EPA's RCRA jurisdiction. To mount an effective challenge or defense to any final rule, it will continue to be important for the regulated community to establish a robust record throughout all stages of the solid waste rulemakings, focusing on discard and EPA's limited RCRA authority.

After coming within one day of a final resolution of the long-standing effort to define solid waste for RCRA purposes, resolution of EPA's definition of solid waste under RCRA once again appears years away. Until then, industry, EPA, the states, and other interest groups must continue to manage secondary materials under a patchwork of state regulatory programs and an umbrella of regulatory uncertainty.