



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 12 2014

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

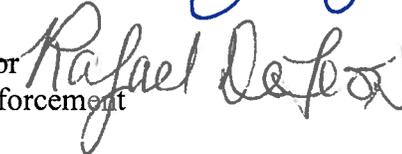
MEMORANDUM

SUBJECT: Ninth Circuit Court of Appeals Decision in Ecological Rights Foundation v. Pacific Gas and Electric Company Regarding the RCRA Definition of Solid Waste

FROM:  Susan Shinkman, Director
Office of Civil Enforcement



Rafael DeLeon, Acting Director
Office of Site Remediation Enforcement



TO: Regional Counsels
Regional Enforcement Division Directors
RCRA Enforcement Managers
RCRA Division Directors

This memorandum highlights issues raised by the decision in *Ecological Rights Foundation v. Pacific Gas and Electric*, 713 F.3d 502 (9th Cir. 2013) (*ERF*). The Office of Enforcement and Compliance Assurance (OECA) believes this decision relied on a problematic analysis of when a material may be a solid waste under the Resource Conservation and Recovery Act (RCRA). OECA is concerned that defendants in RCRA citizen suits and EPA enforcement actions may attempt to use this decision to narrow the definition of solid waste under RCRA. OECA therefore requests that the regions contact us if you suspect similar issues may arise in any future enforcement actions, citizen suits, or imminent and substantial endangerment actions under RCRA. In developing this memo, OECA conferred with the Office of Resource Conservation and Recovery and the Office of General Counsel.

The Ecological Rights Foundation (ERF) sued Pacific Gas and Electric and Pacific Bell Telephone Company, alleging that pressure-treated utility poles used and maintained by the defendants discharged wood preservative chemicals into waters of the United States in violation of the Clean Water Act (CWA). ERF argued that the discharged material constituted a solid waste that may present an imminent and substantial endangerment to human health or the environment under RCRA. The utility poles are pressure treated with an oil-pentachlorophenol (PCP) wood preservative mixture that is toxic, a probable human carcinogen, and an EPA registered, restricted-use pesticide under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

The defendants filed a motion to dismiss, arguing under the CWA, that discharges of storm water from the utility poles are neither a "point source discharge" nor "associated with industrial activity." They also

argued that wood preservative that escapes from utility poles is not a “solid waste” under RCRA. The district court agreed, granting defendants’ motion to dismiss both counts.¹

The Ninth Circuit affirmed the lower court’s decision to dismiss both the CWA and RCRA claims.² With respect to the RCRA claim, the court concluded that wood preservative that escapes from utility poles through normal weathering while those poles are in use is not automatically a “solid waste” under RCRA, because wood preservative “that is washed or blown away from utility poles by natural means, as an expected consequence of the preservative’s intended use, has not been ‘discarded.’” The court limited its holding, indicating that because the plaintiff did not allege “dangerous accumulations” of PCP, the court was not addressing whether escaping wood preservative could be a “solid waste” in that circumstance.

The statutory definition of solid waste under RCRA establishes the jurisdictional threshold for EPA’s authority to regulate hazardous waste and also for the exercise of EPA’s information gathering, corrective action, and enforcement authorities under RCRA sections 3004, 3007, 3008, 3013, and 7003. The section 7002 imminent and substantial endangerment provision at issue in the *ERF* decision contains the same language as EPA’s authority under section 7003.

This memorandum is limited to EPA’s view on the court’s decision that the wood preservative alleged by plaintiff to be escaping from utility poles is not a solid waste under RCRA. EPA is not opining on whether the other elements of a RCRA section 7002 cause of action were met in this case, nor is EPA suggesting that the wood preservative escaping from poles in use is subject to EPA’s hazardous waste regulations.

Analysis of Decision

The Ninth Circuit’s decision in this case turned on the second element of a RCRA imminent and substantial endangerment claim under section 7002 (which has similar language to section 7003) – whether the material released into the environment was a solid waste. We believe the court made two fundamental errors in its analysis that led to the incorrect finding that the PCP released into the environment from utility poles is not a solid waste. First, the court incorrectly concluded that because the leaking, dripping or escaping of PCP to the environment by natural causes or human activity was an “expected consequence” of the PCP’s intended use, it was not automatically a discarded material under RCRA’s statutory definition of solid waste. Second, the court suggested that its conclusion may have been different if the plaintiff had alleged that the PCP releases had resulted in “dangerous accumulations” of

¹ The district court held that PCP leaking from the poles due to natural means is not the type of discharge that is covered by RCRA section 7002. *See* 803 F. Supp. 2d, 1056, 1065 (N.D. Cal. 2011). The district court noted that *ERF* had not alleged any conduct by defendant resulting in discharge and that passive leaking from containers was not disposal. The district court’s conclusion conflicts with the statutory language and the position the United States has taken in several actions under RCRA section 7003, but the Ninth Circuit did not rely on the district court’s analysis in its decision.

² The Ninth Circuit also addressed two claims brought under the CWA’s citizen suit enforcement provision. *See* 33 U.S.C. § 1365. The Plaintiff argued that the defendants had violated the CWA by discharging pollutants from point sources into waters of the United States without a permit. The court concluded that stormwater discharges from utility poles did not require a permit under the CWA because stormwater discharges from the poles are not associated with industrial activity, per EPA’s regulations, and because the utility poles are not point sources. EPA agrees with the court that EPA has not defined stormwater discharges associated with industrial activity to include discharges from utility poles. *See ERF*, 713 F.3d at 515. Nothing in the decision limits EPA’s authority to address these stormwater discharges in the future, if the Agency decides it is appropriate. With respect to the point source issue, the court acknowledged that it would normally defer to EPA, but that EPA has not spoken directly to whether utility poles are point sources. *Id.* at 509. Though we do not necessarily agree with the court’s conclusion that utility poles are not point sources, this memorandum does not address this issue because we believe the court’s decision acknowledges that the Agency remains free to interpret the term “point source” as appropriate.

the chemical. The court's approach improperly conflates when a material becomes a solid waste with the analysis necessary to determine when circumstances may present an endangerment. The court's decision also misinterpreted the Second Circuit's holding in *Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314-15 (2d Cir. 1993), and incorrectly construed and applied EPA regulations and guidance on when a product released to the environment may be a solid waste.

1. Releases that are "expected consequences" of a product's intended use may be "discard" of a "solid waste" under RCRA.

A product released to the environment as part of its intended purpose is not immediately a solid waste under RCRA, but may become a solid waste if left in the environment long enough. However, the court erred in holding that a product released into the environment as an "expected consequence" of the product's intended use is likewise not a solid waste. The court held that "wood preservative that is washed or blown away from utility poles by natural means, as an expected consequence of the preservative's intended use, has not been 'discarded.'" *ERF*, 713F.3d at 516. The court cited for support a Second Circuit decision which held that pesticides sprayed for the intended purpose of reaching and killing mosquitoes and their larvae were not discarded. *No Spray Coalition, Inc. v. New York*, 252 F.3d 148 (2d Cir. 2001). In analyzing the issue, the Second Circuit stated that "material is not discarded until after it has served its intended purpose." *Id.*

EPA agrees with the Second Circuit's statement that a material is not discarded so long as it is serving its intended purpose. However, PCP applied to utility poles can be distinguished from land-applied pesticides, such as those that were addressed by the Second Circuit. While land-applied pesticides may serve their intended purpose when dispersed into the environment, the Ninth Circuit noted in this case that the purpose of PCP applied to utility poles is to protect the poles. EPA believes that PCP ceases to serve this purpose at some point after it leaves the poles and is dispersed into the environment.³ Despite noting that the PCP's purpose was to preserve the poles, the Ninth Circuit held that because dispersal into the environment is an expected consequence of this use, the PCP was not discarded.

The court did not define what it meant by "expected consequences." A broad reading of this language would represent a significant expansion of the Second Circuit's holding and could have unintended ramifications for the RCRA program. For example, with respect to the residue from spilled products, EPA's longstanding position is that absent a bona fide intent to recycle, such residue is a solid waste because the product has been abandoned.⁴ The Ninth Circuit's opinion could have the unintended consequence of undermining EPA's established legal position because spills and leaks could be argued to be "expected consequences" of using products and there may be little room to distinguish PCP use on utility poles – where a product in use leaks material to the environment – from the spill scenarios upon which the Agency has opined. This decision could not only undermine EPA's use of Section 7003 but also its authority to ensure adequate cleanup at RCRA regulated facilities.

³ While the court noted that leaking, dripping or spilling PCP that comes to land in the soil immediately adjacent to the poles may still be serving its intended purpose of preserving the poles, EPA does not agree that this conclusion can be made without further factual development. *ERF*, F.3d at 515-16. First, the use of PCP in surrounding soils to preserve poles is not a registered use of the preservative under FIFRA. Second, it is not clear whether or to what extent leaked PCP may still be acting as a preservative and whether, at some point, the PCP is either rendered chemically inert (or diluted) or has moved too far away from the pole to accomplish this purpose.

⁴ Land Disposal Restrictions for Third Scheduled Wastes, 55 Fed. Reg. 22,520, 22,671 (June 1, 1990).

2. Maintaining a distinction between the definition of solid waste and a potential endangerment.

It is well settled that a prima facie case for an imminent and substantial endangerment suit requires three elements: (1) the person (e.g., defendant) is contributing to or has contributed to the handling, storage, treatment, transportation or disposal (2) of a solid or hazardous waste (3) that may present an imminent and substantial endangerment to human health or the environment.⁵ See 42 U.S.C. §6972(a)(1)(B) and § 6973(a). The only question to be answered in establishing the second element is whether the material has been “discarded” and thus meets the statutory definition of solid waste set forth in RCRA section 1004(27).

In purporting to limit its holding on “discard” to the facts of this case, the court improperly suggested that it might have reached a different conclusion had plaintiffs alleged “dangerous accumulations” of PCP. *ERF*, 713 F.3d at 518. The court’s analysis was improper because the quantity of material and how toxic or dangerous it is has no bearing on the simple question of whether it has been “discarded.” Once the “discard” element has been established, an evaluation of quantity, toxicity, or danger of the material is appropriate for an endangerment determination.⁶ By conflating the two statutory elements, the court seems to have established a heightened standard for demonstrating whether a substance is a solid waste. This conclusion has no basis in the statutory language or existing case law.

In fact, the United States successfully advocated its position on this issue before the Second Circuit, when it argued that spent lead ammunition could become a solid waste at some point in time, if left to accumulate in the environment after serving its intended purpose. United States as Amicus Curiae at 25, *Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2d Cir. 1993) (Dockets 92-7191, 91-7193) (“the literal meaning of ‘discarded’ certainly can encompass shot and targets released into the environment and left to accumulate long after serving their intended purpose”). The Second Circuit adopted this position in its holding. See *Conn. Coastal Fishermen’s Ass’n*, 989 F.2d at 1314-15. Neither the United States’ brief nor the Second Circuit’s decision referred to the amount or toxicity of the spent ammunition in analyzing whether it had been discarded, but instead focused on whether it was left to accumulate after serving its intended purpose.

3. The court’s reliance on EPA’s regulatory treatment of materials was incorrect in this case.

The court also looked to EPA’s regulatory treatment of other materials for support, but this reliance was misplaced. *ERF*, 713 F.3d at 517. The court repeatedly erred by looking to EPA statements on what materials are exempt from *regulation* as solid or hazardous waste under RCRA rather than focusing on what materials fall within the broader statutory definition that applies to actions under RCRA sections 7002 and 7003.⁷ EPA has consistently stated, both in its rulemakings and in guidance, that the statutory

⁵ The Ninth Circuit incorrectly states that the prima facie case under RCRA requires (1) the defendant has been or is a generator or transporter of solid or hazardous waste, or is or has been an operator of a solid or hazardous waste treatment, storage or disposal facility; (2) the defendant has “contributed” or “is contributing to” the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and, (3) the solid or hazardous waste in question may present an imminent and substantial endangerment to health or the environment, *ERF*, 713 F.3d at 514 (citing 42 U.S.C. Section 6972(a)(1)(B); *Prisco v. A&D Carting Corp.*, 168 F.3d 593, 608 (2d Cir.1999).

⁶ “Dangerous accumulation” also appears on its face to present a more stringent standard than “may present an imminent and substantial endangerment.” See *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (actual harm need not be shown).

⁷ RCRA section 1004(27) defines “solid waste” to include “discarded material,” whereas the regulatory definition at 40 C.F.R. § 261.2 narrows the term by defining “discarded material” as material that is abandoned, recycled, inherently waste-like or a military munition as those terms are further defined in the RCRA Subtitle C regulations. EPA and the courts have clearly stated that the two definitions apply for different purposes. The regulatory definition of solid waste is intended to apply only for

definition of solid waste is broader than the regulatory definition, and that the broader statutory definition is relevant for RCRA section 7003.⁸ This position is consistent with Congressional intent.⁹ The United States has also successfully advocated this position in litigation.¹⁰

The court also looked to EPA's hazardous waste listings of various types of PCP wastes as evidence of how PCP is governed by RCRA's statutory authorities. The court noted that four specific PCP-containing wastes were listed hazardous wastes and concluded that, because neither PCP in use nor soil contaminated with PCP is listed, it must not fall under the statutory definition of solid waste. This conclusion was erroneous because, logically, the absence of a regulatory hazardous waste listing is not determinative of what is covered by the regulatory or statutory definition of solid waste. The court also cited to a June 19, 1987 document describing the status of PCP wastes. "Regulatory Status of Various Types of Pentachlorophenol Wastes," RCRA Online No. 11256 (June 19, 1987). However, this document clearly states that it only addresses the scope of the hazardous waste listings.

The court also misinterpreted and took out of context statements by EPA regarding munitions and lead-based paint and failed to acknowledge more relevant statements that run counter to its decision, which actually support the proposition that the material is a solid waste for purposes of RCRA sections 7002 and 7003. For example, EPA's military munitions rule specifically states that munitions are solid wastes for purposes of RCRA sections 7002 and 7003 when munitions land off-range and are not promptly rendered safe and/or retrieved. *See* 40 C.F.R. § 266.202(d); 62 Fed. Reg. 6632 (analogizing this situation to a spill that goes unaddressed). Spent lead ammunition can be a solid waste under RCRA's statutory definition at private firing ranges although such ammunition is not subject to Subtitle C regulation. *See e.g., Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1314-15.

The court in *ERF* cited to EPA regulations and guidance on the regulation and disposition of lead-based paint wastes, noting that EPA regulates lead-based paint wastes generated and disposed of during renovation "but not lead-based paint that falls from houses through ordinary wear and tear." The court, however, again confused EPA's regulatory definition of solid waste with the statutory definition. In the memo cited by the court, EPA specifically states that although lead-based paint waste is exempt from the

purposes of implementing RCRA Subtitle C. *See* 40 C.F.R. § 261.1(a), *see U.S. v Valentine*, 856 F. Supp 621, 627 (D.Wyo. 1994) and *Conn. Coastal*, 989 F.2d. 1314, 1315. The RCRA Subtitle C regulations govern the treatment, transportation, storage and disposal of regulated hazardous waste. The broader statutory definition, on the other hand, applies in other circumstances, such as for purposes of the imminent and substantial endangerment authorities in sections 7002 and 7003. A regulated solid waste is necessarily a solid waste under the statute -- the reverse is not true.

⁸ *See* 40 C.F.R. § 261.1(b)(2) (stating that EPA may use RCRA section 7003 authority if the EPA has reason to believe that the material may be a "solid waste" and a "hazardous waste" as those terms are defined in the statute); 45 Fed. Reg. 33,084, 33,090 (May 19, 1980) ("unlike [sections 3002 through 3005 and 3010], Congress did not confine the operations of Sections 3007 and 7003 to 'hazardous wastes identified or listed under this subtitle.'"); 50 Fed. Reg. 614, 627 (Jan. 4, 1985) (stating that the statutory definitions of solid and hazardous waste would apply under RCRA sections 3007, 3013 and 7003).

⁹ *See* H.R. Rep. 98-198 at 47 (EPA's authority under RCRA sections 3007 and 7003 includes all wastes that meet the statutory definition of hazardous waste).

¹⁰ *See, e.g., U.S. v Valentine*, 856 F. Supp. 621, 627 (D. Wyo. 1994) (citing 40 C.F.R. § 261.1 (b)(2)); *Military Toxics Project v. Env'tl. Prot. Agency*, 146 F.3d 948 (D.C. Cir. 1998) and *Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1314-15. As the United States stated in its brief to the Second Circuit in the *Connecticut Coastal* case, "EPA applies a broader definition of solid waste for remedial purposes than for regulatory purposes in order to preserve the widest possible latitude for imminent threats to the public and the environment and to limit RCRA's prospective regulatory requirements to waste management activities that warrant comprehensive regulation from time of generation until final disposition." United States as Amicus Curiae at 23, *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2d Cir. 1993) (Dockets 92-7191, 91-7193).

regulatory requirements under the household waste exclusion, this exclusion “does not affect EPA’s ability to reach those wastes under its statutory authorities, such as RCRA § 3007 (inspection) and § 7003 (imminent hazard).” See “Applicability of the Household Waste Exclusion to Lead-Contaminated Soil” (March 7, 1995) and “Regulatory Status of Waste Generated by Contractors and Residents from Lead-Based Paint Activities Conducted in Households,” at 3, *available at* <http://www.epa.gov/lead/fslbp.html> (Aug. 2000). EPA’s regulations clearly exclude household waste from the definition of hazardous waste, but not from the definition of solid waste. See 40 C.F.R. § 261.4(b).

The court noted the potential broad implications if it found that leaking wood preservative constitutes a solid waste under RCRA, citing lead paint that naturally chips away from houses as an example of something that would also fall within RCRA’s jurisdiction. Not only were the court’s concerns misplaced, the court also misstated EPA’s authority over lead-based paint. In fact, EPA has asserted its RCRA statutory authority over lead-based paint that falls from houses through ordinary wear and tear. EPA has issued two RCRA section 7003 orders to abate imminent and substantial endangerments from lead-based paint.¹¹ One order addressed the presence of lead-based paint which was in a deteriorating condition – it was chipping, peeling, and/or flaking – in 20 residential units on the property. Another order addressed the presence of lead dust in a commercial property from sandblasting activity during renovation.

As to pesticides, the Ninth Circuit found persuasive that EPA, under FIFRA, approved the use of PCP for preserving utility poles. The court erred in relying on EPA’s approval of the use of PCP as a wood preservative as support for its conclusion that the material cannot be solid waste. Approval under the FIFRA registration process, which evaluates risks associated with use of pesticides does not answer the question of whether the material has been “discarded” and is thus a solid waste under RCRA’s statutory definition.¹² Risk is not relevant with respect to the solid waste question, which is simply whether the material has been discarded. In fact, EPA has given notice that pesticides approved for use under FIFRA may be subject to RCRA at some point,¹³ and the Agency’s interpretation is that pesticides can become “discarded” for purposes of section 1004(27) under circumstances where they no longer serve their intended purpose.

Finally, in upholding the district court’s refusal to grant the plaintiff’s request for leave to amend the complaint, the court improperly suggested that a material is not a solid waste if its release was caused by human intervention, if that intervention is also an expected consequence of intended use (e.g., drilling into the utility poles). *ERF*, 713 F.3d at 520. Like many of the court’s other statements, this conclusion could significantly broaden the concept of intended use. EPA does not agree that human intervention that may be part of a material’s use can never result in the material becoming discarded and thus a solid waste under the statute. Referring back to our earlier example of product spills, if human intervention is a

¹¹ See Unilateral Administrative Orders (UAO) issued to 17th Street Revocable Trust, John R. Redmond, New 4775 Huron L.L.C. and Argyle Properties, RCRA 3-2000-0001TH (April 8, 2002) regarding residential property in the District of Columbia, and UAO to Group I Management and M275, LLC (September 5, 2001) about a commercial property in Fall River, Massachusetts.

¹² EPA’s approval of PCP was for use in the poles themselves, not the adjacent soil or areas beyond the utility poles. See, e.g. Letter from Jacqueline McFarlane, Office of Chemical Safety and Pollution Prevention, to Dr. Hubert R. O’Neal (March 15, 2012), *available at* http://www.epa.gov/pesticides/chem_search/ppls/061483-00003-20120315.pdf.

¹³ See, e.g., Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Toxicity Characteristic Revisions, 55 Fed. Reg. 11798, 11839 (March 1990) (“...the mandates of FIFRA and RCRA are different. EPA has previously stated that even if it were determined that certain ground *uses* of treated wood did not pose unreasonable risks, wood *wastes* might still be regulated under RCRA Subtitle C”).

regular part of a product's use, yet results in a spill of the product, EPA would consider that spill to be discarded product and thus a solid waste under the statute. Furthermore, EPA has used its RCRA section 7003 authority to address similar human activity when lead-based paint is released through contractor renovation work. As stated earlier, however, a finding that a material is a solid waste under RCRA's statutory definition does not trigger RCRA regulatory obligations.

Legal Impact of the Decision

We are not aware of any other court that followed a similar rationale and found that the release of a chemical product that is no longer serving its intended purpose is not a "solid waste" so long as that release (1) is a "natural expected consequence" of its intended use, or (2) does not result in a dangerous accumulation of the material. Because the court neither defined "expected consequence" nor properly applied the holding of *Connecticut Coastal* (by suggesting that there may have been a different result if the plaintiff alleged a "dangerous accumulation" of PCP), the *ERF* decision appears to set a higher bar for establishing the presence of solid wastes under RCRA than currently exists under established case law and thus could limit EPA and citizen's use of RCRA Sections 7002 and 7003.

EPA's Position and Path Forward

When deciding whether a material such as the PCP in the instant matter is a solid waste, the court should have focused solely on whether the PCP was discarded. EPA agrees with the court that PCP applied to utility poles is not a waste since it is used for its intended purpose. However, EPA has also consistently stated its position that materials originally used for their intended purpose can become solid wastes under the RCRA statutory definition in certain circumstances such as where the material is no longer serving its intended purpose, is not able to serve its intended purpose, or cannot be reasonably recycled or used for other purposes.

We are seeking opportunities to address these issues in federal court in future judicial actions. We therefore request that you monitor the federal court docket in your region and alert OECA when a case or controversy could affect the analysis regarding the definition of solid waste. Please contact Leslie Oif at Oif.Leslie@epa.gov or 202-564-2291 in OCE or Mary Godwin at Godwin.Mary@epa.gov or 202-564-5114 in OSRE if you have any questions about this memo or have identified a case where this issue might be raised.

cc:

Barnes Johnson, OSWER
Mary Kay Lynch, OGC
John Michaud, OGC