

EPA Broadens RCRA Definition of “Hazardous Waste” to Include Mixtures and Derivatives

In *American Chemistry Council v. Environmental Protection Agency*,¹ the United States Court of Appeals for the District of Columbia held that the Environmental Protection Agency's interpretation of “hazardous waste” as defined in the Resource Conservation and Recovery Act of 1976 (RCRA)² validly encompassed derivatives and mixtures of hazardous wastes. The ruling means that the EPA may now, without further testing, declare a solid waste “hazardous” if it is derived from or mixed with a listed hazardous waste. This ruling eases the administrative burden on the EPA and helps to control the flow of derivatives and mixtures of hazardous wastes into the environment.

RCRA defines “hazardous waste” and gives the EPA the authority to regulate it.³ The Supreme Court illuminated the validity and broad scope of RCRA in *City of Chicago v. Environmental Defense Fund*, stating that the Act was a “comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave.”⁴ Pursuant to its regulatory authority under RCRA, the EPA in 1992 modified its definition of hazardous waste to include hazardous mixtures and derivatives.⁵ Under the modifications, “a mixture of solid waste and one or more hazardous wastes,”⁶ and “any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any

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1. 337 F.3d 1060 (D.C. Cir. 2003).

2. 42 U.S.C. §§ 6901-6992 (2000).

3. “Hazardous waste” is defined as: “a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may – (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.” § 6903(5).

4. 511 U.S. 328, 331 (1994).

5. 57 Fed. Reg. 7628 (Mar. 3, 1992); *American Chemistry Council*, 337 F.3d at 1063.

6. 40 C.F.R. § 261.3(a)(2)(iv) (2003).

sludge, spill residue, ash emission control dust, or leachate"⁷ became "hazardous wastes" subject to EPA regulation. The new definition went into effect on an interim basis until 2001,⁸ when the EPA issued its final rule.⁹

The American Chemistry Council (ACC)¹⁰ objected to the final rule and filed a petition for review in the D.C. Court of Appeals, arguing that the EPA's modifications were inconsistent with the statutory definition of "hazardous waste" and that it was unreasonable to include all mixtures and derivatives of hazardous waste under the canopy of RCRA protection.¹¹ The ACC argued that the EPA did not have the authority to designate hazardous derivatives and mixtures when the EPA was not testing those substances.¹² It also argued that the cost to industry and the effort needed to regulate such substances far outweighed the public benefit such regulation would confer, and that the EPA had other, less-intrusive means available to regulate hazardous mixtures and derivatives.¹³ Leslie Hulse, an ACC attorney, said the industry group had "hoped its challenge would serve as a catalyst for a more comprehensive review of how EPA identifies hazardous waste," and noted that it "gets to be exceedingly expensive" for industry to comply with an "unbelievably stringent regulatory framework."¹⁴

The Court of Appeals, however, rejected the ACC's arguments, upholding the EPA's interpretation under the deferential standard of judicial review outlined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁵ Under *Chevron*, when an agency is interpreting a statute it is charged with administering, a court first determines whether Congress has directly spoken to the issue in question. If Congress's intent is not clear, the court then assesses whether the agency's interpretation of the statute is reasonable.¹⁶ After finding that Congress's intent was not clear, the Court held that the EPA's interpretation of RCRA to allow their regulation of mixtures and derivatives as hazardous waste was reasonable.

7. § 261.3(c)(2)(i).

8. 64 Fed. Reg. 63,382 (Nov. 19, 1999).

9. 66 Fed. Reg. 27,266 (May 16, 2001).

10. The American Chemistry Council is a lobbying group that represents the leading companies engaged in the business of chemistry. See <http://www.americanchemistry.com> (last visited July 29, 2004).

11. *American Chemistry Council v. EPA*, 337 F.3d 1060, 1063 (D.C. Cir. 2003).

12. *Id.* at 1064.

13. *Id.* at 1065-66.

14. Linda Roeder, *Chemistry Council to Press for Streamlining Of RCRA Delisting After Mixed Waste Ruling*, 34 ENV'T REP. (2003), at <http://ehscenter.bna.com/pic2/ehs.nsf/id/BNAP-5QFF5Q>.

15. 467 U.S. 837 (1984).

16. *American Chemistry Council*, 337 F.3d at 1063; *Chevron*, 467 U.S. at 842-43.

The ACC argued that the final rule was not what Congress had in mind because it allows the EPA to classify a substance as hazardous without, as required by RCRA, "taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors."¹⁷ The American Petroleum Institute, in an amicus brief, quoted RCRA's legislative history for the requirement that the EPA first determine the characteristics of a hazardous waste, then find at least one of those characteristics in the substance under scrutiny before declaring a hazardous substance to be hazardous and regulating it as such.¹⁸

However, the EPA claimed that "when it lists a waste as hazardous it could, in principle, automatically list its mixtures and derivatives" as well, since it is "reasonable to presume" that the mixtures and derivatives are also hazardous.¹⁹ The court found this argument sufficient to show that the statute did not preclude the EPA "from regulating mixtures and derivatives until such time as they may be shown to be non-hazardous."²⁰ The court concluded that Congress had not directly addressed the question of whether substances mixed with or derived from hazardous waste could be labeled "hazardous waste."²¹ While the term had a very "broad sweep" in the statute, the court found that it was ambiguous on the issue of derivatives and mixtures.²² In sum, it was not clear from RCRA whether Congress intended the EPA to regulate mixtures and derivatives, and the court thus moved on to address whether the EPA's interpretation was reasonable.²³

The EPA argued that the final rule reasonably promoted RCRA's purpose of "cradle to grave" regulation of hazardous waste by ensuring that hazardous mixtures and derivatives did not escape the Act's protections.²⁴ The court agreed, rejecting the ACC's position that the burden should be on the EPA to specifically prove that a derivative or mixture is hazardous before regulating it. It would be "nearly impossible," the court noted, to expect the agency to prove a negative by showing the lack of hazardous characteristics in each derivative or mixture.²⁵

The ACC argued that the EPA should use currently available statutory avenues to make a determination on each derivative or mixture,

17. *Id.* (quoting 42 U.S.C. § 6921(a)).

18. *Id.* See H.R. REP. NO. 94-1491, at 25 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6263.

19. *American Chemistry Council v. EPA*, 337 F.3d 1060, 1064 (D.C. Cir. 2003).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1064-65.

24. *Id.* at 1065.

25. *Id.*

as opposed to the blanket policy of assuming all derivatives and mixtures are hazardous.²⁶ For example, the EPA could adopt broader listings or modify the current prohibition on dilution of hazardous wastes.²⁷ The court rejected these options, noting that using broader listings would unduly increase the EPA's administrative burdens, and that the ACC had failed to explain how modifying the anti-dilution rule would be an effective substitute for the EPA's final rule.²⁸

Finally, the ACC argued that the cost to industry associated with testing the derivatives and mixtures outweighed the benefits to the public.²⁹ The court did not feel the ACC was entitled to assert such considerations, noting that the RCRA does not require the benefits of regulation to equal or exceed its costs.³⁰ Furthermore, the EPA had shown that some mixtures and derivatives display the hazardous characteristics of their parent waste, and that regulating them would thus provide protection to the environment and the public health. Therefore, contrary to ACC's arguments, the EPA rule did demonstrate public benefits.³¹

In the end, the Court of Appeals found that Congress wanted the EPA to "err on the side of caution" in regulating hazardous waste under RCRA, and that EPA's final rule permitting the agency to regulate hazardous mixtures and derivatives was a reasonable interpretation of this intent.³² Accordingly, the court upheld the rule and denied ACC's petition for review.³³

This decision will allow the EPA more leeway in its evaluation and regulation of hazardous waste, making its "cradle to grave" regulatory burden more manageable. This case is significant because of the substantial effect mixtures have on the environment. It is believed that "some, perhaps most, mixtures and derivatives maintain the characteristics of their parent hazardous waste."³⁴ While the chemistry industry would like to avoid the responsibility for these derivatives and mixtures under the guise that they are unlikely to be as dangerous as the parent hazardous waste, the fact is that derivatives and mixtures are liable to have damaging effects.³⁵ This case is a substantial victory for the

26. *Id.*

27. *Id.* The "anti-dilution" rule makes unlawful the practice of circumventing RCRA by diluting hazardous waste in order to lower the concentration of hazardous constituents. *Id.* at 1065-66 (citing 40 C.F.R. § 268.3).

28. *Id.*

29. *Id.* at 1066.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1064.

35. 66 Fed. Reg. 27,266 (May 16, 2001).

EPA who ensured that hazardous mixtures and derivatives will be kept out of the environment and forced the private sector to bear the burden of paying for testing.

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