

Superfund Report

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Industry Fight Could Undermine EPA-Activist Pact On New Waste Definition

A dispute between the oil industry and a metals recycling company over whether certain petroleum refinery wastes should be subject to strict EPA waste management rules could undermine environmentalists' ability to enforce a settlement in which the agency is agreeing to initiate a new rulemaking process for its definition of solid waste (DSW).

The recycler, Gulf Chemical and Metallurgical Corporation, is urging the court to dismiss the underlying litigation in an effort to oppose petroleum industry efforts to win exemptions for some oil refinery wastes. But should the recycler succeed in its argument, it could undermine environmentalists bid to stay their pending litigation that led to their settlement with EPA — a key mechanism for enforcing the settlement.

EPA and the Sierra Club in September announced the settlement, which requires EPA to initiate a new rulemaking process for the DSW rule, though it does not necessarily require the agency to finalize a new rule. The rule, issued under the Resource Conservation & Recovery Act (RCRA), generally defines when wastes are solid or hazardous and whether they are subject to strict management requirements or eased requirements for recycling.

The Sierra Club had sued EPA in the U.S. Court of Appeals for the District of Columbia Circuit over the Bush-era version of the rule, charging that it relaxes waste management requirements too much and could lead to dangerous "sham" recycling.

In light of the proposed settlement, EPA and the environmentalists filed a joint brief Sept. 10 asking the court to hold litigation related the DSW rule in abeyance pending the outcome of EPA's promised new rulemaking. According to the environmentalists, having the court hold their suit in abeyance is key to their ability to enforce the settlement because it would allow the activists to take EPA back to court if they are dissatisfied with the results of the agency's new rulemaking.

But Gulf, the recycler seeking intervenor status in the litigation, is urging the court to dismiss the case entirely in light of the settlement rather than hold the litigation in abeyance. According to an industry source, Gulf, which recycles oil refinery wastes by extracting metals from it, is seeking to have the litigation dismissed entirely because it opposes claims the American Petroleum Institute (API) is making in the case.

As API explains in an Oct. 28 brief in which it rejects Gulf's arguments that the litigation should be dismissed, the oil industry trade association is urging the court to hear its long-standing arguments regarding whether spent petroleum refinery catalysts should be subject to strict waste management requirements under the DSW rule. API argues that EPA's application of the requirements to catalysts under the rule is arbitrary and capricious and in violation of RCRA. *Relevant documents are available on InsideEPA.com.*

But Gulf, which according to the industry source is opposed to EPA exempting the refinery catalysts from strict waste management requirements as API has urged, argues in a Nov. 8 brief that all pending litigation regarding the DSW rule is moot now that EPA has agreed to initiate a new new rulemaking process. "Both Sierra Club and API have the right to (and no doubt will) participate fully in this rulemaking by submitting comments on the forthcoming proposed rule," Gulf argues. "Consequently, it makes no sense to further squander this Court's resources on adjudication of either Petitioner's appeal of the existing DSW rule."

According to the industry source, Gulf is primarily interested in the case due to its opposition to API's bid to deregulate the management of spent catalysts. While Gulf's business revolves largely around recycling the materials under the current rules, it argues however that its interests are not "purely economic," the source says. The company also argues the materials are too dangerous to not be handled according to strict requirements, the source adds.

But if Gulf is successful in urging the court to dismiss the DSW litigation entirely, environmentalists will lose their ability to enforce their settlement agreement with EPA, activists argue. "If, at the end of the rule-making process, EPA decided to leave the current DSW rule in place, Sierra Club would have the same legal claims it has now, but it would be time-barred from raising them in a new appeal," the activists argue in an Oct. 28 brief.

"Further, a dismissal would leave the Sierra Club without recourse in the event that EPA fails to meet its obligations under the settlement agreement" because under the agreement "the Sierra Club's sole remedy in the event of EPA's non-performance is to move that the instant case no longer be held in abeyance," the environmentalists argue.

EPA in an Oct. 28 brief also urges the court to reject Gulf's bid to dismiss the litigation. "While a new regulation may

moot the Sierra Club's and API's petitions for review, the Settlement Agreement, by itself, does not," EPA says. "Therefore, the Court should deny Gulf's motion to dismiss."

Meanwhile, another group of intervening industry parties to the litigation — including the Metals Industries Recycling Coalition, the American Chemistry Council, the American Coke & Coal Chemicals Institute, the American Forest and Paper Association, the Society of Chemical Manufacturers and Affiliates and the Treated Wood Council — are opposing EPA and the environmentalists' joint motion to lodge the settlement agreement and hold the DSW litigation in abeyance.

In a Sept. 20 brief, the industry groups argue that "the DSW Rule already extends as far as it can" and that "EPA's new rulemaking cannot accede to any request in Sierra Club's administrative petition without the Agency exceeding its RCRA authority."

EPA and Sierra Club in a Sept. 29 joint motion call the industry groups' concern "speculative" and say "it is premature to adjudicate . . . the scope of EPA's RCRA authority. If EPA takes final agency action with which Industry-Intervenors disagree, they can raise their objections at that time," the motion says.