Tab 1

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

JUN 30 1993

MEMORANDUM

SUBJECT: Clarification of RCRA Regulatory Application to Soils Contaminated by Cement Kiln Dust

FROM: Sylvia K. Lowrance
Director
Office of Solid Waste (OS-300)

Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency
Response Division (LE-132S)

TO: Robert L. Duprey
Director
Hazardous Waste Management Division
Region VIII

This memorandum is in response to your memorandum dated March 9, 1993, in which you seek clarification of whether soils which are contaminated by constituents from cement kiln dust (CKD), and which, as a result, fail the toxicity characteristic leaching procedure (TCLP), must be managed as RCRA hazardous waste.

As you know, Section 3001(b)(3)(A) of RCRA exempts CKD from regulation under RCRA Subtitle C pending a Report to Congress and subsequent determination of whether the waste should be regulated under Subtitle C. The exemption for CKD means that CKD cannot be regulated as hazardous waste under Subtitle C prior to the Report to Congress and subsequent regulatory determination, even if it exhibits one of the characteristics of hazardous waste identified at 40 CFR Part 261 Subpart C.[1] With respect to CKD-contaminated

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[1] In the 1991 Boilers and Industrial Furnaces (BIF) Final Rule 56 FR 7134 (February 21, 1991), EPA specified the extent to which CKD wastes from cement kilns that burn hazardous waste would still be subject to the Bevill exemption. See 40 CFR § 266.112. Since it is our understanding that, regardless of whether the CKD was produced by a kiln that burned hazardous waste, the CKD at issue in

(continued...)

soils described in your letter that exhibit the TC because of that CKD contamination, we believe that the statutory exemption must be read to exempt those soils from regulation under Subtitle C of RCRA. The rationale for this interpretation of the Bevill amendment is that the CKD exemption remains with the CKD, even when it migrates into soils, provided that the exempt CKD is the only reason that the contaminated soil would, absent the Bevill amendment, be considered a RCRA hazardous waste. As a result, the contaminated soil would, in effect, be Bevill exempt. (See Chemical Waste Management v EPA, 869 F.2d 1526, 1537-1540 (D.C. Cir. 1989) and Solite v EPA, 952 F.2d 473, 493-494 (D.C. Cir. 1991).)

The Agency faced a similar issue in its regulatory determination for mining waste, and the approach taken in this memorandum is similar to the Agency's mining waste determination. In the Mining Waste Exclusion; Final Rule (54 FR 36592, September 1, 1989), the Agency states, with respect to mixtures of Bevill wastes and non-Bevill wastes, that if "the mixture exhibits one or more hazardous characteristics exhibited by the Bevill waste, but not by the non-excluded characteristic waste, then the mixture would not be a hazardous waste." 54 FR at 36622. Similar logic applies to the situation described in your memorandum. If the contaminated soils are exhibiting the TC because of the presence of CKD constituents, then the Bevill exemption applies to the contaminated media. However, if the soil is hazardous for reasons other than CKD contamination, then the contaminated soil is not excluded from Subtitle C requirements by the Bevill amendment.

In light of the above discussion, a couple of issues concerning the contaminated soils described in your memorandum must be clarified prior to confirming their regulatory status. First, do the metals that cause the soil to exhibit the TC come from the CKD itself or was either (1) the CKD mixed with a listed or characteristic hazardous waste bearing such metals prior to being brought into contact with the soil or (2) did the soil already exhibit the TC prior to being contaminated by CKD? If the metals in the CKD are not the reason for the soil exhibiting the TC, then the contaminated soil would not enjoy the Bevill exemption from RCRA Subtitle C requirements.

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[1](...continued)
your inquiry was generated and deposited on the ground before the effective date of the BIF rule, that rule, and specifically the provision at 40 CFR § 266.112, would not be applicable. Of course, for CKD generated after the effective date of the BIF rule, section 266.112 would have to be consulted to determine whether the CKD would retain the Bevill exemption.

A second question, which you have also raised, is whether it is possible that secondary mobilization is taking place, such that constituents in the CKD are not directly causing the contaminated soil to exhibit the TC, but rather, that the pH of the groundwater in contact with and affected by the CKD is causing otherwise non-available metals in the soil to become mobilized and thus cause the soil to fail the TCLP? We are still taking this issue under consideration, and have not conducted a complete analysis at this time.

If you have any comments or further questions, please have your staff contact either Mark Badalamente (OGC, 202-260-9745) or Bill Schoenborn (WMD, 703-803-8483) of our respective staffs.

Tab 2

APR 21 1986

G.N. Weinreich, P.E.
Environmental Manager
ANG Coal Gasification Co.
P.O. Box 1149
Beulah, ND 58523

Dear Mr. Weinreich:

I am responding to your letter of March 18, 1986, in which you request a clarification of whether precipitation which contacts coal gasification ash waste resulting from the processing of coal, and becomes corrosive is subject to the hazardous waste provisions of RCRA. As you state in your letter, the ash is currently exempt from regulation under RCRA pursuant to 40 CFR 261.4(b)(4). See also Section 3001(b)(3)(A)(i) of RCRA. The precipitation becomes corrosive solely as a result of contact with the ash. Since the hazardous waste characteristic of the precipitation is derived from an exempt waste, the resulting corrosive water retains the exempt status of that waste (i.e., the water is also exempt from regulation as a hazardous waste).

I hope the above clarifies your concerns regarding the proper classification of this aqueous waste. If you have further questions, please contact Mr. Edwin F. Abrams of my staff at (202) 382-4787.

Sincerely
Originated by
Marcia E. Williams

Marcia E. Williams
Director
Office of Solid Waste

JUN 16 1986

Mr. G. N. Weinreich, P.E.
Environmental Manager
ANG Coal Gasification Co.
P.O. Box 1149
Beulah, North Dakota 58524

Dear Mr. Weinreich:

This is in response to your May 13, 1986, letter requesting further clarification on the proper classification of residual water that acquires a high pH from a waste that is exempt from regulation. Like the precipitation run-off discussed in my letter of April 21, 1986, the residual water (which becomes corrosive due to its contact with coal ash) is also exempt from regulation pursuant to 40 CFR 261.4(b)(4) (i.e., since the residual water is derived from an exempt waste, the resulting corrosive water retains the exempt status of the waste).

Please feel free to write me if I can be of any further assistance.

Sincerely,

Original Signed by
Marcia E. Williams

Marcia E. Williams
Director
Office of Solid Waste

WH-562B/MSTRAUS/pes/475-8551/5-30-86/Congressional 0419
OSW-209 DUE DATE: 6/6/86

Tab 3

FAXBACK 13602

9441.1993(04)

REGULATORY STATUS OF SOLID WASTE GENERATED FROM GOLD/MERCURY AMALGAM RETORTING

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

April 26, 1993

Ms. Kristen DuBois Goodwin
Hazardous Waste Program Coordinator
Alaska Department of Environmental Conservation
Northern Regional Office
1001 Noble Street, Suite 350
Fairbanks, Alaska 99701-4980

Dear Ms. Goodwin:

This is in response to you March 16, 1993 letter regarding the regulatory status of solid waste generated from gold/mercury amalgam retorting. In particular, you requested that we concur with your interpretation that the solid waste generated from the retort process, including contaminated soils containing block sands, is beneficiation and extraction waste and subject to the exclusion found in 40 CFR 261.4(b)(7).

The operation that you described in your letter involves metal bearing materials that undergo retorting. Based upon EPA's September 1, 1989 final rule (54 FR 36618), and the information provided in your letter, EPA would interpret the retorting operation described in your letter to be mineral processing under EPA's regulations. Specifically,

. . . heating operations such as smelting (i.e., any metallurgical operation in which metal is separated by fusion from impurities) and fire-refining (e.g., retorting) are clearly and have always been considered within the realm of mineral processing. Here, the physical structure of the ore or mineral is destroyed, and neither the product stream nor the waste stream(s) arising from the operation bear any close physical/chemical resemblance to the ore or mineral entering the operation (54 FR 36618).

Mineral processing wastes do not retain the Bevill exemption unless they are one of the 20 permanently exempt mineral processing waste listed in 40 CFR 261.4(b)(7)(i) -(xx). (No retorting wastes are among the 20 permanently exempt mineral processing wastes.) Therefore, EPA believes that any solid waste generated from the retorting operation is no longer covered by the Bevill exclusion in 40 CFR 261.4(b)(7).

According to your letter, the site ceased operations in the 1960s and cleanup of the site will involve removal of contaminated soil and debris. The September 1, 1989, rule does not impose Subtitle C requirements on mineral processing wastes disposed of in Alaska prior to March 1, 1990, unless those wastes are actively managed. Active management includes physical disturbance of the wastes (see 54 FR 36597). Therefore, if the retort wastes were actively managed (i.e., removed for disposal) after March 1, 1990, the wastes would be subject to Subtitle C control if they either exhibit a hazardous characteristic or are listed. If these wastes are not actively managed, Subtitle C requirements do not apply.

I hope this letter clarifies the regulatory status of the retort wastes you described. If we can be of further service, or if you have any questions, please do not hesitate to call Robert Tonetti, Chief, Special Wastes Branch at (703) 308-8424.

Sincerely,
Sylvia K. Lowrance, Director
Office of Solid Waste

Tab 4

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

JUN 26 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

Peter R. Simon, M.D., M.P.H.
Assistant Meical Director
Division of Family Heath
Cannon Building
Davis Street
Providence, Rhode Island 02908-5097

Dear Dr. Simon:

Thank you for your letter of April 20, 1989, regarding the potential effect of the leach testing procedure on programs designed to remove lead-contaminated soils from residential areas.

Under existing solid waste regulations, if a contaminated soil is removed from a site, the generator must determine whether the soil is contaminated by a hazardous waste and thus must be managed as a hazardous waste. (Contaminated soil that is left in place is not subject to any hazardous waste management requirements, including any testing.) This determination can be made either by testing the waste containing soil or through knowledge of the composition of the waste soil. If the soil is deemed to contain a hazardous waste, it must be managed under the Subtitle C regulations of the Resource Conservation and Recovery Act (RCRA).

RCRA requires that regulatory decisions regarding a hazardous waste take into account the potential risks to human health and the environment posed by mismanagement of the waste. The Environmental Protection Agency (EPA) has determined that a municipal landfill, which does not have design and operating standards as stringent as those under Subtitle C of RCRA, is not an appropriate site for disposal of hazardous waste. Under the existing statutory and regulatory framework, hazardous waste generated as a result of cleanups at industrial and residential sites are subject to the same management standards.

As you know, EPA also has authority to clean up releases of hazardous materials under the Comprehensive Environmental Response, Compensation and Liability Act, more popularly known as "Superfund." Superfund, like RCRA, requires cleanups to protect human health and the environment. Furthermore, unless certain exceptions apply, Superfund cleanups must comply with requirements from other environmental statutes, such as RCRA, when those requirements are "applicable" to the Superfund activities. The Superfund statute also encourages compliance with these other laws where they do not apply, but are "relevant" or "appropriate" to the clean-up action. Currently, EPA follows the rules outlined above to determine whether the hazardous material at a Superfund site is a RCRA hazardous waste -- in other words, we test the material or determine whether it is hazardous based on knowledge of its composition. If the material were a RCRA waste, RCRA standards would probably be "applicable," and disposal in a municipal landfill would not be acceptable.

You have expressed concern that EPA has proposed to change its regulatory test for determining whether a waste is toxic hazardous waste. Section 3001(g) of the 1984 amendments to RCRA specifically directed EPA to examine the extraction procedure (EP) toxicity test as a predictor of the leaching potential of waste and to make necessary changes to improve its accuracy. In June 1986 (see 51 FR 21648), the Agency proposed to require a new, more precise, leaching procedure, using a buffered solution instead of an acid titration, to determine whether a waste is characteristically hazardous based upon its toxicity. This test, the toxicity characteristic leaching procedure (TCLP), is more precise than the original EP toxicity test. A second Federal Register notice (53 FR 18792, May 24, 1988) provided additional information and opportunity for comment on the TCLP. When the toxicity characteristic proposal is promulgated as a final rule, the TCLP will supersede the EP test.

We are aware that under certain conditions the TCLP may be somewhat more aggressive than the EP toxicity test. For this reason, we are gathering information on the relationship between the two test procedures. We would like to ensure that the test procedures we use to determine whether a waste is hazardous appropriately model our reasonable worst-case mismanagement scenario -- in the case of the toxicity characteristic, management of a hazardous waste in a municipal landfill.

At this time, we are working closely with EPA Region I officials to assess the possible implications of applying the TCLP to lead-contaminated soils. I encourage you to provide us with any information you may have that compares the results of the two procedures on identical lead-contaminated soil samples. We will be using these data in our continuing efforts to improve the accuracy and reproducibility of our test procedures.

Thank you for sharing your concerns with us. To keep up to date on our progress regarding this matter, we suggest that you contact Gerry Levy, Branch Chief of Massachusetts Waste Management, in our Region I office. Mr. Levy can be reached at (617) 573-5720.

Sincerely yours,

for Jonathan Z. Cannon
Acting Assistant Administrator

Tab 5

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SWH-FRL-3625-8; EPA/OSW-FR-89-017]

RIN 2050 AC41

Mining Waste Exclusion

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Section 3001(b)(3)(A)(ii) of the Resource Conservation and Recovery Act (RCRA) excludes "solid waste from the extraction, beneficiation, and processing of ores and minerals" from regulation as hazardous waste under subtitle C of RCRA, pending completion of certain studies by EPA. In 1980, EPA interpreted this exclusion (on a temporary basis) to encompass "solid waste from the exploration, mining, milling, smelting, and refining of ores and minerals" (45 FR 76619, November 19, 1980).

Today's final rule responds to a federal Appeals Court directive to narrow this exclusion as it applies to mineral processing wastes. EPA published a proposed rule articulating the criteria by which mineral processing wastes would be evaluated for continued exclusion on October 20, 1988 (53 FR 41288) and a revised proposal on April 17, 1989 (54 FR 15316). In today's final rule, EPA provides final criteria that have been modified in response to public comment, and finalizes the Bevill status of nine mineral processing waste streams that were proposed for either retention within or removal from the exclusion in the April notice. In addition, the Agency has modified the list of mineral processing wastes proposed for conditional retention in April, based upon the revised criteria and information submitted in public comment. All other mineral processing wastes that have not been listed for conditional retention will be permanently removed from the Bevill exclusion as of the effective date of this rule.

The Agency will apply the criteria described in this rule to the conditionally retained wastes and on that basis propose either to remove them from or retain them in the Bevill exclusion by September 15, 1989. Final Agency action on the scope of the Bevill exclusion for mineral processing wastes will occur by January 15, 1990.

DATES: *Effective Date:* March 1, 1990.

Not later than November 30, 1989, all persons who generate, transport, treat, store, or dispose of wastes removed from temporary exclusion by this rule and which are characteristically hazardous under 40 CFR part 261, subpart C, will be required to notify either EPA or an authorized State of these activities pursuant to section 3010 of RCRA.

See sections VI and VII of the preamble below for additional dates and details.

FOR FURTHER INFORMATION CONTACT: RCRA/Superfund Hotline at (800) 424-9346 or (202) 382-3000 or for technical information contact Dan Derkics, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-3608.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

A. History

Section 3001(b)(3)(A)(ii) of the Resource Conservation and Recovery

Commenters pointed to roast leach acid plant residue from primary copper processing, oil shale and tar sand processing wastes, and wastes from the processing of nodules collected from the ocean as examples of wastes that may qualify for the Bevill exclusion in the near future under the proposed criteria.

These commenters also asserted that EPA should study and issue regulatory determinations for wastes that may meet the special waste criteria in the future. They also argued that it is more appropriate to define the scope of the Bevill exclusion for mineral processing wastes directly using the criteria and not create a list of wastes that EPA has determined meet the criteria. Applying the criteria to additional waste streams in the future would allow for the effects of changing market conditions and new mineral processing technologies. Some commenters thus recommended that EPA amend the proposed rule to include a provision whereby if a waste qualifies as a high volume/low hazard waste in the future, it would become subject to the provisions of the Bevill Amendment.

The Agency has considered these comments and decided to maintain its proposed approach of a one-time reinterpretation of the Bevill exclusion for mineral processing wastes. As discussed in the April proposal, EPA interprets the legislative history as clearly establishing a temporary exclusion through the Bevill Amendment over a fixed time period. In fact, the statutory language includes explicit time limits on the Bevill exclusion which apply to the submission of the required Report to Congress and subsequent regulatory determination. Moreover, the Court of Appeals decision stipulates an updated timetable for completion of the study and the final regulatory determination.

In today's final rule, wastes not presently being generated or currently meeting the high volume/low hazard standard will not be considered for special waste status in the future. Thus, EPA is making a one-time reinterpretation of the Bevill exclusion for mineral processing wastes by providing a specific list of such wastes that tentatively fall under the "special waste" criteria. EPA further maintains that the one-time reinterpretation is not contrary to the interests of industry or the environment. New wastes generated in the future will be regulated under either the subtitle C or subtitle D regulatory programs, thus industry will know in advance the regulatory standards that will be applied to new mineral processing wastes. EPA does not believe that failure to apply the Bevill Amendment to future waste streams will discourage treatment of these wastes; the application of Subtitle C or D will, in many cases, create exactly the opposite incentive. Thus, this position is consistent with recent EPA policy initiatives that encourage the development of process changes and new waste treatment technologies that minimize hazardous waste/treatment residual generation.

Certain commenters took issue with EPA's assertion that the Report to Congress on Bevill wastes identified in today's rule would be the last under section 8002(p). They argued that EPA is under a continuing statutory duty to study and Report to Congress under sections 8002(f) and 8002(p) of RCRA regarding wastes from the extraction and beneficiation of ores and minerals in sectors not discussed in detail in EPA's 1985 report entitled "Wastes from the Extraction and Beneficiation of Metallic Ores, Phosphate Rock, Asbestos, Overburden from Uranium Mining, and Oil Shale" (Dec. 31, 1985). These commenters cited pages from a draft EPA report (which was never completed or released to the public) on wastes from certain mineral processing operations. In that draft report, the commenters allege, EPA committed to further study of wastes from the extraction and beneficiation of certain nonmetallic ores and minerals.

EPA disagrees that it is necessary for the Agency to commit to further studies of extraction and beneficiation wastes under section 8002(p). EPA believes that the 1985 Report, and the subsequent regulatory determination, discharged its statutory duty with respect to all extraction and beneficiation wastes. As explained in the Executive Summary to the 1985 Report, the Report specifically addressed "wastes from the extraction and beneficiation of metallic ores (with special emphasis on copper, gold, iron, lead, silver and zinc), uranium overburden, and the nonmetals asbestos and phosphate rock." Oil shale wastes were also addressed in an Appendix. EPA explained that it "selected these mining industry segments because they generate large quantities of wastes that are potentially hazardous and because the Agency is solely responsible for regulating the waste from extraction and beneficiation of these ores and minerals." Report to Congress, page ES-2. However, the Report is not limited solely to wastes from these identified sectors. Rather, the Report considers waste generation, waste management, health and environmental risks, and regulatory impacts on the entire nonfuel mining and beneficiation industry. *See, e.g.*, Report, pages ES-3, ES-4 (overview of the nonfuel mining industry), ES-10 (potential dangers posed by the nonfuel mining industry), and ES-14 (potential costs of regulating mining wastes as hazardous).

EPA's 1986 Regulatory Determination also clearly states that it covers all mineral extraction and beneficiation wastes. As EPA said at the time, "this notice constitutes the Agency's regulatory determination for the wastes covered by the Report to Congress, i.e., wastes from the extraction and beneficiation of ores and minerals." 51 FR 24497 (July 3, 1986). The Regulatory Determination went on to explain that, by contrast, Bevill mineral processing wastes (based on EPA's 1985 proposal) "were not studied in the mining waste Report to Congress and therefore, are not covered by this regulatory determination." *Ibid.*

EPA believes that the Report to Congress and Regulatory Determination make clear the Agency's intent that wastes from the extraction and beneficiation of ores and minerals are to be regulated under subtitle D. Accordingly, EPA has no present plans to conduct any further studies under 8002(p) or make any further regulatory determinations. EPA's draft Report to Congress cited by the commenters was an internal pre-decisional document and does not represent the final Agency policy on this issue. (EPA also has no plans to complete or submit that Report in any form; its relevance was rendered moot by the decision in EDF II.)

3. Retroactive Application of Subtitle C Requirements

In the April NPRM, EPA stated explicitly that subtitle C regulation arising from the withdrawal of Bevill status from most mineral processing wastes would not be imposed retroactively. That is, Subtitle C requirements would apply only to newly generated or actively managed mineral processing wastes that are removed from the Bevill exclusion and that exhibit one or more characteristics of hazardous waste, not to existing accumulations of these materials unless they are actively managed after the effective date of the rule or are subject to regulation as waste mixtures, as discussed in further detail below. This is consistent with standard Agency policy regarding the imposition of new regulatory requirements.

Commenters disagreed on the appropriateness of this approach. One commenter supported the approach, while another stated that the lack of regulation of previously disposed

mineral processing wastes would not be protective of human health and the environment. Most comments on the retroactivity provision, however, centered around the definition of "active management." Several commenters requested clarification of this term.

In keeping with the April proposed rule, today's final rule does not impose Subtitle C requirements (such as those for closure and post-closure care) on mineral processing wastes that were disposed prior to the effective date of today's rule, unless they are actively managed after the effective date. This provision ensures that those mineral processing wastes that were originally excluded from subtitle C under the Bevill exclusion, and are now considered hazardous under the reinterpretation of the Bevill exclusion, are not subject to subtitle C requirements if the wastes were disposed prior to the effective date of the final rule. EPA is maintaining its proposed approach largely because of its long-standing policy of not regulating wastes under RCRA that were disposed prior to the effective date of a rule governing those wastes. See, e.g., 45 FR 33066.

For purposes of this rule, EPA views active management as physically disturbing the accumulated wastes within or disposing additional non-Bevill hazardous wastes into existing waste management units after the effective date of this rule. EPA does *not* intend to bring under subtitle C regulation existing waste management units containing wastes now identified as non-Bevill to which only Bevill wastes or other non-hazardous solid wastes are subsequently added (i.e., this practice will not constitute active management of the non-Bevill waste(s)). For example, a waste management unit receiving a high volume slag excluded from Subtitle C regulation under today's rule may continue to receive additional slag (or other non-hazardous or Bevill waste stream) even if it has also received (prior to the effective date of the rule) hazardous waste now identified as non-Bevill, provided that no additional non-Bevill wastes that exhibit characteristics of hazard or are listed as hazardous are managed in these units. Continued use of an existing unit after the effective date of this rule for treatment, storage, or disposal of additional quantities of a newly listed or characteristic hazardous waste will be considered active management and will subject the entire unit and its contents to Subtitle C regulation.

4. Scope of Today's Rule

In the April notice, EPA stated clearly that its interpretations and definitions regarding the regulatory status of mineral processing wastes under the Bevill Amendment applied only to the wastes addressed in this series of rulemakings (i.e., mineral processing wastes).

Nonetheless, commenters contended that the Agency's position as articulated in the 4/17/89 NPRM with respect to the actual or potential status of coal combustion wastes was unclear. They stated that some of the interpretations and definitions proposed for mineral processing wastes would not be appropriate for application to coal combustion wastes (another Bevill special waste category), particularly the high volume and low hazard criteria presented in the April NPRM, and requested that EPA clarify its position on this issue.

EPA emphasizes that the applicability of the definitions and criteria interpretations contained within this rulemaking, as presented below, is confined only to mineral processing wastes. The Agency believes that the special wastes concept remains a flexible one, and that the criteria for defining special wastes in the mineral processing industry may not be directly transferable to the other special waste categories, particularly coal combustion wastes. (EPA noted differences in its discussion of coal combustion waste volumes in the October, 1988 NPRM.) The Agency will consider this issue further in the context of its Regulatory Determination for coal combustion wastes.

B. The Low Hazard Criterion

As discussed in the preamble to the April 17, 1989 NPRM, EPA has proposed a hazard criterion for use in determining the proper scope of the Bevill exclusion as it applies to mineral processing wastes. The purpose of the hazard criterion is to identify candidate Bevill mineral processing wastes that clearly do not present a low hazard to human health and/or the environment. Any wastes failing such a criterion should be immediately removed from the Bevill exclusion; these wastes would then be evaluated (just like any other solid waste) to determine whether they are hazardous—that is, whether they are listed or exhibit any of the hazardous waste characteristics.

The proposed hazard criterion was based on two types of tests: (1) A pH test and (2) a mobility and toxicity test. The pH test requires that a mineral processing waste have a pH between 1 and 13.5 to be considered an exempt special waste, which represents a one order of magnitude increase of the pH levels used to identify corrosive hazardous wastes (i.e., 2 and 12.5). The mobility and toxicity test requires that mineral processing waste constituents be extracted from the waste using a procedure (Method 1312—Synthetic Precipitation Leaching Procedure) that EPA believes is generally less aggressive in leaching out constituents from solid wastes than the EP Toxicity Test (Method 1310), which is used to determine whether non-Bevill solid wastes exhibit the toxicity characteristic. The waste extract is evaluated in the same manner and at the same regulatory levels as in the EP Toxicity test. As EPA explained in the April NPRM, the low hazard criterion is solely a preliminary screening device to determine which mineral processing wastes are special wastes, and will not be used in determining which wastes will subsequently be regulated under Subtitle C, either as a result of today's rule or in the upcoming regulatory determination.

Comments on the low hazard criterion are organized in this preamble into general comments on the appropriateness of the criterion, followed by general comments on the overall approach, and specific comments on potential components of the approach (i.e., pH test, ignitability and reactivity tests, mobility and toxicity test, constituents for testing, additional standards, application of tests, and types of information).

1. Appropriateness of Establishing a Hazard Criterion

Many comments were received on whether EPA should include a hazard criterion for identifying which wastes should not be subject to continued temporary exclusion from RCRA subtitle C requirements under the Bevill Amendment.

a. *Low Hazard Criterion is Appropriate.* Several commenters supported EPA's proposal to use a low hazard criterion. One commenter maintained that a low hazard criterion is appropriate provided that the test used to evaluate whether the low hazard criterion is met is reasonable and appropriate for use with mineral processing wastes. Another commenter stated that Bevill exclusion status should be awarded only to those wastes that meet both the volume and hazard criteria, and yet another commenter stated that EPA should immediately remove from consideration those wastes

Tab 6

CHEMICAL WASTE MANAGEMENT, INC., Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent,

Hazardous Waste Treatment Council, American Mining Congress, American Iron and Steel Institute, The International Metals Reclamation Company, Inc., Intervenors.

HAZARDOUS WASTE TREATMENT COUNCIL, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent,

Chemical Manufacturers Association, American Petroleum Institute, American Mining Congress, American Iron and Steel Institute, The International Metals Reclamation Company, Inc., Intervenors.

CHEMICAL MANUFACTURERS ASSOCIATION, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent,

Hazardous Waste Treatment Council, Intervenor.

BROWNING-FERRIS INDUSTRIES, INC., Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY. Respondent.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION, INC. and Waste Management of North America, Inc., Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Lee M. Thomas, Administrator, Respondents,

Hazardous Waste Treatment Council, Intervenor.

AMERICAN IRON AND STEEL INSTITUTE, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

AMERICAN IRON AND STEEL INSTITUTE, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

CHEMICAL MANUFACTURERS ASSOCIATION, Petitioner.

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

AMERICAN WOOD PRESERVERS INSTITUTE. Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

E.I. DU PONT DE NEMOURS & COMPANY, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent,

Hazardous Waste Treatment Council, Intervenor.

MONSANTO COMPANY, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

THE DOW CHEMICAL COMPANY, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

AMERICAN MINING CONGRESS, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

ROSS INCINERATION SERVICES, INC., Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent,

American Iron & Steel Institute, Intervenor.

Nos. 88-1581, 88-1578, 88-1591, 88-1592, 88-1600, 88-1604 to 88-1607, 88-1615, 88-1643, 88-1735, 88-1736 and 88-1784.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 31, 1989.

Decided March 14, 1989.

As Amended April 21, 1989.

Waste management company sought review of orders of the Environmental Protection Agency. The Court of Appeals, Wald, Chief Judge, held that: (1) rule that leachate containing more than one hazard-

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(1) rule that
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ous waste would be subject to standards applicable to each of those wastes was not a retroactive application of hazardous wastes regulations; (2) regulation was reasonable; and (3) determination that environmental media, such as ground water and soil, containing hazardous wastes would themselves be considered hazardous waste was a reasonable interpretation of hazardous waste regulations.

Review denied.

1. **Federal Courts** ⇐714

Because ripeness doctrine serves a judicial interest in avoiding unnecessary or premature litigation, it is appropriate for Court of Appeals to consider the question even though the issue has not been raised by the parties.

2. **Administrative Law and Procedure** ⇐704

Health and Environment ⇐25.15(3.2)

Issue of whether Environmental Protection Agency impermissibly adopted retroactive hazardous waste listings was ripe for review, even though parties had agreed to further consideration of what the exact standards would be as the EPA's announcement that the standards, whatever they would be, would apply to leachate contaminated by materials not considered hazardous when disposed of had immediate consequences for landfill operators and the pronouncement constituted final agency action. 5 U.S.C.A. § 704.

3. **Administrative Law and Procedure** ⇐394

Health and Environment ⇐25.5(9)

EPA determination that its standards for leachate containing more than one hazardous waste would apply to leachate contaminated by waste not considered hazardous when disposed of was a construction of its rule that leachate derived from hazardous wastes is itself a hazardous waste, and not a new rule requiring notice and comment.

4. **Administrative Law and Procedure** ⇐394

Health and Environment ⇐25.5(9)

Environmental Protection Agency gave adequate notice and opportunity for comment before determining that its rule that leachates containing more than one hazardous waste are subject to standards for each of the wastes would apply to leachate which was contaminated by wastes which were not considered hazardous when disposed of.

5. **Administrative Law and Procedure** ⇐394

There is no contradiction between agency's contention that its notice and comment were not required and its argument that notice and comment provisions were in fact satisfied, as an agency cannot be faulted for attempting to provide clarification of a preexisting regulation and does not waive its right to argue that regulation is an interpretive rule by considering and responding to the comments which it has received.

6. **Administrative Law and Procedure** ⇐419

Health and Environment ⇐25.5(5.5)

Determination of Environmental Protection Agency that rule that leachate containing more than one hazardous waste will be subject to the standards applicable to each of the wastes should be applied to leachate contaminated by materials not considered hazardous when disposed of did not result in an impermissible retroactive operation of EPA regulation.

7. **Administrative Law and Procedure** ⇐753

Court may not sustain an agency's decision on basis other than that relied upon by the agency itself.

8. **Administrative Law and Procedure** ⇐394

Health and Environment ⇐25.5(9)

If Environmental Protection Agency rules that soil or groundwater containing hazardous wastes are themselves considered hazardous wastes was simply the application to environmental media of regulations previously adopted, the EPA was not required to provide notice or to consider comments when it adopted the rule.

9. **Health and Environment** ⇐25.15(5)

Rules concerning hazardous waste did not clearly provide that contaminated environmental media would be considered hazardous wastes, so that 90–day period for seeking judicial review of application of hazardous waste disposal regulations to environmental media did not to begin to run from the date of the original regulations but, rather, ran from date that EPA adopted its interpretation.

10. **Health and Environment** ⇐25.15(5)

If Environmental Protection Agency 1988 rule had simply restated a regulatory principle which was clearly expressed in 1980 rulemaking, challenge to that interpretation would in substance be an attack on the 1980 regulations and thus time barred.

11. **Administrative Law and Procedure** ⇐797

Judicial review of an agency's interpretation of its own rules is highly deferential, but deferential review is not the same as no review at all.

12. **Health and Environment** ⇐25.5(5.5)

Determination of Environmental Protection Agency that rules relating to disposal of hazardous waste apply to environmental media such as groundwater or soil which are contaminated by hazardous waste was a reasonable interpretation of its hazardous waste regulations.

13. **Health and Environment** ⇐25.15(4)

Acquiescence of particular companies in environmental protection rules does not signal the acquiescence of entire industry nor bar others in the industry from contesting an interpretation because it had been applied without objection to other companies in the past.

Petition for Review of an Order by the Environmental Protection Agency.

Angus Macbeth and Richard A. Flye, with whom Lawrence S. Ebner and John C. Chambers, Jr., Washington, D.C., were on the brief, for petitioners.

J. Brian Molloy, Douglas H. Green and Joan Z. Bernstein, Washington, D.C., also entered appearances for petitioner in No. 88–1581.

David R. Case, Washington, D.C., also entered an appearance, for petitioner in No. 88–1578 and for intervenor, Hazardous Waste Treatment Council, in Nos. 88–1591, 88–1581, 88–1600, 88–1643.

John T. Smith II, Washington, D.C., also entered an appearance, for petitioner in Nos. 88–1591, 88–1643, 88–1607, 88–1721, and for intervenor Chemical Mfrs. Ass'n in No. 88–1578.

Kevin A. Gaynor, Washington, D.C., also entered an appearance, for petitioner in No. 88–1592.

Samuel I. Gutter, Washington, D.C., also entered an appearance, for petitioner in No. 88–1600.

Steven F. Hirsch, and Barton C. Green, Washington, D.C., also entered appearances, for petitioner in Nos. 88–1604, 88–1665.

Karl S. Bourdeau also entered an appearance for petitioner in Nos. 88–1604, 88–1655 and 88–1735.

David F. Zoll, Washington, D.C., also entered an appearance, for petitioner in No. 88–1607 and for intervenor, Chemical Mfrs. Ass'n in No. 88–1578.

John N. Hanson and Edward M. Green, Washington, D.C., also entered appearances, for petitioner in No. 88–1736 and for intervenor American Mining Congress in No. 88–1581.

Richard D. Panza and Thomas A. Downie, Lorain, Ohio, also entered appearances, for petitioner in No. 88–1784.

Daniel S. Goodman, Atty., Dept. of Justice, with whom Roger J. Marzulla, Asst. Atty. Gen., Dept. of Justice, and Steven E.

hout objection to other compa· past.

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. Hirsch, and Barton C. Green, n, D.C., also entered appear- petitioner in Nos. 88–1604, 88–

ourdeau also entered an appear- etitioner in Nos. 88–1604, 88– 8–1735.

Zoll, Washington, D.C., also en- pearance, for petitioner in No. d for intervenor, Chemical Mfrs. o. 88–1578.

Hanson and Edward M. Green, n, D.C., also entered appear- etitioner in No. 88–1736 and for American Mining Congress in 1.

D. Panza and Thomas A. Dow- Ohio, also entered appearances, ier in No. 88–1784.

Goodman, Atty., Dept. of Jus- vhom Roger J. Marzulla, Asst. Dept. of Justice, and Steven E.

Silverman, Atty., U.S. E.P.A., Washington, D.C., were on the brief, for respondent.

Lisa F. Ryan, Atty., Dept. of Justice, Washington, D.C., also entered an appearance, for respondent in No. 88–1581.

Thomas R. Bartman, Atty., Dept. of Justice, Washington, D.C., also entered an appearance, for respondent in No. 88–1784.

G. William Frick, James Jackson, Washington, D.C., and Ralph J. Colleli, Jr. were on the brief, for intervenor American Petroleum Institute in No. 88–1578.

Neil J. King, Washington, D.C., and Raymond B. Ludwiszewski, Newington, Conn., entered appearances, for intervenor The Intern. Metals Reclamation Co., Inc. in Nos. 88–1581 and 88–1578.

Donald J. Patterson, Jr., Washington, D.C., and Roderick T. Dwyer entered appearances, for intervenor American Mining Congress in No. 88–1581.

Gary H. Baise, Karl S. Bourdeau and Steven F. Hirsch, Washington, D.C., entered appearances, for intervenor American Iron and Steel Institute in Nos. 88–1581, 88–1578 and 88–1784.

Before: WALD, Chief Judge and MIKVA, Circuit Judge, and REVERCOMB,* District Judge.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

Petitioners [1] in this case challenge two regulatory provisions dealing with the treatment and disposal of hazardous waste established by the Environmental Protection Agency ("EPA" or "the agency") pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA" or "the Act"). The petitioners claim that the contested regulations are arbitrary and capricious, and that they were issued without adequate notice and comment as required by the Administrative Procedure Act ("APA"). We conclude that the challenged regulations are reasonable and that petitioners' notice and comment challenge is without merit. Accordingly, the petition for review is denied.

I. Facts

A. *Applicable Statute and Regulations*

This dispute involves a rulemaking initiated by the EPA under the RCRA. Subtitle C of the Act, 42 U.S.C. §§ 6921–34, establishes a comprehensive framework regulating the treatment and disposal of hazardous wastes. Pursuant to its statutory mandate, the EPA has adopted a two-part definition of the term "hazardous waste." First, the agency has published several lists of specific "listed" hazardous wastes. 40 C.F.R. Part 261, Subpart D. Second, the agency has issued rules providing that any solid waste which demonstrates any one of four characteristics—ignitability, corrosivity, reactivity, and extraction procedure toxicity—will be considered a "characteristic" hazardous waste. 40 C.F.R. Part 261, Subpart C. The Act provides that any facility which treats, stores, or disposes of a listed or characteristic hazardous waste must first obtain a permit. 42 U.S.C. § 6925.

The RCRA was recently modified by the Hazardous Solid Waste Amendments of 1984 (the "1984 Amendments"), which established sweeping restrictions on the land disposal of hazardous wastes. The EPA was required to establish a schedule dividing the hazardous wastes into "thirds," *see* 42 U.S.C. § 6924(g)(4); the agency promulgated the schedule in May of 1986.[2] *See* 51 Fed.Reg. 19,300 (May 28, 1986). The division of the schedule into thirds was designed as a means of phasing in the land disposal restrictions. By August 8, 1988, the EPA was required to promulgate treat-

* The Honorable George H. Revercomb, of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

1. Petitioners are numerous companies and industry associations, principally engaged in chemical manufacturing and hazardous waste treatment.

2. That schedule, however, is not irrevocable: the agency retains a continuing authority to shift particular wastes from one third of the schedule to another.

ment standards for each of the first-third scheduled wastes; these wastes may not be land disposed unless they have been treated to meet the applicable standards or the disposal unit is one from which there will be no migration of hazardous constituents for as long as the waste remains hazardous. *See* 42 U.S.C. § 6924(g)(4)(A). Similar land disposal restrictions for second-third and third-third wastes are scheduled to take effect on June 8, 1989 and May 8, 1990; prior to these dates, the EPA is required to promulgate treatment standards for the scheduled wastes.[3] *See* 42 U.S.C. §§ 6924(g)(4)(B), 6924(g)(4)(C).

The present dispute concerns the rulemaking in which the EPA established treatment standards for first-third wastes. The new regulations were submitted for public comment in two Notices of Proposed Rulemaking, which were published in the Federal Register on April 8, 1988 and May 17, 1988. *See* 53 Fed.Reg. 11,741; 53 Fed.Reg. 17,577. The final rule was published in the Federal Register on August 17, 1988, with an effective date of August 8, 1988. *See* 53 Fed.Reg. 31,137. In these public notices the EPA issued treatment standards for the various wastes; in lengthy preambles to the notices, the agency discussed the interpretive principles which would guide its application of the standards. Three such principles merit discussion here.

One of these principles concerns the treatment standards applicable to leachate produced from hazardous waste. Leachate is produced when liquids, such as rainwater, percolate through wastes stored in a landfill. The resulting fluid will contain suspended components drawn from the original waste. Proper leachate management involves the storage of wastes in lined containers so that leachate may be collected before it seeps into soil or groundwater. The leachate will periodically be pumped out of the container and subsequently treated.

An EPA regulation promulgated in 1980, known as the "derived-from rule," provided that "any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust, or leachate (but not including precipitation run-off) is a hazardous waste." 40 C.F.R. § 261.3 (c)(2)(i).[4] Thus, for some years prior to the 1988 rulemaking, it had been understood that leachate derived from a hazardous waste was itself a hazardous waste. In the 1988 preambles, the agency stated that leachate derived from multiple hazardous wastes would be deemed to contain each of the wastes from which it was generated, and that it must therefore be treated to meet the applicable treatment standards for each of the underlying wastes.[5] *See* 53 Fed.Reg. 31,146–31,150 (August 17, 1988). This is known as the "waste code carry-through" principle.

The second interpretive principle at issue in this proceeding also involves the treatment requirements for hazardous waste leachate. In its preamble to the August rule, the agency stated that "[h]azardous waste listings are retroactive, so that once

3. The statute also contains fallback provisions which take effect if the agency fails to set treatment standards by the appropriate deadlines. If treatment standards for first-third and second-third wastes have not been promulgated by the applicable dates, the statute's "soft hammer" provisions take effect. Under the "soft hammer" provisions, land disposal of these wastes is permitted only if (1) the facility meets the technological requirements of 42 U.S.C. § 6924(*o*), and (2) the generator of the waste has certified that land disposal "is the only practical alternative to treatment currently available." *See* 42 U.S.C. §§ 6924(g)(6)(A), 6924(g)(6)(B). If the EPA fails to set treatment standards for a hazardous waste by May 8, 1990—the deadline for the promulgation of third-third treatment standards—then "such hazardous waste shall be prohibited from land disposal." *See* 42 U.S.C. § 6924(g)(6)(C).

4. Petitioners in this proceeding do not challenge the validity of the derived-from rule itself. That rule was, however, challenged contemporaneously by other parties. Due to protracted negotiations between those parties and the agency, that challenge is only now reaching this court. *See Shell Oil v. EPA*, No. 80–1532 (D.C.Cir.). As we explain *infra*, our disposition of this case does not require that we express any view concerning the validity of the derived-from rule.

5. Since different wastes will typically be stored together in a landfill, it is not uncommon for leachate to be derived from many different wastes.

a particular waste is listed, all wastes meeting that description are hazardous wastes no matter when disposed." 53 Fed.Reg. 31,147 (August 17, 1988). The implications of that statement center around wastes which were not deemed hazardous at the time they were disposed but which are subsequently listed as hazardous wastes. The RCRA does not require that such wastes be cleaned up or moved from the landfill, nor does the agency impose any retroactive penalty on the prior disposal of the waste. Under the August rule, however, the agency announced that leachate which is actively managed after the underlying wastes have been listed as hazardous will itself be deemed a hazardous waste and must be treated to the applicable standards. Under this approach, the fact that the original waste was not deemed hazardous at the time of disposal is simply irrelevant in determining the treatment requirements for the leachate.

Finally, the agency discussed the applicability of the treatment standards to contaminated environmental media such as soil and groundwater. The preamble stated that "[i]n these cases, the mixture is deemed to be the listed waste." 53 Fed. Reg. 31,142 (August 17, 1988). Thus, when a listed hazardous waste (or hazardous waste leachate) is mixed with soil or groundwater—as may occur, for example, through spills or leaking—the soil or groundwater is subject to all the treatment standards or restrictions that would be applicable to the original waste.

B. *The Present Litigation*

Immediately after the issuance of the challenged regulations, the petitioners filed a Motion for Emergency Stay Pending Review of the August rule by this court. On August 18, 1988, this court stayed enforcement of the rule "only as it applies to leachate and anything contaminated by leachate." That order was amended by the court on September 23, 1988 to provide that the stay would apply "to leachate, residues from treating such leachate, and groundwater contaminated with leachate." The court also established an expedited briefing schedule for "leachate-related issues" implicated by the various challenges to the August rule. Briefs were filed, and oral argument was set for January 31, 1989.

Petitioners in this case raised a host of substantive and procedural challenges to the August rulemaking. First, the petitioners contested the agency's determination that "derived-from" wastes (such as leachate) will be subject to the standards applicable to each of the underlying wastes. The petitioners' position was in essence that the EPA should establish separate treatment standards for leachate, based on a leachate treatability study, rather than assuming that leachate can be treated to the standards for all of the wastes from which it is generated. The petitioners also challenged the application of the treatment standards to leachate derived from wastes which were not deemed hazardous at the time they were disposed; their claim was that such a regulation would constitute improper "retroactive" rulemaking. They also contested the agency's statement that environmental media contaminated by listed hazardous wastes would themselves be considered hazardous wastes and would be required to meet the treatment standards. Finally, the petitioners contended that the challenged regulations had been promulgated in violation of the notice and comment requirements of the APA.

Shortly before oral argument, however, the posture of the case changed dramatically. On January 27, 1989, the parties filed an Emergency Joint Motion to Defer Oral Argument on Certain Leachate-Related Issues. That motion, which was granted by this court, covered the petitioners' challenge to the waste code carry-through principle—the requirement that derived-from wastes such as leachate would be deemed to contain each of the original wastes from which they were generated. The parties also requested that argument be deferred on the notice and comment challenge, insofar as it pertained to the waste code carry-through principle. The explanation for the parties' request was that settlement negotiations had already produced agreement on some preliminary issues, and that a negoti-

ated settlement seemed likely on all issues pertaining to the waste code carry-through principle. Under the terms of the proposed settlement, all multiple-waste leachate would be rescheduled to the third-third, and a leachate treatability study would be undertaken so that appropriate treatment standards could be determined. *See* Emergency Joint Motion at 2, 3.

The issues argued to the court, and the issues that we decide today, are therefore limited to the following. First, did the agency improperly engage in retroactive rulemaking in ordering that its leachate regulations be made applicable to leachate derived from wastes which were not deemed hazardous at the time they were disposed? Second, did the agency act in an arbitrary and capricious manner by mandating that environmental media contaminated by hazardous wastes must themselves be treated as hazardous wastes? Finally, did the EPA fail to provide interested parties with adequate notice of and opportunity to comment on the foregoing regulatory principles?

II. Analysis

A. *"Retroactive" Hazardous Waste Listings*

1. Ripeness

[1] The impending settlement of some but not all of the issues originally scheduled for argument has introduced an anomaly into the parties' disagreement concerning the "retroactivity" of hazardous waste listings. The parties continue to differ as to the applicability of EPA treatment standards to leachate derived from wastes which were not deemed hazardous when they were disposed. If the settlement is finalized, however, treatment standards for multiple waste stream leachate—leachate derived from more than one hazardous waste—will not be promulgated until 1990. Much of the argument. therefore. concerns the question whether these standards, *when they are eventually promulgated,* can legitimately be applied to leachate derived from wastes listed as hazardous subsequent to their disposal. We must first determine whether this question is currently ripe for judicial review.[6]

[2] As the Supreme Court has stated, the ripeness doctrine's

> basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). A determination of ripeness "requires the court to balance its interest in deciding the issue in a more concrete setting against the hardship to the parties caused by delaying review." *Webb v. Department of Health and Human Services,* 696 F.2d 101, 106 (D.C.Cir.1982). Of particular relevance to the present case are decisions which address the reviewability of agency actions which threaten to cause harm at some point in the future. On the one hand, "[t]he mere *potential* for future injury ... is insufficient to render an issue ripe for review." *Alascom, Inc. v. FCC,* 727 F.2d 1212, 1217 (D.C.Cir.1984) (empha-

6. The EPA has not suggested that this issue is unripe for judicial review. In fact, the Emergency Joint Motion, submitted both by petitioners and by the agency, asserted that this issue (as well as the issue of contaminated environmental media) is "severable from the issues sought to be deferred.... All petitioners and respondent agree that argument on these remaining issues should be held as scheduled." Emergency Joint Motion at 4. This fact is surely relevant: it belies any fear that immediate review will disrupt the administrative process, and such disruption is a central concern of the ripeness inquiry. However, since the ripeness doctrine also serves judicial interests in avoiding unnecessary or premature litigation, it is appropriate that this court consider the question even though the issue has not been raised by the parties.

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First, it is clear that the EPA pronouncement at issue here constitutes "final agency action" within the meaning of 5 U.S.C. § 704. One function of the ripeness doctrine is to provide an agency "full opportunity ... to correct errors or modify positions in the course of a proceeding." *Public Citizen Health Research Group v. Commissioner, Food & Drug Administration*, 740 F.2d 21, 31 (D.C.Cir.1984). It seems quite clear to us, however, that the EPA has arrived at its ultimate decision on this issue. It is true that certain related questions—most notably, the specific treatment standards to be applied to hazardous waste leachate—have yet to be resolved. These questions, however, are logically distinct from the issue of "retroactivity." The EPA's determination of appropriate treatment standards will not involve agency reconsideration of the "retroactivity" principle. Nor is there any plausible basis for believing that the specific treatment standards eventually promulgated will affect this court's judgment as to the propriety of applying those standards to leachate derived from wastes which were deemed hazardous after their disposal.

Second, the EPA's announcement of the "retroactivity" principle is not without immediate consequences for the petitioners. By the terms of the proposed settlement, the agency is free at any time to require that single-waste leachate be treated to meet the standards promulgated for the underlying waste.[7] The petitioners would thus appear to be entitled to an immediate determination as to whether these standards may be applied to single-waste leachate derived from wastes which had not been listed at the time of disposal. Moreover, the application of the "retroactivity" principle to multiple-waste leachate may mean that some such leachate will fall under the definition of "hazardous waste" when it would not otherwise be so regarded. The requirement that this leachate be treated as "hazardous waste" will impose significant regulatory obligations even in the absence of specific treatment standards.[8]

Certainly the most severe consequences of the "retroactivity" principle will not be felt until the agency promulgates treatment standards for mixed-waste leachate. Even those consequences, however, are by no means speculative or conjectural. By rescheduling mixed-waste leachates to the third-third, the agency has postponed its obligation to set specific treatment standards. It has not, however, postponed that obligation indefinitely. The EPA is required by law to set treatment standards for third-third wastes by May 8, 1990. Even if the only consequences of the "retroactivity" principle would be felt in the future, we would conclude that the pros-

7. The Emergency Joint Motion states that the "EPA may at any time move this Court to exclude any single-source leachate from coverage by the stay and the undersigned petitioners will not oppose such motion." Emergency Joint Motion at 3.

8. Most obviously, the designation of particular leachate as "hazardous waste" will impose restrictions on the range of facilities to which petitioners may turn for leachate treatment. In general, hazardous waste may be treated only by facilities which have RCRA permits. The agency has suggested, however, that "[f]acilities collecting hazardous leachate can manage the leachate in such a way as not to trigger subtitle C requirements (including the land disposal restrictions) by managing the leachate in tanks at facilities subject to regulation under the Clean Water Act (see § 264.1(g)(6)). Consequently, [our interpretation] most directly discourages subsequent management in surface impoundments." 53 Fed.Reg. 31,149 (August 17, 1988). The petitioners dispute the EPA's assessment, contending that treatment in tanks regulated under the Clean Water Act is not in fact a practicable alternative. *See* Brief for Consolidated Petitioners at 12. Petitioners and the agency both agree, however, that fewer treatment options exist for leachate which is deemed a hazardous waste than for leachate which is not.

pect of these consequences is sufficiently certain to warrant immediate judicial review.

The posture in which this issue presents itself is admittedly a somewhat peculiar one. To a large extent, this court is being asked to pass upon the validity of interpretive principles which will govern the application of standards that have yet to be promulgated. Nevertheless, we conclude that this question is ripe for our review. The agency has plainly issued its final pronouncement on the subject, and its further deliberations on related issues will not serve to inform this court's consideration of this question. The agency's decision is likely to impose some immediate consequences on the petitioners. The most significant consequences, it is true, will not be felt immediately, but even these are not speculative: they are certain to occur by a clearly determinable time in the near (if not immediate) future. Under these circumstances, no purpose would be served by delaying our decision. All parties would be inconvenienced, and judicial resources would in the long run be unnecessarily burdened, if we required that this issue be re-briefed and re-argued to a future panel. Accordingly, we proceed to consideration of petitioners' challenge.

2. Notice and Comment

In contending that the "retroactivity" principle was promulgated in violation of the APA's notice and comment requirements, the petitioners make two distinct arguments. First, they contend that the notice given was inadequate because it consisted only of brief references which were "buried" within lengthy preambles in the Notices of Proposed Rulemaking. Second, the petitioners assert that the opportunity for comment was illusory, since the rulemaking record reveals that "[t]he Agency's mind obviously was made up," *see* Brief for Consolidated Petitioners at 48, and that the EPA was "simply unready to hear new argument" on these issues. *See McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C.Cir.1988). We reject both challenges to the notice and comment procedures used by the agency in this case.

First, it is not clear to us that the agency was compelled in this case to comply with the notice and comment requirements of the APA. The APA provides that these requirements are inapplicable to "interpretive rules," *see* 5 U.S.C. § 553(b). The distinction between interpretive (or "interpretative") and substantive (or "legislative") rules is admittedly far from crystal-clear. *See American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir.1987) ("the spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum"). In general, though, our cases (and those of other circuits) have emphasized the distinction between rules which create new legal obligations and those which simply restate or clarify existing statutes or regulations. *See American Hospital Association*, 834 F.2d at 1045–46, and cases cited therein.

[3] Given that standard, it would appear to us that the "retroactivity" principle is an interpretive rule. The derived-from rule, on the books since 1980, provides that "any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any ... leachate ... is a hazardous waste." 40 C.F.R. § 261.3(c)(2)(i). The agency's position is that the hazardousness of a waste does not depend upon the time it was disposed, and that therefore leachate derived from any waste which is now recognized as hazardous will have been "generated from the treatment, storage, or disposal of a hazardous waste." This seems to us an entirely reasonable (if not inevitable) construction of the regulation, and we therefore believe that, even had the agency failed to provide notice and an opportunity for comment, its action could be sustained.

[4] We need not rest on that proposition, however, for in our view the agency did in fact provide the notice and opportunity for comment which the APA requires for the promulgation of substantive rules. The agency clearly stated the "retroactivity" principle in its preamble to the second Notice of Proposed Rulemaking. *See* 53 Fed.Reg. 17,586 (May 17, 1988). Admitted-

ly, the language used by the EPA did not explicitly solicit comments on this question. Indeed, the Notice appeared to treat this principle as an accomplished fact. The Notice stated that the "EPA confirms its long-standing interpretation that residues (leachate, for example) that derive from treatment, storage, or disposal of wastes that were disposed before the effective date of the listing are nevertheless subject to the derived-from rule. These residues therefore could become subject to the land disposal ban for the listed waste from which they derive if they are managed actively after the effective date of the land disposal prohibition for the underlying waste." 53 Fed.Reg. 17,586 (May 17, 1988). Admittedly, the agency's statement assumes rather than invites comments on this issue. Nevertheless, the public Notice did provide interested parties with a clear indication of the agency's intended course of action, and in fact the agency received numerous comments on this question.[9] Certainly the passage dealing with this issue comprised only a small percentage of a lengthy preamble to the Notice of Proposed Rulemaking. But whenever a rulemaking involves numerous discrete issues, it is almost inevitable that agency discussion of particular questions will be brief in comparison to the documents as a whole. This does not render public notice insufficient.

Of course, if the agency had ignored the comments it received—if it had simply reasserted its previous position that this principle was a "long-standing interpretation"—then it could not claim to have complied with the APA's notice and comment requirements. It would then be forced to rely exclusively on its contention that the regulatory principle at issue here is an interpretive rule. In announcing its final rule, however, the agency extensively discussed the objections it had received, and it cogently explained its reasons for concluding that leachate derived from wastes listed as hazardous after their disposal should be considered hazardous wastes. *See* 53 Fed.Reg. 31,147–31,149 (August 17, 1988). Although the Notice of Proposed Rulemaking might have suggested that the agency's mind was made up, its subsequent statements reflect a willingness to consider and respond to public comment.

[5] We see no contradiction, moreover, between the agency's contention that notice and comment were not required in this instance (since an interpretive rule was involved) and its argument that the APA's notice and comment provisions were in fact satisfied. Certainly the EPA cannot be faulted for attempting to provide clarification of a pre-existing regulation. Nor do we believe that the agency, by considering and responding to comments received, has somehow waived its right to argue that the regulation in question is an interpretive rule. We therefore reject the petitioners' argument that the agency's disposition of this issue was in violation of the APA's notice and comment requirements.

3. Merits

[6] We observe at the outset that the agency has to a certain extent brought its troubles on itself. Both in its second Notice of Proposed Rulemaking and in its explanation of the final rule, the EPA asserted that "hazardous waste listings are retroactive." *See* 53 Fed.Reg. 17,586 (May

9. In finding that the agency's published notice was inadequate, the *McLouth* court was principally concerned with the fact that the "Summary" at the beginning of the notice of proposed rulemaking "would not have alerted a reader to the stakes." 838 F.2d at 1323. We find no such deficiency in the present case. At the beginning of its two Notices of Proposed Rulemaking, the agency included outlines, just over a page in length, summarizing the issues to be addressed in the proposed rule. These outlines contained headings and subheadings which clearly indicated that the Notices would discuss the applicability of the treatment standards to derived-from wastes. *See* 53 Fed.Reg. 11,742 (April 8, 1988); *id.* at 17,578 (May 17, 1988). The outline to the second Notice, in fact, contained a subheading stating that "Residues from Managing Listed Wastes, or that Contain Listed Wastes, are Covered by the Prohibitions for the Listed Waste." *Id.* at 17,578 (subheading 7.c.). Of course the outline did not alert the reader to every scrap of information contained in the full Notice; if it had, it would not have been an outline. We nevertheless believe that the outlines, and the Notices, were sufficiently informative to satisfy the requirements of the APA.

17, 1988); *id.* at 31,147 (August 17, 1988). Petitioners argue that the EPA lacks the authority to promulgate retroactive regulations, and they correctly observe that such regulations are disfavored. *See Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C.Cir. 1985). In our view, however, the crucial question is not whether the EPA is authorized to promulgate a retroactive rule. Rather, the crucial question is whether the challenged regulation in fact operates retroactively. We conclude that it does not.

In discussing the presumption against retroactive lawmaking, this court has noted that "the Supreme Court's teaching in this area is, upon analysis, decidedly unfriendly to statutory interpretations that would effect a latter-day burdening of a completed act—lawful at the time it was done—with retroactive liability." *Ralis*, 770 F.2d at 1127. It is plain, however, that the regulation with which we are confronted here is not retroactive as that term was used in *Ralis*. The agency has made no effort to impose a legal penalty on the disposal of waste which was not deemed hazardous at the time it was disposed. Nor, in fact, does this regulation require the cleanup of any newly listed hazardous wastes. The preamble to the final rule expressly provides that "these residues could become subject to the land disposal restrictions for the listed waste from which they derive *if they are managed actively after the effective date of the land disposal prohibition for the underlying waste.*" 53 Fed.Reg. 31,148 (August 17, 1988) (emphasis supplied). The rule has prospective effect only: treatment or disposal of leachate will be subject to the regulation only if that treatment or disposal occurs after the promulgation of applicable treatment standards.

As a practical matter. of course, a landfill operator has little choice but to collect and manage its leachate. Active management of leachate is sound environmental practice, and a panoply of regulations require it.[10] A landfill operator therefore finds its present range of options constrained by its own past actions (the decision to accept certain wastes) even though it could not have foreseen those consequences when the actions occurred. This does not, however, make the rule a retroactive regulation. It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.[11]

Moreover, we find this aspect of the agency's interpretation of the derived-from rule to be eminently reasonable. The derived-from rule establishes a presumption: leachate generated from hazardous waste will be presumed hazardous unless it is proved nonhazardous or treated to applicable standards. The reasonableness of that presumption does not vary depending upon the time when the underlying waste was disposed. In fact, the view of the rule

10. The agency itself noted that the "EPA does not accept the argument that facilities are better off if they do not collect contaminated leachate, and so will discontinue voluntary collection. Continued release of such leachate exposes the facility to CERCLA liability, common law tort liability, and possibly criminal liability under intentional endangerment statutes." 53 Fed. Reg. 31,149 (August 17, 1988).

11. Commenters who stressed the potential disruption of settled expectations emphasized the plight of Subtitle D landfill operators who have accepted "small quantity generator waste." *See, e.g.*, Comments of Waste Management of North America at 10 (J.A. 640). The RCRA provides that Subtitle D landfills, which typically manage nonhazardous solid waste, may accept up to 100 kg/month of hazardous waste from small quantity generators without becoming subject to the hazardous waste regulations of Subtitle C. Commenters feared that these landfill operators would be brought under all of the restrictions of Subtitle C due to their active management of leachate. Such a result, we would note, might have occurred even if the treatment standards applied only to leachate derived from wastes listed as hazardous at the time of disposal. In any event, the commenters' fears appear to have been unfounded. In its preamble to the final rule, the EPA stated that it viewed the derived-from rule as inapplicable to small quantity generator hazardous wastes. *See* 53 Fed.Reg. 31,149 (August 17, 1988).

urged by the petitioners would seem to create serious enforcement problems. No doubt there are many landfills which have accepted certain listed hazardous wastes both before and after the wastes were listed. Under petitioners' approach, leachate generated from the wastes disposed after listing would be deemed hazardous and would be subject to the treatment standards; leachate derived from previous shipments of the same waste would not. There is, however, no possible way of determining which portions of the collected leachate were generated from particular shipments of the underlying waste.

[7] In upholding the EPA rule as a nonretroactive regulation, we do not believe that we have impermissibly sustained the agency's decision on a basis other than that relied upon by the agency itself.[12] The EPA did, it is true, state repeatedly that "hazardous waste listings are retroactive." Read in context, however, these statements mean only that the hazardousness of leachate will depend on the composition of the underlying wastes, not on the time at which those wastes were disposed. The agency emphasized that its action would apply only to the future active management of leachate. The preamble to the final rule stated: "What EPA's reading does is to ensure that once hazardous derived-from residues are collected, their subsequent management will be controlled under the statute designed to control management of hazardous waste. EPA has no other statutory tool for assuring *prospectively* that proper management will occur." 53 Fed.Reg. 31,149 (August 17, 1988) (emphasis supplied). Although the EPA did use the word "retroactive" in a way that careful lawyers would not, we believe that the basis on which the agency acted was congruent in substance (if not in phrasing) with the rationale which we uphold today.

12. Such an approach would of course be improper. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 2870, 77 L.Ed.2d 443 (1983).

B. *Contaminated Environmental Media*

1. Notice and Comment

[8] Petitioners also challenge the EPA's assertion that environmental media (*e.g.*, soil or groundwater) which are contaminated with hazardous wastes will themselves be considered hazardous wastes, and thus will be subject to the land disposal restrictions. Although petitioners appear to press their argument that this measure was adopted in violation of the APA's notice and comment requirements, we believe that the notice and comment argument actually adds nothing to their position. The EPA makes no attempt to defend the contaminated soil rule as a new regulation; the agency does not purport to have weighed the pros and cons of the policy within the course of the 1988 rulemaking.[13] Rather, the agency relies exclusively on the contention that the challenged rule is simply the application to environmental media of regulations adopted in 1980. If the EPA is correct in this assertion, then it was not required to provide notice or to consider comments in 1988. *See American Hospital Association, supra* p. 1534, 834 F.2d at 1045 (interpretive rules, which do not require notice and comment, "are those which merely clarify or explain existing law or regulations") (citations omitted). *See also American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C.Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984) "the impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals"). If the agency is wrong, then it cannot win on this issue no matter how much notice it provided. We therefore consider the merits of petitioners' challenge.

2. Is Petitioners' Claim Time–Barred?

The agency makes two related arguments based on the 1980 regulations.

13. In fact, the brief for the EPA emphasizes that the agency did not revisit this issue during the 1988 rulemaking. *See* Brief for EPA at 49.

First, the EPA asserts that these regulations clearly established that contaminated environmental media would be considered hazardous wastes. Therefore, the agency argues, "[t]he Court need not consider petitioners' argument further, since it has been made eight years too late." Brief for EPA at 46. Second, the agency contends that to treat contaminated soil and groundwater as hazardous waste is in any event a reasonable *interpretation* of the 1980 rules. These arguments, while related, have quite different ramifications, and we will consider them in turn.

[9] If the 1980 regulations (or the preamble thereto) clearly stated that contaminated environmental media would be covered, then petitioners' challenge would indeed be barred. The EPA correctly notes that the RCRA's ninety-day limit for seeking judicial review of agency regulations is jurisdictional. *See Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C.Cir. 1981). We do not believe, however, that the 1980 rules clearly provided that contaminated environmental media would be considered hazardous wastes. Neither the mixture nor the derived-from rule is by its terms directly applicable to contaminated soil or groundwater.[14] No other portion of the rules plainly applies, and the preamble issued by the agency at that time does not explicitly address the question.

[10, 11] Of course the EPA retains broad authority to issue interpretations of its rules which are reasonable though not compelled by the plain language of the rules themselves. And such interpretive statements, as we have seen, are not subject to the notice and comment requirements imposed by the APA. But to say that the agency is interpreting a preexisting regulation does not mean that judicial review of that interpretation is barred simply because a direct challenge to the rule itself would be untimely. The petitioners were required, within ninety days after the promulgation of the 1980 rules, to challenge any aspect of the rules which was clearly discernible from the language of the rules or from the agency's contemporaneous statements. The petitioners were not required, however, to anticipate every construction which the agency might later place upon its regulations.[15] Such an approach to the statutory time limits would impose hardships on individual petitioners; moreover, to require that challengers file these "protective" lawsuits would enmesh courts and agencies in irksome litigation concerning regulatory interpretations which had not been adopted and might never be adopted. Judicial review of an agency's interpretation of its own rules is, as we shall see, highly deferential, but deferential review is not the same as no review at all.

3. Did the Agency Reasonably Interpret the 1980 Regulations?

[12] In reviewing the EPA's application of its 1980 rules to contaminated soil, we are guided by two fundamental principles. The first is that "[a]n agency's interpreta-

14. The derived-from rule provides that "any *solid waste* generated from the treatment, storage, or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust, or leachate ... is a hazardous waste." 40 C.F.R. § 261.3(c)(2)(i) (emphasis supplied). The mixture rule states that "a mixture of *solid waste* and one or more hazardous wastes listed in Subpart D" will itself be a hazardous waste. 40 C.F.R. § 261.3(a)(2)(iv) (emphasis supplied). For either of these rules to apply directly, soil or groundwater would have to be considered a "solid waste." This does not match the statutory definition: "The term 'solid waste' means any garbage, refuse, sludge ... and other discarded material." 42 U.S.C. § 6903(27).

15. To put it a slightly different way, the question is whether the agency action currently under attack occurred in 1980 or in 1988. If the EPA in 1988 had simply restated a regulatory principle which was clearly expressed in the 1980 rulemaking, then petitioners' challenge would in substance be an attack on the 1980 regulations, and thus would be barred. In our view, however, the EPA's 1988 discussion of contaminated soil is best understood as a gloss on, not a reiteration of, the 1980 rules. The line is admittedly a fine one: the contaminated soil principle is sufficiently linked to the 1980 regulations to qualify as an interpretive rule, yet is a sufficiently significant extension of the earlier regulations that it qualifies as a new agency action triggering its own statutory review period.

tion of its own regulations will be accepted unless it is plainly wrong." *General Carbon Company v. Occupational Safety and Health Review Commission*, 860 F.2d 479, 483 (D.C.Cir.1988). The second is that on "a highly technical question ... courts necessarily must show considerable deference to an agency's expertise." *MCI Cellular Telephone Company v. FCC*, 738 F.2d 1322, 1333 (D.C.Cir.1984). Taken together, these principles counsel extreme circumspection in our review of the agency's action.

The agency's rule, adopted in 1980, provides that "[a] hazardous waste will remain a hazardous waste" until it is delisted.[16] *See* 40 C.F.R. §§ 261.3(c)(1), 261.3(d)(2). The petitioners argue in essence that an agglomeration of soil and hazardous waste is to be regarded as a new and distinct substance, to which the presumption of hazardousness no longer applies. The agency's position is that hazardous waste cannot be presumed to change character when it is combined with an environmental medium, and that the hazardous waste restrictions therefore continue to apply to waste which is contained in soil or groundwater. Certainly the EPA's position appears plausible on its face. Moreover, several other factors support the agency's interpretation of its rules.

In its preamble to the 1980 regulations, the agency sought to explain the circumstances under which a hazardous waste would cease to be a hazardous waste. The agency stated that a waste, once deemed hazardous, would ordinarily be presumed to retain its hazardous character. The EPA explained: "As a practical matter, this means that facilities which store, dispose of or treat hazardous waste must be considered hazardous waste management facilities for as long as they continue to contain hazardous waste and that any wastes removed from such facilities—including spills, discharges or leaks—must be managed as hazardous wastes." 45 Fed. Reg. 33,096 (May 19, 1980). The preamble did not specifically refer to contaminated environmental media, and it is certainly true that hazardous wastes may spill or leak into solid waste rather than into soil or groundwater. Clearly, though, the EPA's current treatment of contaminated soil is entirely consistent with the 1980 preamble's insistence that hazardous wastes will ordinarily be presumed to remain hazardous.

The EPA's approach to contaminated environmental media is also consistent with the derived-from and mixture rules established in 1980. *See* 40 C.F.R. §§ 261.3(c)(2)(i), 261.3(a)(2)(iv).[17] These rules provide that a hazardous waste will continue to be presumed hazardous when it is mixed with a solid waste, or when it is contained in a residue from treatment or disposal. The derived-from and mixture rules do not, it is true, apply by their own terms to contaminated soil or groundwater. *See supra*, p. 1538 n. 14. They nevertheless demonstrate that the agency's rule on contaminated soil is part of a coherent regulatory framework. It is one application of a general principle, consistently adhered to, that a hazardous waste does not lose its hazardous character simply because it changes form or is combined with other substances. In promulgating the mixture rule, the agency did not presume that every mixture of listed wastes and other wastes would in fact present a hazard. Rather, the agency reasoned that "[b]ecause the potential combinations of listed wastes and other wastes are infinite, we have been unable to devise any workable, broadly applicable formula which would distinguish between those waste mixtures which are and are not hazardous." 45 Fed.Reg. 33,095 (May 19, 1980). The EPA therefore concluded that

16. In filing a delisting petition, a petitioner seeks to convince the EPA that its particular form of the waste, although it falls within the regulatory definition of hazardous waste, does not in fact pose a hazard. *See* 40 C.F.R. §§ 260.20, 260.22. *See also McLouth*, 838 F.2d at 1319.

17. Petitioners do not challenge the mixture or derived-from rule. We therefore presume the validity of these rules in the current proceeding, although we recognize that the regulations were the subject of a timely challenge which is presently pending before this court. *See supra*, p. 1530 n. 4.

it was fair to shift to the individual operator the burden of establishing (through the delisting process) that its own waste mixture is not hazardous. Precisely the same logic applies to combinations of hazardous waste and soil or groundwater.

[13] The EPA also asserts that its interpretation of the 1980 rules as covering contaminated soil and groundwater, though not previously published in the Federal Register, has frequently been applied to individual cases during the past decade. The agency cites several instances in which it has received petitions to delist environmental media contaminated with hazardous waste; such delisting would be unnecessary unless the contaminated soil or groundwater were deemed hazardous waste to begin with. *See* Brief for EPA at 48 & n. 48. We find these examples persuasive. We recognize that the acquiescence of particular companies does not signal the acquiescence of the entire industry, nor do we suggest that the petitioners are somehow barred from contesting this interpretation simply because it has been applied to others in the past. We nevertheless believe that, when we assess the reasonableness of the EPA's interpretation of its own rule, the consistency with which that interpretation has been applied in the past weighs in favor of the agency. *Cf. NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 108 S.Ct. 413, 421 n. 20, 98 L.Ed.2d 429 (1987) (in determining whether an agency has reasonably interpreted a governing statute, courts should "consider the consistency with which an agency interpretation has been applied").[18]

The EPA's interpretation is also buttressed by one provision of the Hazardous Solid Waste Amendments of 1984, 42 U.S.C. § 6924(e). Congress there provided that certain specified solvents and dioxins would be prohibited from land disposal. 42 U.S.C. §§ 6924(e)(1), 6924(e)(2). The statute further provided that, for a two-year period after the effective date of the ban, the prohibition "shall not apply to any disposal of contaminated soil or debris resulting from a response action taken under section 9604 or 9606 of this title or a corrective action required under this subchapter." 42 U.S.C. § 6924(e)(3). This statutory exemption would of course have been superfluous unless contaminated soil would otherwise fall within the terms of the ban; the statute itself, however, made no explicit reference to a prohibition on land disposal of contaminated soil. This provision at least suggests that Congress assumed that the hazardousness of an underlying waste would be imputed to contaminated environmental media.

We need not decide whether any of these factors, or all of them taken together, would *compel* the conclusion that soil or groundwater contaminated with hazardous waste is itself a hazardous waste as defined by EPA regulations. We do believe, however, that, given the agency's broad discretion to interpret its own rules, it was entirely reasonable for the EPA to arrive at that conclusion. We therefore must sustain the agency's position.

III. Conclusion

We find that both of the EPA's policies under attack here represent reasonable exercises of agency discretion. The "retroactivity" principle does not in fact constitute retroactive rulemaking at all: the rule announced in August of 1988 will impose regulatory consequences only on leachate management which takes place after that time. The agency might perhaps be accused of inartful phrasing in the explication of its policy, but in substance its decision lay well within the bounds of its lawful authority. The EPA's approach to contaminated soil is also reasonable and is entirely consistent with the agency's general regu-

18. As one petitioner notes, some of these delisting petitions were filed "under protest": companies requested delisting of their contaminated soils while denying that such delisting was required by the regulations. *See* Reply Brief of American Wood Preservers Institute at 3–4 n. 4 (citing Delisting Petition of Vulcan Chemicals (J.A. 967)). This fact is of marginal significance, however, since our focus is on the consistency of the agency's interpretation rather than on the acquiescence of the regulated community.

latory framework, which emphasizes that a continuing presumption of hazardousness attaches to hazardous waste which changes form or is combined with other substances. Finally, the agency did not violate the notice and comment requirements imposed by the Administrative Procedure Act. The petitions for review are accordingly

Denied.

PUBLIC CITIZEN, et al.

v.

FEDERAL TRADE COMMISSION, Appellant.

No. 88–5209.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 30, 1989.

Decided March 14, 1989.

Public Citizen, joined by various associations, brought suit against Federal Trade Commission, seeking declaratory and injunctive relief pursuant to Administrative Procedure Act, alleging regulations exempting "utilitarian items for personal use" from warning label requirements under Comprehensive Smokeless Tobacco Health Education Act were contrary to law, or, alternatively, arbitrary and capricious. Both sides moved for summary judgment. The United States District Court for the District of Columbia, 688 F.Supp. 667, Thomas Penfield Jackson, J., held that regulations were contrary to law, and FTC appealed. The Court of Appeals, Wald, Chief Judge, held that: (1) associations had standing to challenge regulations, and (2) FTC was without authority to exempt utilitarian items from warning requirements.

Affirmed.

1. Trade Regulation ⇐764

Health organizations had standing to challenge Federal Trade Commission's decision to exempt utilitarian items such as T-shirts and other promotional products from the warning requirements imposed under Comprehensive Smokeless Tobacco Health Education Act; organizations established that exemption would directly deprive their members of valuable warnings to which Congress determined they were entitled, and deprivation of information constituted a constitutionally cognizable "injury." Comprehensive Smokeless Tobacco Health Education Act of 1986, §§ 2–9, 3(a)(1, 2), 15 U.S.C.A. §§ 4401–4408, 4402(a)(1, 2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Trade Regulation ⇐764

Federal Trade Commission was without authority to exempt utilitarian items such as T-shirts and promotional products from warning requirements of Comprehensive Smokeless Tobacco Health Education Act, insofar as Congress' explicit intent was for all advertising to carry warnings with single exception of billboards. Comprehensive Smokeless Tobacco Health Education Act of 1986, §§ 2–9, 15 U.S.C.A. §§ 4401–4408.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 86–03556).

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David C. Vladeck, with whom Alan B. Morrison, Washington, D.C., was on the brief for appellees.

James G. O'Hara, with whom Garret G. Rasmussen, Washington, D.C., was on the brief for The Smokeless Tobacco Council, Inc. as amicus curiae, urging the judgment of the District Court be vacated.