American Petroleum Institute
v.
United States Environmental Protection Agency

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

906 F.2d 729
June 26, 1990, Decided

PRIOR HISTORY:

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

JUDGES: Wald, Chief Judge, and Edwards and Ruth B. Ginsburg, Circuit Judges.

OPINIONBY: PER CURIAM

OPINION: [*732] Opinion for the Court filed Per Curiam.

These consolidated petitions for review challenge various aspects of a final Environmental Protection Agency ("EPA" or "agency") rule promulgated under the authority of the Resource Conservation and Recovery Act of 1976 ("RCRA") § 3004, 42 U.S.C. § 6924. The rule sets out land disposal prohibitions and treatment standards for "First-Third" scheduled wastes ("First-Third Rule"), ... n1

> n1 42 U.S.C. § 6924(g) required EPA to promulgate final regulations governing the disposal of all scheduled hazardous wastes. Section 6924(g)(4) required EPA to promulgate a schedule dividing such wastes into "thirds." In 1986, EPA established a three-part schedule for setting treatment standards for the § 6924(g) hazardous wastes. * * *. Land disposal restrictions for First-Third scheduled wastes took effect on August 8, 1988

The American Petroleum Institute, the American Iron and Steel Institute, the Chemical Manufacturers Association and the National Association of Metal Finishers (collectively "Industry Petitioners") challenge EPA's conclusion that the RCRA precludes the agency from considering land treatment, in conjunction with pretreatment, as an authorized method of treating hazardous wastes. Industry Petitioners also challenge EPA's abandonment of comparative risk analysis as a means of determining authorized treatment standards for hazardous wastes, claiming that the agency did not provide adequate reasons for abandoning this type of risk assessment.

The Natural Resources Defense Council, Chemical Waste Management, Inc. and the Hazardous Waste Treatment Council (collectively "NRDC") challenge the part of the First-Third Rule that establishes treatment standards for K061 hazardous waste. NRDC claims that EPA has unlawfully exempted the slag residues that result from the "treatment" of K061 in zinc smelters from the RCRA's restrictions on land disposal of hazardous wastes.

We agree with EPA that the RCRA does preclude land treatment in conjunction with pretreatment as a method of treating hazardous wastes. Additionally, we find that EPA provided adequate reasons for abandoning comparative risk analysis. However, because we find that EPA unlawfully exempted the residue produced from smelting K061 waste from the RCRA's restrictions on land disposal of hazardous wastes, we vacate

that portion of the rule and remand to the agency for further rulemaking consistent with this opinion.

I. BACKGROUND

A. *Overview*

Subtitle C of the RCRA establishes "a 'cradle to grave' regulatory structure overseeing the safe treatment, storage and disposal of hazardous waste." *United Technologies* [*733] *Corp. v. EPA*, ... Section 3001 of the RCRA, 42 U.S.C. § 6921, directs EPA to promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste. In accordance with this directive, EPA has adopted a two-part definition of hazardous waste.

First, EPA has published several lists of specific hazardous wastes ("listed wastes") in which EPA has described the wastes and assigned a "waste code" to each one. * * *. Second, EPA has identified four characteristics of hazardous wastes: ignitability, corrosivity, reactivity and extraction procedure toxicity. * * *. Any solid waste exhibiting one or more of these characteristics is automatically deemed a "hazardous waste" subject to regulation under Subtitle C of the RCRA even if it is not a "listed" waste. * * *.

Once a waste is listed or identified as hazardous, its subsequent management is regulated. Treatment, storage and disposal of a hazardous waste normally can be undertaken only pursuant to a permit that specifies the conditions under which the waste will be managed. * * *.

In the 1984 amendments to the RCRA, Congress shifted the focus of hazardous waste management away from land disposal to treatment alternatives, determining that:

> Certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated. . . . Land disposal . . . should be the least favored method for managing hazardous wastes.

42 U.S.C. § 6901(b)(7). Consistent with this finding, . . . RCRA now prohibits hazardous wastes from being disposed of on the land unless one of two conditions is satisfied: (1) the Administrator of EPA determines, "to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous." 42 U.S.C. § 6924(d), (e), (g), (m); or (2) the waste is treated to meet standards established by EPA pursuant to 42 U.S.C. § 6924(m). Section 6924(m)(1), . . ., provides:

> the Administrator shall, after notice and opportunity for hearings . . ., promulgate regulations specifying those levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.

* * *.

To satisfy this directive, EPA required that the hazardous wastes subject to the standards be treated to levels that are achievable by performance of the "best demonstrated available technology ("BDAT") or be treated by methods that constitute BDAT. * * *. EPA also explained that in setting BDATs it would compare the risk of various treatments for a particular waste with the risk of land disposal of that waste ("comparative risk" assessment).

B. *EPA's First-Third Rule*

1. Land Treatment

EPA's First-Third Rule established BDATs for the petroleum refining wastes with the waste codes K048-K052, ... n2 The standards chosen by EPA are based on incineration and solvent extraction technology. * * *.

> n2 Petroleum refining wastes K048-K052 are listed, respectively, as dissolved air flotation float, slop oil emulsion solids, heat exchanger bundle cleaning sludge, API separator sludge and tank bottoms. * * *.

Notwithstanding the requests of Industry Petitioners, the agency refused to consider [*734] land treatment (in conjunction with certain forms of pretreatment) as a potential BDAT for petroleum wastes. In responses to comments advocating such treatment, the agency explained that "Congress had specifically voided the consideration of land treatment as BDAT by defining it to be land disposal in [§ 6924(k)] as amended. . . . Land treatment is a type of land disposal, and prohibited wastes must meet a treatment standard *before* they are land disposed, unless they are disposed in no-migration units." . . . (emphasis added); . . ..

2. K061 Hazardous Waste

The final First-Third Rule also established BDATs for K061, a zinc-bearing listed hazardous waste that emanates from the primary production of steel in electric furnaces. * * *. The rule established separate treatment standards for two subcategories of K061: a high zinc subcategory (K061 that is at least 15% zinc in composition) and a low zinc subcategory (K061 that is less than 15% zinc in composition). Only the treatment standard for the high zinc subcategory is at issue in this case.

EPA determined that high temperature metals recovery was the BDAT for treating high zinc K061 hazardous wastes. It selected this treatment method on the ground that mandatory recycling of recoverable metals would reduce the amount of hazardous wastes ultimately treated and disposed. 53 Fed.Reg. 31,162 (1988).

. . ., EPA determined that it lacked authority to establish any treatment standards for the slag residue that results from the metals reclamation process. As the agency explained in the notice of proposed rulemaking, the furnaces used for metals reclamation "are normally . . . essential components of the industrial process, and when they are actually burning secondary materials for material recovery[,] [they] can be involved in the very act of production, an activity normally beyond the Agency's RCRA authority." * * *. . . ., EPA felt constrained to view K061 as no longer being "waste" within the meaning of the RCRA once the K061 enters a reclamation furnace. * * *. In the preambles to the final rule, EPA related

this analysis to the agency's so-called "indigenous principle," under which EPA disclaims the power to regulate any material generated by the same type of furnace in which the material is being reclaimed. * * *.

3. Comparative Risk

In addition to establishing BDATs for various hazardous wastes, the First-Third Rule discussed certain general principles that the agency would follow in establishing treatment standards. As part of this discussion, EPA stated that it would no longer compare the risks of treatment technologies with the risks of land disposal in determining treatment technologies. * * *. EPA found that such assessments had been of negligible benefit to the agency in previous rulemakings and concluded that the continued use of the assessments would have no influence on the treatment standards chosen under the First-Third Rule and subsequent rulemakings and could lead to environmentally counterproductive results. * * *.

II. ANALYSIS n3

n3 [Footnote Omitted.]

A. *Land Treatment*

Prior to the final First-Third rulemaking, Industry Petitioners asked EPA to consider [*735] land treatment in conjunction with pretreatment as a BDAT for K048-K052, which are "listed" hazardous wastes that emerge from the petroleum refining process. n4 * * *. While EPA made no mention of these comments in either the proposed or final rule on First-Third wastes, the agency responded to them . . .. EPA explained that the RCRA precluded the agency from considering land treatment methods as BDATs because "land treatment is a type of land disposal, and prohibited wastes must meet a treatment standard before they are land disposed, unless they are disposed in no-migration units. . . . Congress has *specifically* voided the consideration of land treatment as BDAT by defining it to be land disposal in § [6924(k)] of RCRA as amended." n5 * * *.

n4 [Footnote Omitted.]

n5 [Footnote Omitted.]

Industry Petitioners take issue with EPA's finding that the RCRA precludes consideration of land treatment as a BDAT. They maintain that the RCRA permits EPA to consider land treatment and that we must vacate the portion of the agency's rule that established BDATs for petroleum wastes because the agency misinterpreted the RCRA in determining those BDATs. * * *. We find, however, that EPA properly interpreted the RCRA as precluding consideration of land treatment.

Section 6924(k) of the RCRA specifically includes the placement of hazardous waste in a "land treatment facility" within its definition of land disposal. *See* n. 5 *supra*. Consequently, land treatment is subject to all of the statutory restrictions applicable to land disposal generally. In simple terms, land treatment is a form of land disposal involving the placement of hazardous waste directly on the ground (rather than, for example, in a landfill or surface impoundment) with the expectation that the hazardous constituents will eventually become less hazardous. n6 Thus, in a "land treatment facility," the treatment of hazardous wastes occurs

only *after* the waste has been land disposed.

n6 EPA has described the land treatment of hazardous waste as:

> the application of waste on the soil surface or the incorporation of waste into the upper layers of the soil . . . in order to degrade, transform, or immobilize hazardous constituents present in the waste. As such, land treatment is both a treatment and a disposal operation.

* * *.

The RCRA clearly specifies, however, that hazardous wastes must be treated *before* being land disposed. Unless a waste is disposed of in a unit demonstrated to meet the "no migration" test . . ., n7 the waste may not be land disposed unless the waste "*has complied* with the pretreatment regulations promulgated under" . . .. 42 U.S.C. § 6924(g)(5) (emphasis added

n7 The "no migration test" operates as follows. Where the Administrator determines that a method of land disposal of a hazardous waste "will be protective of human health and the environment for as long as the waste remains hazardous," § 6924(g)(5), the RCRA allows land disposal of the waste pursuant to that method. The Administrator may not determine a method of land disposal of a hazardous waste to be protective of health and the environment unless:

> it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be *no migration* of hazardous constituents from the disposal unit . . . for as long as the waste remains hazardous.

42 U.S.C. § 6924(d)(1) (emphasis added). The "no migration" provision is not in issue here, . . ., because Industry Petitioners do not argue that the BDAT they are requesting meets the "no migration" test.

Sections 6924(m)(1) and (2) are equally explicit. In pertinent part they provide that when a

> Hazardous waste *has been treated* [in a manner] which substantially diminish[es] the toxicity of the waste or substantially reduce[s] the likelihood of migration of hazardous constituents from the waste so that the short-term and long-term threats to human health and the environment are minimized . . .[,] such waste or residue thereof . . . may be disposed of in a land disposal facility which meets the requirements of this subchapter.

(Emphasis added.) These provisions are unambiguous: treatment, *i.e.*, a BDAT, must substantially diminish the toxicity of a waste or substantially reduce the likelihood of the migration of its hazardous constituents *prior* to land disposal.

* * *. . . ., Congress allowed surface impoundments (a type of land disposal unit under § 6924(k)) to receive, on an interim basis, hazardous wastes that have not been treated to meet § 6924(m) standards. Such surface impoundments must, however, meet certain "minimum technological requirements" . . ., including double liners and leachate collection systems. * * *. Moreover, the hazardous treatment residues from such surface impoundments must be removed for subsequent management within a year after the hazardous waste has been placed in the impoundment. * * *.

If Industry Petitioners' interpretation of § 6924(m) were correct, § 6925(j)(11) would be surplusage since EPA would already have been authorized to permit the treatment of hazardous wastes

subsequent to land disposal. Moreover, § 6925(j)(11) shows that when Congress intended to allow the land disposal of untreated hazardous wastes in units not meeting the "no migration" standard, it did so explicitly and placed numerous restrictions upon such disposal.

In sum, then, because we find no indication in the record that the pretreatment component of the BDAT that Industry Petitioners asked EPA to consider – land treatment in conjunction with some form of pretreatment – would *by itself* meet the strictures of § 6924(m), we find that EPA was correct in concluding that the BDAT suggested by Industry Petitioners was precluded from consideration by § 6924(m)

Of course, if Industry Petitioners had asserted that the pretreatment they were contemplating in conjunction with land treatment *by itself* met either the "substantially diminish" or "substantially reduce" requirement of § 6924(m), we would agree that EPA erred in concluding that the RCRA precluded consideration of the recommended BDAT. n8

n8 Unlike Industry Petitioners, however, we would not interpret § 6924(m) as giving EPA the *discretion* to allow land treatment, *i.e.*, land disposal, of wastes that have been pretreated to either the "substantially reduce" or "substantially diminish" level. Rather, if a party meets the pretreatment standard set out by § 6924 *and* requests permission to subsequently place the treated waste in a land treatment facility, we would interpret § 6924(m) as *compelling* EPA to grant that request. * * *.

[*737] The record, however, is not only barren of any such suggestions, it contains indications to the contrary. * * *. n9 . . .[I]t was eminently reasonable for EPA to conclude that Industry Petitioners were requesting the agency to consider a BDAT that clearly contravened the strictures of the RCRA.

n9 [Footnote Omitted.]

B. *Comparative Risk*

1. Standing

In the First-Third Rule, EPA announced that it would no longer engage in comparative risk assessment – comparing the risks to human health and the environment of treatment of a waste by a particular BDAT with those inherent in land disposal of the same waste. Industry Petitioners challenge this decision. EPA claims, however, that Industry Petitioners lack standing to raise their challenge because Industry Petitioners have alleged no harm flowing from EPA's decision to abandon comparative risk assessment. We disagree.

In their comments on EPA's Proposed First-Third rulemaking, Industry Petitioners identified several techniques for the treatment of refinery wastes. * * *. In the final rule, . . ., without performing comparative risk analyses, EPA rejected several of these methods in establishing treatment levels for the wastes, and limited standards for the listed petroleum refining wastes essentially to three technologies (incineration, a three-cycle solvent extraction process and fixation). * * *. . . .[T]he alternative and allegedly cheaper technologies recommended by Industry Petitioners were precluded from use. Industry Petitioners claim that had comparative risk assessments been made, these alternative technologies would not have been rejected by EPA. *

* *. Preclusion of such technologies in many cases may increase the cost of waste treatment for refiners and may compel refiners to make expensive changes in the manner in which they manage hazardous wastes. Thus, Industry Petitioners have alleged an "actual or threatened injury as a result of the putatively illegal conduct of the defendants." * * *.

2. Merits

Industry Petitioners contend that EPA's decision to abandon comparative risk analysis was arbitrary and capricious. In reviewing an agency's action under the arbitrary and capricious standard, we must affirm the agency if it has articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . [*738] * * *. EPA has done so here. In the final First-Third rulemaking, EPA offered two reasons for its decision to abandon comparative risk analysis. We think both reasons are in and of themselves satisfactory.

First, EPA explained that if a comparative risk assessment resulted in ruling out all treatments as riskier than land disposal (in terms of the potential danger it posed to human health and the environment), then treatment standards could not be set for a given waste *and* that waste could not be land disposed. * * *. n10 Industry Petitioners . . . argue that it is highly unlikely that comparative risk assessments will result in a lack of treatment standards because as applied by EPA so far, comparative risk has rarely precluded consideration of technologies as potential BDATs. This argument, however, is not an attack on the soundness of EPA's reasoning but rather speculation that the scenario envisioned by the agency is unlikely to occur. But to suggest that the scenario is unlikely to occur is not to demonstrate that it will not, and EPA is certainly entitled to take into account worst-case scenarios in dealing with issues of such staggering environmental significance.

n10 [Footnote Omitted.]

The second reason EPA offered for abandoning comparative risk was that the methodology had not proven to be particularly useful because it does not compare equally viable options since land disposal is presumptively disfavored by the RCRA. * * *. Industry Petitioners also reject this reason, arguing that comparing the risks inherent in treatments with those attendant to land disposal serves the useful purpose of helping the agency eliminate consideration of treatments that are riskier than land disposal.

The ultimate goal of comparative risk assessment, however, is not to eliminate consideration of individual treatment technologies, but to arrive at treatments that can be used as BDATs. EPA has noted that comparative risk assessment has not been helpful in that regard. * * *. Thus . . . rather than continuing to expend resources on comparative risk analyses which have in the past proven relatively useless to the agency, it [the EPA] is considerably more efficient for the agency's time to focus on comparing "the net risk posed by alternative [treatment] practices [as a way to] . . . identif[y the] [] 'best' treatment technologies." * * *.

In sum, then, we find that EPA's decision to abandon comparative risk analysis was not arbitrary and

capricious, and that the agency articulated a more than satisfactory explanation for its action. n11

n11 Industry Petitioners additionally contend that EPA's explanations are arbitrary and capricious because the agency had "resolved or rejected" the problems associated with comparative risk in its earlier "Framework Rulemaking." Even if this were so, an agency is certainly entitled to change course so long as it does so for adequately explained reasons.

C. *K061 Hazardous Waste*

1. Overview

Ordinarily, once EPA determines that a particular substance is a hazardous waste, the agency continues to treat as a hazardous waste any product "derived from" that substance in the course of waste treatment. * * *. EPA [*739] declined to apply the "derived-from" rule in this case on the belief that the RCRA prevents the agency from treating K061 as a "solid waste" once it reaches a metals reclamation facility. * * *. . . ., EPA declined to prescribe treatment standards for K061 slag pursuant to the land disposal prohibition contained in Subtitle C of the RCRA. Thus, but for EPA's determination that it lacked *authority* to regulate the K061 slag, the slag would automatically be treated as a hazardous waste as a product "derived from" a listed hazardous waste. n12

n12 [Footnote Omitted.]

NRDC argues that EPA's failure to prescribe treatment standards derives from a flawed interpretation of the scope of EPA's statutory authority. We agree. We conclude that the EPA failed to give a reasoned explanation for its construction of the RCRA and therefore remand for further consideration of this issue

2. Ripeness

As a threshold matter, we consider EPA's claim that NRDC's challenge should be dismissed as unripe. Our primary concern in assessing the ripeness of a pre-enforcement challenge to agency action is "the fitness of the issue[] for judicial decision." * * *. n13 To determine fitness, we ask first whether the issue raised in the petition for review presents a "purely legal question," in which case it is "presumptively reviewable." * * *. Next we consider "whether the agency or court will benefit from deferring review until the agency's policies have crystallized" through the application of the policy to particular facts. * * *.

n13 A secondary concern under the ripeness doctrine is "the hardship to the parties of withholding court consideration." * * *. We reach the issue of hardship, however, only if the fitness of the issue for judicial resolution is in doubt. * * *.

Applying these criteria, we have no difficulty concluding that NRDC's challenge is ripe. Whether EPA has the statutory authority to prescribe treatment standards for K061 slag is a purely legal question, one that can be answered solely by consulting the text, legislative history and judicial interpretations of the RCRA. * * *. Nor will EPA have occasion to refine its conclusion that it lacks statutory authority to regulate K061 slag in the course of applying the standards that the agency has promulgated for the treatment of K061.

* * *.

3. The Merits

EPA concluded that it lacked authority to regulate K061 slag because the material is not a "solid waste," and thus not a "hazardous waste," for purposes of the RCRA. * * *. The RCRA defines "solid waste" as

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material*. . . .

§ * * * (emphasis added). Although it is undisputed that K061 is a "solid waste" when it leaves the electric furnace in which it is produced, n14 EPA concluded that K061 ceases to be a "solid waste" when it arrives at a metal reclamation facility because at that point it is no longer "discarded material."

> n14 K061 is produced when particulate matter in the gasses emitted by electric furnaces is removed by air pollution control equipment. It therefore constitutes "sludge" from an "air pollution control facility." * * *.

Review of the EPA's interpretation of the RCRA is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, ... Under *Chevron's* familiar two-step analysis, we ask first "whether Congress has directly spoken to the precise question at issue"; if so, we "must give effect to the unambiguously expressed intent of Congress." * * *. If not, we defer to the agency's interpretation so long as it is "permissible," . . ., that is, "so long it is *reasonable* and consistent with the statutory purpose." * * *.

Our application of the *Chevron* test is necessarily influenced by the agency's own explanation of its action. In this case, EPA concluded that the terms of the RCRA left it *no choice* but to disclaim authority to prescribe treatment standards for K061 slag. * * *. It follows that we can uphold EPA's construction of the statute *only* if the agency's exercise of authority over the slag was indeed foreclosed by the RCRA under *Chevron* step one. For an agency's conclusion that a particular course is compelled by a statute that is actually ambiguous does not display the caliber of reasoned decisionmaking necessary to warrant *Chevron* step two deference. * * *. Because a reviewing court is powerless to remedy this defect in reasoning, . . ., the proper course in such a situation is to remand so that the agency can pursue a reasoned interpretation of the statute. * * *.

"Employing traditional tools of statutory construction," *Chevron*, . . . n. 9, we find that the answer to the question regarding EPA's authority to prescribe treatment standards for K061 slag is at best ambiguous. EPA contends that K061 "discarded" by producers of steel is no longer "discarded" under section 6903(5) when it arrives at a facility for metal reclamations. An at least equally plausible reading of the statute, however, is that K061 remains "discarded" *throughout* the "waste treatment" process dictated by the agency. Indeed, EPA does not seriously contend that this reading of the statute is *foreclosed* by the text of the statute, nor does it refer us to anything in the legislative history that prohibits such a construction.

> n15 [Footnote Omitted.]

[*741] . . ., EPA bases its reading of the RCRA almost entirely on our decision in *American Mining Congress v. EPA*, . . .

("*AMC*"). The issue in *AMC* was whether the EPA could, under the RCRA, treat as "solid wastes" "materials that are recycled and reused in an *ongoing* manufacturing or industrial process." * * *. We held that it could not because

> these materials have not yet become part of the waste disposal problem; rather, *they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself*.

* * *. Materials subject to such a process were not "discarded" because they were never "disposed of, abandoned, or thrown away." * * *.

AMC is by no means dispositive of EPA's authority to regulate K061 slag. Unlike the materials in question in *AMC*, K061 is indisputably "discarded" *before* being subject to metals reclamation. . . ., it *has* "become part of the waste disposal problem"; that is why EPA has the power to require that K061 be subject to mandatory metals reclamation. * * *. Nor does anything in *AMC* require EPA to cease treating K061 as "solid waste" once it reaches the metals reclamation facility. K061 is delivered to the facility not as part of an "*ongoing* manufacturing or industrial process" within "the generating industry," but as part of a mandatory waste treatment plan prescribed by EPA. As such, the resulting slag appears to remain within the scope of the agency's authority as "sludge from a *waste treatment plant*." * * *. n16 Because the EPA mistakenly concluded that our case law left it no discretion to interpret the relevant statutory provisions, we are constrained to remand. * * *.

n16 [Footnote Omitted.]

We add, however, that the scope of the agency's interpretive discretion on remand is far from unbounded. First, although we conclude that Congress has not spoken precisely on the question of EPA's authority to regulate the slag produced from the treatment of K061, any "permissible" construction of the relevant provisions must comport with the broader "statutory purpose" of the RCRA. * * *. Thus, it appears unlikely that EPA can simply readopt the conclusion that its authority to regulate K061 ends at the door of the reclamation facility. To reach such a conclusion, EPA would have to reconcile this position with the RCRA's acknowledged objective to "establish[] a 'cradle-to-grave' regulatory structure" for the safe handling of hazardous wastes. * * *.

[*742] Second, the agency's interpretive discretion is limited by its *previous* interpretations of the RCRA. EPA has expressly defined "solid waste" to include any *listed hazardous waste* (including K061) subject to reclamation, . . ., and "hazardous waste" to include "any solid waste *generated from the treatment* . . . of a hazardous waste," * * * (emphasis added). Thus, it would appear that EPA must prescribe treatment standards for the disposal of K061 slag, for "it is axiomatic that an agency must adhere to its own regulations. . . ." * * *. . . ., [B]ecause an agency is entitled to construe its own regulations in the first instance, we offer no view at this point on whether these rules can be reconciled with a disavowal of authority to regulate K061 slag. But clearly, this is a matter that will have to be addressed on remand should EPA

again seriously consider whether it is without such authority. n17

n17 [Footnote Omitted.]

After reconsidering these matters with *AMC* in correct focus, it appears likely that EPA will recognize that it must comply with its statutory mandate to prescribe treatment standards for the disposal of K061 slag. And, if as we expect, this is the result on remand, then EPA must enforce the RCRA's ban on land disposal of K061 slag unless the agency determines that one of the statutory exceptions of Subtitle C is satisfied. * * *. n18

n18 [Footnote Omitted.]

III. CONCLUSION

EPA was correct in concluding that the RCRA's land disposal and hazardous waste treatment provisions preclude consideration of land treatment of hazardous wastes. Consequently, we deny the petition to review EPA's interpretation of the RCRA's land disposal and hazardous waste treatment provisions. Additionally, because EPA provided adequate reasons for abandoning comparative risk assessment, we deny the petition to review its decision in this regard. However, because EPA unlawfully exempted the K061 residues from the RCRA's land disposal restrictions, we grant the petition to review EPA's rulemaking on K061 wastes, vacate that part of the rule, and remand for further rulemaking consistent with this opinion

So Ordered.