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Re: Legal Strategies to Develop An Administrative Record for RCRA Section 7003

Region 2 is presently in settlement negotiations with AES Puerto Rico regarding the land placement of Agremax™ (hereinafter Agremax) at both the AES facility in Guayamo and at its adjacent property referred to as the" north well field." Agremax is AES's trademarked product that is formed from the mixing of fly ash and bottom ash, which are themselves by-products (in the generic sense) from the burning of coal (fly ash and bottom ash are individually and collectively referred to as coal ash) that are "cured" by the addition of water and physically reduced to a uniform consistency.

If an Agreement on Consent with AES Puerto Rico cannot be reached, the question becomes whether Region 2 is able to develop the evidence needed in an administrative record to support the issuance of a unilateral RCRA Section 7003 order. Under RCRA Section 7003, 42 U.S.C. § 6973, the Administrator, notwithstanding any other section of RCRA, "may upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment" bring suit to restrain that activity or to order such person to take specified action to abate or remedy the situation.

At present, Region 2 has firm evidence that AES Puerto Rico land placed Agremax on its property at both the power plant and the north well field. Tests conducted by EPA on the Agremax collected from the power plant (the LEAF test); demonstrate, in theory, that Agremax has the potential to leach certain hazardous constituents such as arsenic, selenium thallium and boron into the environment. Based on the LEAF test results and prior EPA studies on coal ash, Region 2 believes that the land placement of Agremax on these properties may cause a substantial endangerment because of the potential for arsenic to leach into groundwater and is considering possible actions under either RCRA or CERCLA.

AES Puerto Rico has argued to Region 2 that a RCRA Section 7003 order is inappropriate because Agremax is not a discarded material within the statutory meaning of "solid waste" (42 U.S.C. § 6903(27)) because Agremax is not being thrown away. Instead, AES Puerto Rico is claiming that Agremax is being beneficially using as fill material in the construction of paved or unpaved roads and, therefore, Agremax is not a waste or discarded material under RCRA's statutory definition of solid waste. In addition, AES Puerto Rico has also argued that Region 2 cannot prove that Agremax has the potential to imminently harm the environment through migration to groundwater.

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In order to construct an administrative record to document imminent harm under Section 7003, 42 U.S.C. §6973, Region 2 must be able to develop evidence or proof that Agremax is both a solid waste and Agremax, like other coal ash deposits, has the potential to cause imminent harm to the environment.

1. Proving Agremax is a Solid Waste Under Section 7003

The first major hurdle to commencing a Section 7003 action is to develop an administrative record that demonstrates that Agremax is a solid waste when it has been land placed at both the power plant and north well field properties. With respect to solid waste, AES Puerto Rico's argument that Agremax is not a solid waste has focused solely and entirely on the phrase "other discarded material" within the statutory definition. AES Puerto Rico has argued, as a matter of statutory construction that Agremax is not a "discarded material" because it is not yet part of the waste disposal problem because it is being beneficially used in the construction of paved and unpaved roads on its properties.

While this interpretation, arguably, might be correct with respect to the bottom ash component of Agremax which becomes a solid waste when it is discarded or thrown away, Region 2 might be able to construct a legal argument that Agremax, at least the fly ash component, is a "sludge" and therefore, a solid waste under RCRA Section 1003(27), 42 U.S.C. § 6903(27). Fly ash consists of fine particles that rise during the combustion of coal and are captured by electrostatic precipitators or other particle filtration equipment before this ash reaches the chimneys of coal firing plants. Sludge is defined in Section 1003(26a), 42 U.S.C. § 6903(26a), as "any solid, semisolid or liquid waste generated from . . . an air pollution control facility." An air pollution control facility is simply any air pollution control device. Thus, fly ash fits squarely within the definition of "sludge" as used within the statutory definition of solid waste. Therefore, the mixture of sludge (*i.e.,* fly ash) and any other material such as bottom ash will be construed as a solid waste.

A potential problem in making an argument that sludge *per se* is a solid waste is that the legislative history underlying the statutory definition of solid waste suggests that Congress was focusing on the waste-like nature of materials that were being thrown away or discarded and if such materials (including sludge) are not part of the waste disposal problem they are not within the statutory definition of solid waste. As the D.C. Circuit stated in *American Mining Congress v. EPA*, 824 F.2d 1177, 1190, "our analysis of [RCRA] reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." *See also, Safe Air for Everyone v. Meyer*, 273 F.3d 1025, 1040 (9th Cir. 2004). If Region 2 intends to argue that fly ash per *se* is sludge and therefore a solid waste, irrespective of how that fly ash will subsequently be used; Region 2 will need to work closely with both OGC and OECA to develop and refine this legal position.

Alternatively, instead of trying to develop a legal argument that a portion of the Agremax (*i.e.,* the fly ash) meets the statutory definition of sludge and is therefore a statutory solid waste, Region 2 might instead attempt to prove factually that AES Puerto Rico's Agremax, either because of how it has been created or produced or how it has been used is recaptured within the

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statutory definition of solid waste.

a. the Process Relating to the Creation or Formation of Agremax

AES Puerto Rico is producing Agremax pursuant to provisions of two Resolutions issued by the EQB in 1996 and 2000 respectively. These two resolutions, in part, provide that if Agremax is produced in accordance to the specifications contained in those Resolutions, the Agremax is not deemed a solid waste. For example in the 1996 Resolution, EQB spent almost three pages describing the process by which AES manufactures Agremax from coal ash and concludes "[AES Puerto Rico] having demonstrated that there exists an acceptable process to convert the generated material [the coal ash] that is able to be reused or used beneficially, that it has the capacity, resources and adequate facilities to provide such treatment, that the material once processed has a beneficial use and existing market, and the same will not enter the flow of solid waste which are disposed, refused, or abandoned." Id. at 4. In other words, EQB is stating that Agremax when properly manufactured and used in accordance with the Resolution is not deemed a waste under EQB Rules relating to solid waste. On the other hand, if there is evidence that EQB has notified AES Puerto Rico prior to, or at the time that the Agremax has been land placed, that the Agremax has not been produced or used in accordance with EQB 1996 0r 2000 Resolutions, then Region 2 might be able to argue that the Agremax is recaptured within EQB's Rules for solid waste and therefore is a statutory solid waste as defined in RCRA.

To date, Region 2 has no information as to whether AES Puerto Rico has complied with these two Resolutions relating to the manufacturing of Agremax. Assuming, *arguendo*, that AES Puerto Rico has violated either or both of these two resolutions, with respect to how it has manufactured Agremax (and this does not appear to be very likely), **if** Region 2 can obtain from EQB the Notification of Violations it had issued to AES Puerto Rico; Region 2 might be able to construct a case that the by failing to comply with these Resolutions, the Agremax has been recaptured as a solid waste under EQB's Rules. As noted above, based on the present information that Region 2 has, it is much more likely that AES Puerto Rico has complied with these two resolutions but Region 2 needs to obtain the records from EQB as to its inspections of the AES Puerto Rico properties to determine whether the Agremax has been produced in accordance with the EQB Resolutions.

b. how Agremax was land placed for road construction

AES Puerto Rico has argued to Region 2 that the Agremax land placed in the north well field is being beneficially used as structural fill in the construction of paved or unpaved roads. If Region 2 is able to demonstrate that AES Puerto Rico has used either too much Agremax or too little Agremax in the construction of these paved or unpaved roads, then this land placed Agremax might be recaptured as a solid waste.

To prove that an inappropriate amount of Agremax was used as road fill, Region 2 will need to calculate the amount of Agremax placed on the ground for this purpose and then demonstrate that this amount is inconsistent with sound engineering practices in constructing paved or unpaved roads in this part of Puerto Rico. If Region 2 can show that too much or too little Agremax was land placed in the north well field; the Agremax might be recaptured as a solid

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waste under the theory or rationale of "sham" disposal.

In discussing an analogous situation: sham recycling within the hazardous waste context, one court noted "Sham recycling, as opposed to legitimate recycling, occurs when the hazardous waste purportedly recycled contributes in no significant way to the production of the product allegedly resulting from the recycling. . ." *U.S. v. Marine Shale Processors*, 81 F.3d 1361, 1365 (5th Cir. 1996). This is because sham recycling is "nothing more than waste disposal or waste treatment." Id. at 1365 quoting *Burning of Hazardous Waste in Boilers and Industrial Furnaces*, 52 Fed. Reg. 16,982, 16,989 (1987). A similar rationale is equally applicable to sham disposal in the solid waste context because sham disposal, as opposed to beneficial use, is nothing more than waste disposal. As the Court of Appeals for the District of Columbia stated in *American Petroleum Industry v. EPA,* 216 F.3d 50, 59 (C.A.D.C. 2000), "EPA can regulate material "discarded" through sham recycling even though it cannot regulate under RCRA materials that are not discarded." Thus, if Region 2 intends to argue that Agremax, based upon the concept of "sham" disposal, is not being beneficially used but is instead recaptured as a solid waste because it is a discarded material; Region 2 will need to work closely with both OGC and OECA to develop such an argument.

2. Imminent harm

Assuming that Region 2 is able to demonstrate that the Agremax falls within RCRA's statutory definition of being a solid waste, the second hurdle that needs to be overcome is to prove that the Agremax has the potential to cause an imminent and substantial harm to the environment.

Region 2 can demonstrate or prove, on the basis of the LEAF test, that hazardous constituents, such as arsenic, might, in a laboratory setting, leach out of Agremax. However, it is not the leaching of constituents that constitute an imminent harm but rather the migration of those constituents such that when they enter the groundwater their levels exceed MCL or exceed drinking water standards or some other health based standard.

To prove imminent harm, the results of the LEAF test must not only be coupled with a model designed to prove that significant quantities of arsenic in levels exceeding MCL will migrate to and enter the groundwater but the modeling must be confirmed or corroborated by groundwater sampling or other types of field data.

To date, Region 2 neither has developed such modeling nor has it conducted any independent monitoring or sampling to corroborate or confirm this leaching or migration. In a similar vein, Region 2 has not yet developed any risk assessments showing potential harm from the land placement of Agremax. Without such information it may be difficult for Region 2 to prove the land placement of Agremax, even if it is a solid waste, has the potential to cause an imminent harm to the environment.

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