

## ***Safe Air for Everyone Except the Citizens of Idaho: Why the Ninth Circuit’s Narrow Reading of RCRA Should Be Overturned***

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## INTRODUCTION

On July 1, 2004, a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit handed down a ruling which certainly pleased the agricultural industry but which disappointed health and environmental groups.<sup>2</sup> The decision left the agricultural industry free to continue its practice of burning its crop residue, while leaving the health and environmental groups and the citizens of surrounding communities gasping for air. The dispute arose between Kentucky bluegrass farmers<sup>3</sup> in portions of Idaho and citizens in surrounding communities, and concerned the farmers' practice of burning their fields after the harvesting of Kentucky bluegrass seed.<sup>4</sup> In *Safe Air for Everyone v. Meyer*, the issue was whether crop residue, left over after the harvest of Kentucky bluegrass, is a "solid waste"<sup>5</sup> as that term is defined under the Resource Conservation and Recovery Act ("RCRA" or "Act").<sup>6</sup> If the crop residue were considered to be a solid waste, the plaintiffs would have a cause of action to enjoin the farmers from burning their fields under the citizen suit provisions of RCRA.<sup>7</sup> Two of the three judges hearing the case held that the crop residue at issue was not a solid waste, and dismissed the case without a trial on the merits.<sup>8</sup> One judge dissented, stating that RCRA applies to post-harvest crop residue and that the case should be remanded for a trial on the merits.<sup>9</sup> A petition for a writ of certiorari has been filed and, at the time of this writing, is awaiting a response from the Supreme Court of the United States.<sup>10</sup>

The ultimate outcome of this case is literally life or death for at-risk residents of the surrounding communities. Safe Air For Everyone, a 1,000-plus member non-profit corporation, was formed by Idaho

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<sup>2</sup> See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004).

<sup>3</sup> Throughout this comment, I refer to the defendants as "farmers", rather than "growers." Throughout the briefs in this case, the plaintiffs refer to the defendants as "growers" and the defendants refer to themselves as "farmers". The plaintiffs' concern might have been that courts will have more sympathy for "farmers" than they would have with "growers" due to American ideology, which tends to romanticize the farming culture. J.B. Rulh, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263, n.9 (2000). My use of the term "farmer" does not necessarily mean that my views coincide with those of the defendants. I use the word "farmer" simply because it seems more natural to me.

<sup>4</sup> *Safe Air*, 373 F.3d at 1038.

<sup>5</sup> *Id.* at 1041.

<sup>6</sup> 42 U.S.C. §§ 6901-92 (2000).

<sup>7</sup> See 42 U.S.C. § 6972(a)(1)(B) (2000).

<sup>8</sup> *Safe Air*, 373 F.3d at 1047.

<sup>9</sup> *Id.*

<sup>10</sup> Pet. For A Writ Of Cert. By Pet'r Safe Air For Everyone, *Safe Air For Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (No. 04-1055).

physicians solely to put an end to the growing health care crisis in the region caused by the defendants' open-field burning practices.<sup>11</sup> In its complaint, the plaintiff alleged that at least three people had died as a result of "episodes of acute respiratory distress precipitated by grass residue burning."<sup>12</sup> Additionally, the complaint alleged that adverse health effects included "irritation of the eyes, nose and mouth; increased coughing and wheezing; increased respiratory illness; difficulty breathing; decreased lung function; and possible development of lung disease,"<sup>13</sup> and that children, the elderly, and people with asthma, heart disease and other respiratory illnesses are particularly placed at risk due to the high concentrations of fine and coarse particulate matter in the smoke from the burning fields.<sup>14</sup>

For the farmers, many of whom moved their operations to Idaho in the wake of the State of Washington's recent ban on the practice of open-field burning, convenience, efficiency and profits are all at stake.<sup>15</sup> The defendants, seventy five individuals and corporations who grow Kentucky bluegrass for commercial profit in two areas of Northern Idaho,<sup>16</sup> alleged that crop residue burning is a necessary step in the growing process as it "allows for the enhancement of water quality because it deters soil erosion into the air and water as the result of the lack of soil disturbance."<sup>17</sup> The defendants also argued that the practice of open-field burning is necessary for many other reasons that are "integral to producing consistent and maximum yields of a healthy seed crop the following year."<sup>18</sup> These benefits include "stimulation of the soil, recharging the root system, providing nutrients for the grass, clearing the field and soil of harmful parasitic pests . . . eliminating destructive mold and fungus growth . . . and ridding the soil of weed growth."<sup>19</sup> The defendants argued that there are no practical alternatives to open-field burning and that mechanical removal of the crop residue

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<sup>11</sup> Br. of Pl.-Appellant at 3-4, *Safe Air* (No. 02-35751).

<sup>12</sup> Compl. at 92-93, *Safe Air* (No. 02-35751).

<sup>13</sup> *Id.* at 90, *Safe Air* (No. 02-35751).

<sup>14</sup> *Id.* at 91, *Safe Air* (No. 02-35751).

<sup>15</sup> During the *Safe Air* trial at the district court level, Grant Pfeifer, the air quality section supervisor for the Washington State Department of Ecology, testified that the State of Washington concluded that grass residue burning was a health concern. In 1998, the state banned the burning of grass seed fields finding that there were reasonable alternatives to burning. Br. of Pl.-Appellant at 17, *Safe Air* (No. 02-35751).

<sup>16</sup> *Id.* at 4, *Safe Air* (No. 02-35751).

<sup>17</sup> Br. for Defs.-Appellees at 7, *Safe Air* (No. 02-35751).

<sup>18</sup> *Id.*, *Safe Air* (No. 02-35751).

<sup>19</sup> *Id.* at 7-8, *Safe Air* (No. 02-35751).

would not only deprive them of the benefits of burning, but would be economically ruinous.<sup>20</sup>

The State of Idaho has been very friendly to the growers' concerns and has actually encouraged Kentucky bluegrass farmers in Washington State to relocate their operations to Idaho, where there are very limited restrictions on the practice of open-field burning.<sup>21</sup> Additionally, Idaho recently sought to amend its federal Clean Air Act State Implementation Plan ("SIP") in an attempt to specifically list crop residue disposal as an allowable category of open burning under the SIP.<sup>22</sup> That proposal, which has the preliminary approval of the Environmental Protection Agency, is currently working its way through the rulemaking process. Furthermore, Idaho's Right to Farm statutes provide further protections to agribusiness by severely restricting the rights of citizens to file common law nuisance claims against growers of Kentucky bluegrass.<sup>23</sup>

The defendants argued that they are not disposing, discarding or getting rid of the crop residue, because they use the crop residue by burning it, an indispensable step in the growing cycle.<sup>24</sup> The plaintiffs argued that the primary reason that the defendants burn the crop residue is to remove it in the most inexpensive manner.<sup>25</sup> The farmers' true motivation for burning their fields seems to be a question of fact, inappropriate for resolution on summary judgment. Yet two of the three judges on the panel, looking at the facts in a light most favorable to the plaintiffs, found that there was no material question of fact in dispute and that the crop residue was not a solid waste as a matter of law.<sup>26</sup>

It is my contention that crop residue is a solid waste, that the plaintiffs have raised substantial issues of material fact, and that they are entitled to injunctive relief. There are three reasons why the Ninth Circuit's decision in the case should be overturned. First, the legislative

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<sup>20</sup> *Id.* at 8-27, *Safe Air* (No. 02-35751).

<sup>21</sup> For example, an official with the Coeur d'Alene Tribe testified at trial that number of acres burned on that reservation has increased from 14,000 acres a few years ago to 30,000 acres today, as a result of farmers moving from Washington State after Washington State banned crop residue burning. Br. of Pl.-Appellant at 17, *Safe Air* (No. 02-35751). Idaho encourages these farmers to move their operations from neighboring states by codifying the farmer's right to burn under the Idaho Smoke Management and Crop Residue Disposal Act and Idaho's Rules for Crop Residue Disposal. IDAHO CODE §22-4803 (2004). Additionally, Idaho exempts farmers from common-law nuisance attacks under Idaho's Right to Farm Law, set forth in IDAHO CODE §§22-4501 to 22-4504 (2004).

<sup>22</sup> Clean Air Act Approval and Promulgation of State Implementation Plans; Idaho, 69 Fed. Reg. 109 (proposed May 22, 2003) (to be codified at 40 C.F.R. pt. 52).

<sup>23</sup> IDAHO CODE §§22-4501 to 22-4504.

<sup>24</sup> Br. for Defs.-Appellees at 7, *Safe Air* (No. 02-35751).

<sup>25</sup> Br. of Pl.-Appellant at 36, *Safe Air* (No. 02-35751).

<sup>26</sup> *Safe Air*, 373 F.3d at 1047.

history makes it clear that Congress intended crop residue to be included within the scope of RCRA. Second, the prior circuit court cases, which the Ninth Circuit relied on in its opinion, addressing the issue of solid waste all deal with industrial, manufacturing and municipal solid waste, not agricultural waste. Third, common sense dictates that what the farmers are doing here is getting rid of the grass residue, not recycling it for some beneficial purpose.

Moreover, Congress clearly intended a broad reading of this Act.<sup>27</sup> The narrow construction given by this court is clearly inapposite to that intention and an example of the worst sort of judicial activism. Additionally, the state laws which allow open-field burning of grass residue in Idaho all have the word “disposal” in their titles and text, a clear indication that the purpose of burning the fields is to get rid of or dispose of the crop residue.<sup>28</sup>

Additionally, all of the cases addressing the definition of solid waste in the recycling/reuse or continuous process context concern the by-products of the manufacturing process, not the by-products of agriculture.<sup>29</sup> This makes a huge difference, as the legislative history of the Act makes clear that Congress intended that agricultural waste, primarily crop residue and other biomass, be regulated in order to recover energy, and in order to encourage its use as food for livestock.<sup>30</sup> As such, the judicial rules developed in the recycling/reuse and continuous process cases are inappropriate in the agricultural context.

Finally, common sense dictates that the crop residue at issue in this case should be considered a solid waste. This is so because the farmers sold grass crop residue as animal feedstock to area cattle ranchers when it was profitable to do so during periods of drought.<sup>31</sup> Therefore, they cannot claim that grass crop residue is a necessary part of the growing process. Common sense should also dictate that if you burn the grass

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<sup>27</sup> Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469, 1481 (9th Cir. 1995).

<sup>28</sup> For example, Title 22, Chapter 48 of the Idaho Code is the Crop Residue Disposal Program. Farmers wanting to burn their fields must fill out a Crop Residue Disposal Registration Form.

<sup>29</sup> See, e.g., United States v. Interstate Lead Co., 996 F.2d 1126 (11th Cir. 1993) (regulating lead plates from spent automotive batteries used as a feedstock for the smelting process); American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990) (regulating materials used in mining operations); American Petroleum Institute v. EPA, 906 F.2d 729 (D.C. Cir. 1990) (regulating K061 slag, a byproduct of the zinc smelting process); American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) (regulating secondary materials reused within an ongoing industrial production process).

<sup>30</sup> SYMPOSIUM ON RESOURCE CONSERVATION AND RECOVERY, 94<sup>TH</sup> CONG., AGENCY TESTIMONY (Comm. Print 1976).

<sup>31</sup> Br. for Defs.-Appellees at 5, *Safe Air* (No. 02-35751).

residue, only a small percentage of it is returned to the soil as fertilizer. The rest of the residue is disposed of into the air where it drifts into neighboring communities. Thus, the farmers are externalizing their waste disposal problem. Additionally, the Ninth Circuit's holding renders superfluous the actual language of the statute, which includes agricultural waste in its definition of solid waste.

These points will be demonstrated through an examination of the Act, which contains exemptions in the definition of solid waste for solid or dissolved materials in domestic sewage, solid or dissolved materials in irrigation return flows, industrial discharges subject to the Clean Water Act permitting process and certain by-products of the nuclear energy industry, but contains no exemption for crop residues.<sup>32</sup> There is no exemption for crop residues despite the legislative history, which evinces Congressional awareness of the issue of prescribed open-field agricultural burning.<sup>33</sup>

Both sides have a lot at stake in this matter. Who will ultimately prevail depends on the willingness of the Supreme Court of the United States to grant certiorari. Thus, the first part of this comment looks at the purposes of RCRA and its relevant provisions. In the second part of this comment, I will analyze past court decisions that addressed the question of what is a "solid waste." Part three of this comment, explains the facts of this case, the United States District Court for the District of Idaho's decision and the Ninth Circuit's opinion affirming the district court. Part four will analyze the Ninth Circuit's decision in light of the legislative history and explain why I believe the decision is wrong and should be overturned by the Supreme Court of the United States.

#### I. THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA")

Recognizing that the "disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment," Congress, in 1976, enacted RCRA, commonly referred to as the Solid Waste Disposal Act ("SWDA").<sup>34</sup> Congress also found that "inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health."<sup>35</sup> Importantly, with respect to energy, Congress declared, that:

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<sup>32</sup> 42 U.S.C. § 6903(27) (2000).

<sup>33</sup> S. REP. NO. 94-988 (1976).

<sup>34</sup> 42 U.S.C. § 6901(b)(2) (2000).

<sup>35</sup> 42 U.S.C. § 6901(b)(3) (2000).

- (1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;
- (2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and
- (3) technology exists to produce usable energy from solid waste.<sup>36</sup>

These declarations with respect to energy are key to an understanding of why crop residues were intended to be considered a solid waste subject to RCRA.<sup>37</sup> The two objectives of the Act are to “promote the protection of health and the environment and to conserve valuable material and energy resources.”<sup>38</sup>

An understanding of the purposes and structure of RCRA is necessary to understand the prior circuit court decisions in the RCRA solid waste cases. To put it simply, “RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste.”<sup>39</sup> Hazardous wastes are a sub-category of solid wastes and are regulated under Subtitle C, the more onerous and burdensome provision of the Act.<sup>40</sup> Subtitle C hazardous wastes are stringently regulated from the point of generation, to treatment, transport and disposal in a cradle to grave manner. Wastes that do not qualify as hazardous wastes, because they are neither toxic, corrosive, ignitable nor reactive, are simply considered solid wastes and are much less stringently regulated under Subtitle D.<sup>41</sup>

The plaintiffs did not allege that crop residue is a hazardous waste, nor has the EPA specifically listed crop residue as a hazardous waste. Although the smoke that is generated from burning the straw is hazardous in the conventional sense, the straw itself is not hazardous. While you can certainly ignite the straw (after all, that is what the defendants do) it is not ignitable under the regulatory definition of ignitability because it is not “capable, *under standard temperature and pressure*, of causing fire through friction, absorption of moisture or spontaneous chemical changes and, when ignited, [doesn’t] burn[] so

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<sup>36</sup> 42 U.S.C. § 6901(d) (2000).

<sup>37</sup> See discussion *infra* Part IV.

<sup>38</sup> 42 U.S.C. § 6902(a) (2000).

<sup>39</sup> *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

<sup>40</sup> *ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION* 184 (2003).

<sup>41</sup> *Id.* at 181.

vigorously and persistently that it creates a hazard.”<sup>42</sup> Thus, if crop residue is considered a waste, it would be a solid waste regulated under Subtitle D, not a hazardous waste regulated under Subtitle C.

The distinction between hazardous waste and solid waste is important in the context of this case, because the definition of “solid waste” is different if the material is a Subtitle C hazardous waste than it is if the material is a Subtitle D solid waste. If the crop residue were a hazardous waste, the regulatory definition of “solid waste” would apply and that definition is narrower than the statutory definition.<sup>43</sup> The statutory definition of solid waste is broader:

The term “solid waste” means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material *resulting from* industrial, commercial, mining, and *agricultural operations*, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits . . . or source, special nuclear, or byproduct material . . . .<sup>44</sup>

Thus, solid waste includes any *discarded* material resulting from agricultural operations. The debate in this case and in the recycling/reuse and continuous process cases is whether or not the material is discarded.

“The broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment.”<sup>45</sup> Section 6972 of RCRA is the citizen suit provision and provides the plaintiffs in this case standing to enjoin the defendants’ actions. It states that before filing suit, citizens must give notice to the EPA, the state and to any alleged violator in order to give the EPA and the state time to begin its own action, and to give the alleged violator time to remedy the alleged violation.<sup>46</sup> Furthermore, no citizen action may be taken if the State has commenced an action against the alleged violator for the alleged violation.<sup>47</sup> If neither the EPA nor the State have commenced an action against the violator,

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<sup>42</sup> 40 C.F.R. § 261.21(a)(2) (2005) (emphasis added).

<sup>43</sup> Compare 40 C.F.R. § 261.2 (2005), with 42 U.S.C. § 6903(27) (2000).

<sup>44</sup> 42 U.S.C. § 6903(27) (2000) (emphasis added).

<sup>45</sup> Connecticut Coastal Fishermen’s Ass’n v. Remington Arms Co., 989 F.2d 1305, 1314 (2d Cir. 1993).

<sup>46</sup> 42 U.S.C. § 6972(b) (2000).

<sup>47</sup> 42 U.S.C. § 6972(c) (2000).



[A]ny person may commence a civil action on his own behalf . . . against *any person*, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, *who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.*<sup>48</sup>

The citizen suit provision was added to the Act with the 1984 amendments “in an effort to invigorate citizen litigation.”<sup>49</sup> The lawsuit in this case was filed under this citizen suit provision of RCRA.<sup>50</sup>

## II. PRIOR CIRCUIT COURT CASES ADDRESSING THE DEFINITION OF SOLID WASTE UNDER RCRA

Before looking at Safe Air’s claim, it is necessary to first review RCRA jurisprudence in the context of disputes over what is a solid waste. A threshold question is how broadly or narrowly the Act should be construed. Once that scope has been determined, the courts have considered various questions in order to determine whether a material is a solid waste. Among these questions are: Which materials did Congress intend to regulate? What relevance is there to the value of the material? How much time must pass before a material is considered to be discarded? What relevance does subjective intent play in determining whether or not a material is a solid waste? The threshold question is explored first.

### *A. Since RCRA Is a Remedial Statute, Should Its Provisions Be Read Broadly or Narrowly?*

In *Hanford Downwinders*, the United States Court of Appeals for the Ninth Circuit addressed the interpretation of remedial environmental statutes.<sup>51</sup> Although that case dealt with the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the opinion is equally applicable to a case involving RCRA. *Hanford Downwinders* instructs that remedial statutes designed to protect health and the environment are liberally construed in order to avoid frustrating

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<sup>48</sup> 42 U.S.C. § 6972(a)(1)(B) (2000) (emphasis added).

<sup>49</sup> *Ascon Prop., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1158 (9th Cir. 1989).

<sup>50</sup> *Safe Air*, 373 F.3d at 1038.

<sup>51</sup> *Hanford Downwinders*, 71 F.3d at 1481.

Congress's remedial intent.<sup>52</sup> There can be no doubt that RCRA is a remedial statute designed to "promote the protection of health and the environment and to conserve valuable material and energy resources."<sup>53</sup> Therefore, the Ninth Circuit should follow its own precedent by construing RCRA broadly in the context of the questions raised in the *Safe Air* case.

*B. What Material Did Congress Intend to Regulate?: AMC I*

In *American Mining Congress v. EPA*, ("AMC I") the United States Court of Appeals for the District of Columbia provided an answer to this question, which narrowed the scope of the EPA's ability to regulate waste.<sup>54</sup> In an opinion written by Judge Starr,<sup>55</sup> the court held that the EPA's regulatory authority was limited to materials that "are 'discarded' by virtue of being disposed of, abandoned, or thrown away."<sup>56</sup> The court further held that Congress did not intend for in-process secondary materials to be included in the scope of the Act.<sup>57</sup>

American Mining Congress ("AMC") was one of several trade associations representing mining and oil refining interests which challenged the EPA's regulatory definition of "solid waste."<sup>58</sup> The regulatory definition would have allowed EPA to regulate secondary materials reused within an industry's ongoing production process.<sup>59</sup> AMC maintained that these materials were neither discarded nor intended for discard and that EPA was limited to regulating only those materials that had been discarded. Judge Starr agreed, stating that "Congress defined 'solid waste' as 'discarded material'. The ordinary, plain-English meaning of the word 'discarded' is 'disposed of,' 'thrown away' or 'abandoned.' Encompassing materials retained for immediate reuse within the scope of 'discarded' material strains, to say the least, the everyday usage of that term."<sup>60</sup> In a footnote, Judge Starr wrote that "[t]he dictionary definition of 'discard' is 'to drop, dismiss, let go, or get rid of as no longer useful, valuable, or pleasurable.'"<sup>61</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> 42 U.S.C. § 6902(a) (2000).

<sup>54</sup> *Am. Mining Cong. v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987).

<sup>55</sup> Judge Kenneth Starr later became the U.S. Independent Counsel in the Whitewater investigation of President Clinton.

<sup>56</sup> *Am. Mining Cong.*, 824 F.2d at 1193.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1178.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1183-84.

<sup>61</sup> *Id.* at 1184 n.7.

With these definitions in mind, the court looked at the industrial processes at issue.<sup>62</sup> In both the petroleum and mining contexts, the primary material is processed to create other useful materials: crude oil into gasoline, fuel oil and lubricating oils and pure metals extracted from natural ore.<sup>63</sup> The first pass through the processing system does not extract all useful material from the primary material and the leftover material must pass through the system again in order to get more out of the primary material. Thus, the once-processed ore is reprocessed to extract as much pure metal as possible from the natural ore and the leftover hydrocarbons from the first refining process are returned to system to be reprocessed into oils and fuels.<sup>64</sup> In this context, it appeared clear to the court that these secondary materials were not discarded because they were “materials that are recycled or reused in an ongoing manufacturing or industrial process [and that] 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.”<sup>65</sup>

In his dissent, Judge Mikva argued that EPA’s interpretation of the definition of solid waste was reasonable and therefore entitled to *Chevron* deference.<sup>66</sup> Judge Mikva stated that in enacting RCRA, Congress was concerned with more than just abandoned materials.<sup>67</sup> This was evident from the statutory definition of “disposal” under RCRA:

The term “disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter

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<sup>62</sup> *Id.* at 1181.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1186.

<sup>66</sup> In *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-43 (1984), the Supreme Court held that:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

<sup>67</sup> *AMC I*, 824 F.2d at 1196 (Mikva, J., dissenting).

the environment or be emitted into the air or discharged into any waters, including ground waters.<sup>68</sup>

According to Judge Mikva, “[t]he definition is functional: waste is disposed under this provision if it is put into contact with land or water in such a way as to pose the risks to health and environment that animated Congress to pass RCRA.”<sup>69</sup> Importantly, the intent of the manufacturer to put the material to an additional use is irrelevant.<sup>70</sup> In a sub-part below, I will explore the issue of intent to see what other courts have said about whether intent is relevant to the question of whether or not a material is a solid waste.

The crop residue at issue in *Safe Air* is clearly distinguishable from the petroleum and natural ore at issue in *AMC I*. First, *AMC I* expressly applies to materials recycled or reused in an ongoing industrial or manufacturing process. The court says nothing about agricultural processes or municipal solid wastes. More importantly, the materials in *AMC I* were processed and reprocessed in order to get more and more out of the primary material. Crop residue is different. After the farmers separate the grass seed from the straw, the straw is not reprocessed to extract more seed. Admittedly, if after the grass seed was separated from the straw, the crop residue was then reprocessed to extract even more seed, then one could make an argument that the industrial and manufacturing recycling model should apply and that the crop residue was not yet a solid waste. But that is not what the farmers do in Idaho. They burn it in order to get rid of it. In doing so, the burning of the crop residue is “disposal” under Judge Mikva’s functional definition. Whether burning the crop residue provides the farmers with some benefits or has value beyond disposing of it is another matter and will be explored in the next sub-part.

*C. What Relevance Is There to the Value of the Material?: AMC II, Interstate Lead Co., Inc. (“ILCO”) and API*

AMC was back in court in 1990, once again challenging an EPA regulation, which specifically listed six materials produced in mining operations.<sup>71</sup> In this case, commonly referred to as *AMC II*, AMC argued that three of the six wastes were not discarded and therefore not considered to be solid waste.<sup>72</sup> It based its argument, that the materials were not discarded because they were “beneficially reused in mineral

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<sup>68</sup> 42 U.S.C. § 6903(3) (2000).

<sup>69</sup> *AMC I*, 824 F.2d at 1196 (Mikva, J. dissenting).

<sup>70</sup> *Id.* (Mikva, J. dissenting).

<sup>71</sup> *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1183 (D.C. Cir. 1990).

<sup>72</sup> *Id.* at 1184.

processing operations,” on the statutory definition of solid waste and the holding in *AMC I*.<sup>73</sup> The materials in this case were sludges in surface impoundments which were collected for possible future reclamation.<sup>74</sup> The court, in *AMC II*, agreed with the EPA that the sludges could be regulated because they were not “destined for *immediate reuse* in another phase of the industry’s ongoing production process.”<sup>75</sup> Unlike the materials in *AMC I*, the sludges at issue in *AMC II* did not “pass[] in a continuous stream or flow from one production process to another.”<sup>76</sup> The fact that the sludges possessed some value in that they could be reused was irrelevant because they were not part of an ongoing industrial process and thus had become part of the waste disposal problem.<sup>77</sup> Moreover, unlike the materials in *AMC I*, the crop residue at issue in *Safe Air* is distinguishable because it is neither the result of an industrial operation, nor is it truly part of a continuous stream or flow from one production process to another. This will become clear below in part three, which explains the Kentucky bluegrass growing process.

The value issue was also addressed by the Eleventh Circuit in *United States v. Interstate Lead Co. (“ILCO”)*.<sup>78</sup> The defendant in that case was a recycler of spent automotive batteries. The EPA asserted that reclaimed lead plates were waste products.<sup>79</sup> ILCO’s contention was that the lead plates were not a solid waste because they were not discarded but were instead a valuable feedstock for the smelting process.<sup>80</sup> The court held that the EPA’s determination that the lead plates were a solid waste was a reasonable interpretation entitled to *Chevron* deference. “*Somebody* has discarded the battery in which these components are found. This fact does not change just because a reclaimer has purchased or finds value in the components.”<sup>81</sup>

The defendants in *Safe Air* might argue that *ILCO* is distinguishable because they do not purchase the crop residue, but instead produce it themselves. However, the *ILCO* court expressly recognized and incorporated the holding in *AMC II*, that materials may be classified as discarded “whether the materials were discarded by one user and sent to another for recycling, or stored before recycling by the person who

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<sup>73</sup> *Id.* at 1185.

<sup>74</sup> *Id.* at 1186.

<sup>75</sup> *Id.* (quoting *AMC I*, 824 F.2d at 1185).

<sup>76</sup> *AMC I*, 824 F.2d at 1190.

<sup>77</sup> *AMC II*, 907 F.2d at 1186.

<sup>78</sup> *ILCO*, 996 F.2d at 1131.

<sup>79</sup> *Id.* at 1129.

<sup>80</sup> *Id.* at 1131.

<sup>81</sup> *Id.* (emphasis in the original)

initially discarded them in land disposal units.”<sup>82</sup> Importantly, the *ILCO* court recognized that materials may have both primary and secondary characters. The primary character of the lead plates was that they had been discarded. The secondary character was that they were a valuable recyclable material. “Therefore, we find these batteries and their contents are ‘discarded’ within the everyday sense of the word. Their secondary character as recyclable material is irrelevant to that determination.”<sup>83</sup> This is important because, as explained in more detail below in part three, the primary reason that the crop residue is burned is that it is unwanted and must be removed from the fields in order to facilitate the growth of the next crop. The primary character of the crop residue is thus a discarded material. The secondary character as a source of ash to be used as a fertilizer and any other incidental benefits are thus irrelevant to the determination of whether the crop residue is a solid waste.

Similarly, the United States Court of Appeals for the District of Columbia Circuit held that K061 slag, a byproduct of the zinc smelting process, is a solid waste because it is discarded before being subject to metals reclamation.<sup>84</sup> In *American Petroleum Institute v. EPA* (“*API*”), the court stated that:

[I]t is [] immaterial under *AMC I* that the method of waste treatment prescribed by the agency results in the production of something of value, namely reclaimed metals. Indeed, the *AMC I* decision expressly disavowed a reading of the statute that would prevent EPA from regulating processes for extracting valuable products from discarded materials that qualify as hazardous wastes.<sup>85</sup>

The K061 slag at issue in *API* is analogous to the crop residue at issue in *Safe Air* because the farmers contend that they extract valuable fertilizer in the form of ash from the burning process, but that does not change the character of the crop residue when it is discarded from the combine machines. It is thus immaterial under *AMC I* that the method of waste treatment conducted by the growers results in the production of something of value.

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<sup>82</sup> *Id.* at 1132 (quoting *AMC II*, 907 F.2d at 1186-87).

<sup>83</sup> *Id.*

<sup>84</sup> *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990).

<sup>85</sup> *Id.* at n.16.

*D. How Much Time Must Pass Before a Material Is Considered To Be Discarded?: Connecticut Coastal Fishermen and Owen Electric*

There have been few cases seeking to resolve the issue of how much time must pass before a material is considered to be discarded, presumably because the *AMC I* and *AMC II* courts have made it fairly clear that a material must be destined for *immediate* reuse. Nevertheless, the timing issue has been raised in a couple of cases and are thus worth examining. The United States Court of Appeals for the Second Circuit addressed this issue in *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*<sup>86</sup> The defendants in that case owned and operated a trap and skeet shooting club, originally formed in the 1920's.<sup>87</sup> Nearly five million pounds of lead shot and eleven million pounds of clay target fragments were deposited on the land and in adjacent waters over the seventy years of the club's existence.<sup>88</sup> The defendants argued that the lead shot and clay target fragments were not solid waste because "any disposal of waste that occurred was merely incidental to the normal use of a product."<sup>89</sup> The critical issue thus became: "[a]t what point after a lead shot is fired at a clay target do the materials become discarded? Does the transformation from useful to discarded material take place the instant the shot is fired or sometime later?"<sup>90</sup> The court did not give an exact answer to this question, but simply said that in this case the materials had accumulated long enough to be considered solid waste. Thus, at one extreme, materials that have accumulated for seventy years have been discarded and at the other extreme, materials destined for immediate reuse have not been discarded.

A case out of the Court of Appeals for the Fourth Circuit reaffirmed the immediacy requirement, even when combined with a value issue. The sole issue in *Owen Electric Steel Co. v. Browner* was "whether the 'slag' produced by petitioner Owen . . . as a byproduct of steel production [was] 'discarded' and therefore constitute[d] a 'solid waste' under [RCRA]."<sup>91</sup> The court held that "the fundamental inquiry in determining whether a byproduct has been 'discarded' is whether the byproduct is immediately recycled for use in the same industry."<sup>92</sup> The slag in *Owen Electric* sat curing for six months before being sold to other entities and thus was discarded and classified as a solid waste. This case is interesting

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<sup>86</sup> *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d 1305 at 1316.

<sup>87</sup> *Id.* at 1308.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1313.

<sup>90</sup> *Id.* at 1314.

<sup>91</sup> *Owen Electric Steel Co. v. Browner*, 37 F.3d 146, 147 (4th Cir. 1994).

<sup>92</sup> *Id.* at 150.

because it combines the timing issue with the value issue and found that the slag was a solid waste. Another issue in this case, and in all of these cases for that matter, is the issue of whether the stated intent of the waste disposer or waste generator makes any difference. This is the final issue and is explored in the next sub-part.

*E. What Relevance Does Stated Intent Play in Determining Whether or Not a Material Is a Solid Waste?: Fiorillo and AMC II Revisited.*

Should the generator's stated intent be considered in determining whether the material is discarded, abandoned or disposed of, or should actions speak louder than words? In other words, should Judge Mikva's dissent control, making the definition a functional definition? Both the Ninth Circuit and the D.C. Circuit have held that stated intent makes no difference, and that the court must look to the actual intent instead.

In *United States v. Fiorillo*, the Ninth Circuit heard the appeals of Frank Fiorillo and Art Krueger for their criminal convictions of wire fraud and violations of RCRA.<sup>93</sup> Fiorillo and Krueger, who both operated warehousing businesses, had contracted with a manufacturer of industrial cleaning products for the disposal of 30,000 gallons of highly caustic industrial strength cleansers.<sup>94</sup> In fact, only a small percentage of the waste was properly disposed of in accordance with RCRA.<sup>95</sup> The rest was illegally stored in warehouses, which also contained Class A explosives, including 17,000 artillery shells.<sup>96</sup> Krueger argued that his conviction under RCRA should be overturned because there was not enough evidence to conclude that the cleaning products were hazardous wastes.<sup>97</sup> The court held that in order to prove that the cleaning products were hazardous wastes, the government was required to demonstrate that the products had been discarded. If the manufacturer of the cleaning products "intended to dispose of the hazardous materials, it became hazardous waste."<sup>98</sup> Thus, according to the Ninth Circuit, the actual intent of the generator, not the stated intent, is the key to determine whether or not a material is discarded. This is a functional definition.

Similarly, the D.C. Circuit was unimpressed with AMC's argument that they did not intend to discard the sludges from wastewater stored in surface impoundments, but were instead saving them for future

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<sup>93</sup> *United States v. Fiorillo*, 186 F.3d 1136, 1141 (9th Cir. 1999).

<sup>94</sup> *Id.* at 1142.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1154.

<sup>98</sup> *Id.*



beneficial reclamation.<sup>99</sup> While there was no explicit discussion in that case about whether intent was a factor in their decision, their holding indicates that a lack of intent to discard would not have made a difference. In part four, I will examine whether intent should play a part in deciding whether a material has been discarded.

### III. THE DISPUTE BETWEEN SAFE AIR FOR EVERYONE AND THE DEFENDANT FARMERS

#### *A. How to Grow Kentucky Bluegrass: The Basics*

Before examining the court's opinion, it is first necessary to understand the basics of growing Kentucky bluegrass. Initially, the seed is planted in the spring, but does not flower until the summer of the following year.<sup>100</sup> Once the grass has grown between fifteen and thirty-six inches and has flowered, the farmers cut the crop within a few inches of the ground.<sup>101</sup> This leaves some stubble that is needed for plant regeneration. Subsequent years' crops grow out of the crown of the bluegrass plant, which is located at or below the soil surface, under the stubble, which is why the farmers cannot simply plough under the crop residue.<sup>102</sup> The cut crop is left in the field to dry for several weeks.<sup>103</sup> The seed is then harvested using combines that separate the seed from the straw.<sup>104</sup> The valuable seed is then collected and sold while the residue including the straw and the stubble are left in the field. This residue must be removed in order to allow moisture and sunlight to reach the crown during the fall regeneration period.<sup>105</sup> The residue can either be removed mechanically, or it can be removed by burning it away.<sup>106</sup> The farmers in this case remove the crop residue by burning it.

#### *B. The Ninth Circuit's Opinion Affirming the District Court in Safe Air For Everyone v. Meyer*

Judge Ronald M. Gould, joined by Judge Kim McLane Wardlaw, wrote the three-part opinion.<sup>107</sup> An understanding of how Kentucky bluegrass is grown is needed to understand the defendant's motivations.

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<sup>99</sup> Amer. Mining Cong. v. EPA, 907 F.2d 1179, 1186 (D.C. Cir. 1990).

<sup>100</sup> Br. of Pl.-Appellant at 5, *Safe Air* (No. 02-35751).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 5-7.

<sup>103</sup> *Id.* at 5.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Safe Air*, 373 F.3d at 1036.

Thus, the opinion began in Part I with a primer on the growing of Kentucky bluegrass and a brief summary of the procedural history.<sup>108</sup> Part II of the opinion discussed the procedural posture of the case in greater detail.<sup>109</sup> Part III was the heart of the opinion and reviewed the merits of the plaintiff's claims.<sup>110</sup>

### 1. Opinion Part I

After a primer on Kentucky bluegrass farming, the court briefly explained the procedural history of the case: Safe Air filed suit on May 31, 2002, under RCRA's citizen suit provisions, alleging that the defendant's practice of open field burning caused a substantial endangerment to health and the environment.<sup>111</sup> The plaintiff also sought a preliminary injunction to prevent the farmers from continuing the practice of burning the post-harvest residue.<sup>112</sup> The farmers filed a response in opposition to the preliminary injunction and a motion to dismiss the claim based on a lack of subject matter jurisdiction.<sup>113</sup> The district court held an evidentiary hearing on Safe Air's request for a preliminary injunction during three days of testimony from July 10-12, 2002, hearing testimony from twenty-three witnesses.<sup>114</sup> On July 19, 2002, the district court dismissed the complaint, concluding that it did not have subject matter jurisdiction, because, among other reasons, the crop residue at issue was not "solid waste" under RCRA.<sup>115</sup> The Ninth Circuit concluded Part I noting that Safe Air appealed, that federal courts had subject matter jurisdiction, but that it was affirming the lower court's decision.<sup>116</sup>

### 2. Opinion Part II

Safe Air's appeal was based on two arguments. Its first argument was that the district court erred by considering evidence from the preliminary injunction hearing, evidence which was outside the four corners of the complaint.<sup>117</sup> The plaintiff argued that the court should have converted the motion to dismiss into a summary judgment motion

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<sup>108</sup> *Id.* at 1037.

<sup>109</sup> *Id.* at 1038-40.

<sup>110</sup> *Id.* at 1040-47.

<sup>111</sup> *Id.* at 1038.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

under Rule 56.<sup>118</sup> Its second argument maintained that the district court erred by holding that the question of whether the crop residue was a solid waste was a jurisdictional issue.<sup>119</sup> The Ninth Circuit disagreed with the first argument, but agreed with the second argument.<sup>120</sup> It held that “[t]he district court erred in characterizing its dismissal of Safe Air’s complaint under Rule 12(b)(1) because the jurisdictional issue and substantive issues in this case are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits.”<sup>121</sup> Additionally, the court stated that “[i]n resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.”<sup>122</sup> For these reasons, the Ninth Circuit reviewed the district court’s order not as a dismissal for lack of subject matter jurisdiction, but as a grant of summary judgment on the merits for the farmers.<sup>123</sup>

### 3. Opinion Part III

Because the Ninth Circuit reviewed the district court’s order as a grant of summary judgment in favor of the farmers, the standard of review was *de novo*.<sup>124</sup> Thus, the court stated that it would view the evidence in a light most favorable to Safe Air to determine whether there were any genuine issues of material fact.<sup>125</sup> The court then provided a cursory overview of RCRA and noted that Safe Air had the burden to establish that the Kentucky bluegrass residue was “solid waste” within the meaning of RCRA.<sup>126</sup>

After a brief overview of the canons of statutory construction, the court discussed the statutory definition of “solid waste” under RCRA.<sup>127</sup> Focusing on “other discarded material,” the court noted that RCRA does not define “discarded material,” but that the dictionary defines “discard” as to “cast aside; reject; abandon; give up.”<sup>128</sup> “We consider the term ‘discard’ in its ordinary meaning to decide whether Safe Air presented a

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1039-40.

<sup>121</sup> *Id.* at 1040.

<sup>122</sup> *Id.* at 1039.

<sup>123</sup> *Id.* at 1040.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1041.

<sup>127</sup> *Id.* at 1041. That definition can be found in Part I of this Comment.

<sup>128</sup> *Id.* (citing THE NEW SHORTER OXFORD ENGLISH DICTIONARY 684 (4th ed. 1993)).

genuine issue of material fact supporting its contention that the Kentucky bluegrass residue burnt by the Growers is ‘solid waste’ under RCRA.”<sup>129</sup>

The court next discussed prior circuit court cases addressing the question of what is a solid waste, focusing its attention on those aspects of the cases that it believed helped answer the question. First, the court reviewed *AMC I*. “Significant for our purposes, *AMC I* determined that materials have not contributed to a waste disposal problem where ‘they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.’”<sup>130</sup> Next, it considered *AMC II*’s holding that materials being held for potential reuse constitute discarded material.<sup>131</sup> The court also considered the time element by looking at the language of *Connecticut Coastal*, where the Second Circuit held that the material had “accumulated long enough.”<sup>132</sup> Finally, the court addressed the value element as discussed in *ILCO*. In a footnote, the court stated:

We recognize that the issue of monetary value does not affect the analysis of whether materials are “solid waste” under RCRA. As the Eleventh Circuit held in *ILCO*, the fact that discarded materials are “solid waste” under RCRA does not change “just because a reclaimer has purchased or finds value in the components.” However, in this case the Growers do not base their argument on the assertion that grass residue has monetary value to *someone*; rather, the Growers argue that grass residue is not solid waste because they immediately reuse it to further successful bluegrass harvests.<sup>133</sup>

Finding these cases to be persuasive, the Ninth Circuit decided to evaluate the evidence to determine: (1) whether the crop residue is destined for beneficial reuse or recycling in a continuous process by the farmers themselves (an *AMC I* analysis); (2) whether the crop residue is being actively reused, or whether it merely has the potential to be reused (an *AMC II* analysis); and (3) whether the crop residue is being reused by the farmers or by someone else (an *ILCO* analysis).<sup>134</sup> Judge Gould then reviewed the evidence presented in the hearing on Safe Air’s request for a preliminary injunction. The bulk of the opinion with regard to the evidence focused on the evidence submitted by the farmers. First, the court noted that the farmers presented evidence that they do not discard the crop residue, but rather reuse it in a continuous process of growing

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<sup>129</sup> *Id.* at 1041.

<sup>130</sup> *Id.* at 1042 (citing *AMC I*, 824 F.2d at 1186).

<sup>131</sup> *Id.* at 1042.

<sup>132</sup> *Id.* at 1042 (citing *Connecticut Coastal*, 989 F.2d at 1316).

<sup>133</sup> *Id.* at 1043 n.8 (citing *ILCO*, 996 F.2d at 1131) (emphasis in the original).

<sup>134</sup> *Id.* at 1043.

Kentucky bluegrass and that this reuse provides the benefits of both returning nutrients to the soil and facilitating the open burning process.<sup>135</sup> Additionally, the farmers presented evidence that open burning provides four critical benefits for Kentucky bluegrass farmers. First, open field burning extends the productive life of the fields. Second, open field burning restores beneficial minerals and fertilizers to the fields. Third, open field burning reduces or eliminates insects, weeds, and disease, reducing the need to use pesticides. Finally, open field burning blackens the soil, maximizing sunlight absorption.<sup>136</sup>

Safe Air did not dispute that the grass residue provided some benefit to the farmers, but that the claimed benefits were merely incidental and that the primary goal of burning the residue is to get rid of it.<sup>137</sup> The court was not persuaded by Safe Air's argument that the benefit must be more than merely incidental, holding that "even when we review the evidence in the light most favorable to Safe Air, there is no dispute that the Growers realize farming benefits from reusing grass residue in the process of open burning."<sup>138</sup> Furthermore, the court held that:

Because there is undisputed evidence that the Growers reuse the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass, there is no genuine issue of material fact as to whether grass residue is 'discarded material.' It is not. The bluegrass residue is not discarded, abandoned, or given up, and it does not qualify as 'solid waste' under RCRA.<sup>139</sup>

Applying the factors noted in the other circuit court cases, the court found that the grass residue is destined for immediate beneficial reuse by the farmers who were its original owners, and that there was no genuine issue of material fact as to whether grass residue is discarded.<sup>140</sup>

Turning his attention to RCRA's legislative history, Judge Gould opined that "the burning of bluegrass residue by farmers is not the evil against which Congress took aim."<sup>141</sup> Citing a House Report, the court noted that "RCRA was intended as 'a multi-faceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems resulting from anticipated 8% annual increase in the volume of such waste.'"<sup>142</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1043-44.

<sup>137</sup> *Id.* at 1044.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1045.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1046.

<sup>142</sup> *Id.* (citing H.R. REP. No. 94-1491, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6239).

Importantly, the court cited the same House Report which stated that “much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses . . . . Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.”<sup>143</sup>

In a footnote, Judge Gould wrote what I consider to be the portion of the opinion most open to criticism. I will address these criticisms in part four of this comment. Its significance is such that it is reprinted here in its entirety:

Referring to the House Report’s comment that “agricultural wastes which are returned to the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation,” Safe Air argues that “if the Growers mulched their residue and returned it to the soil, this sentence might have applicability. But that is not what they do. They burn the residue . . . .” This argument has some weight but is not dispositive. It is true that a part of the residue is returned to soil while a part that is smoke is carried off by air. Yet, for materials to be solid waste under RCRA, they must be “discarded.” The determination of whether grass residue has been “discarded” is made independently of *how* the materials are handled. Despite the fact that a portion of residue becomes airborne smoke, the residue is not thereby automatically “discarded.”<sup>144</sup>

Finally, the court addressed the four arguments made by the dissent and concluded its opinion by stating that it could not discern any congressional declaration or intent to prohibit the established farming practice of open field burning, the fact that there were benefits to the farmers was beyond dispute, and that there was no issue of material fact as to whether the grass residue was a solid waste under RCRA.<sup>145</sup> Since, in the court’s opinion, the grass residue was not a solid waste, the court declined to address whether the farmers’ handling constituted “disposal,” “treatment,” or “handling” of solid waste, nor did it address whether the burning of the fields constitutes an “imminent and substantial endangerment” under RCRA.<sup>146</sup>

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<sup>143</sup> *Id.* (citing H.R. REP. No. 94-1491, at 3 (1976), reprinted in 1976 U.S.C.A.N. 6238, 6239).

<sup>144</sup> *Id.* at 1046 n.13 (emphasis in the original).

<sup>145</sup> *Id.* at 1047.

<sup>146</sup> *Id.*

#### 4. Judge Paez's Dissent

Judge Paez concurred with Part II of the majority opinion, concluding that the court should review the district court's dismissal for lack of subject matter jurisdiction as a grant of summary judgment on the merits.<sup>147</sup> However, he dissented with regard to Part III because he disagreed with the legal standard applied by the majority.<sup>148</sup> It was his conclusion that the grass residue was discarded and that RCRA should apply to grass residue.<sup>149</sup> Furthermore, even if he were to agree with the majority's interpretation of RCRA, he felt that there were genuine issues of material fact and he would therefore reverse the district court's judgment and remand for trial.<sup>150</sup>

Judge Paez had no trouble concluding that Safe Air had presented sufficient evidence to show that the grass residue was discarded. He discussed the fact that Safe Air presented testimony as well as affidavits from its members, individuals in the community and experts in the medical and agricultural fields.<sup>151</sup> Safe Air established that it is necessary to remove the grass residue in order to maintain seed yields, and it was the plaintiff's contention that the primary purpose of burning the fields is to remove the grass residue.<sup>152</sup> The farmers did not dispute Safe Air's contention that they must remove the grass residue from the fields. As such, Judge Paez concluded that "[b]ecause there is no dispute that the Growers burn the post-harvest residue to remove it from the fields, and because this act of removal is within the plain meaning of 'discard,' I would reverse the district court's judgment and remand for further proceedings."<sup>153</sup>

As to statutory construction, Judge Paez argued that the majority looked beyond the plain meaning of the word "discard" when it considered the factors gleaned from the other circuit court cases addressing the meaning of the word "discard."<sup>154</sup> Furthermore, those cases cited by the majority occurred in distinctly different contexts.<sup>155</sup> Finally, even if those cases were to be considered, he would conclude that there were genuine issues of material fact as to whether the grass residue is destined for beneficial reuse in a continual process.<sup>156</sup>

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<sup>147</sup> *Id.* (Paez, J. dissenting).

<sup>148</sup> *Id.* (Paez, J. dissenting).

<sup>149</sup> *Id.* at 1048 (Paez, J. dissenting).

<sup>150</sup> *Id.* at 1047 (Paez, J. dissenting).

<sup>151</sup> *Id.* at 1048 (Paez, J. dissenting).

<sup>152</sup> *Id.* at 1048 (Paez, J. dissenting).

<sup>153</sup> *Id.* (Paez, J. dissenting).

<sup>154</sup> *Id.* at 1049 (Paez, J. dissenting).

<sup>155</sup> *Id.* (Paez, J. dissenting).

<sup>156</sup> *Id.* (Paez, J. dissenting).

The dissent's review of the legislative history was more comprehensive than that of the majority. For example, Judge Paez pointed out that "Congress intended solid waste to include *any* discarded material resulting from agricultural operations."<sup>157</sup> Additionally, he noted that "[w]hen RCRA was enacted, agricultural waste was the second largest source of waste in this country, producing 687 million tons per year."<sup>158</sup> Furthermore, EPA regulation 40 C.F.R. § 261.4(b)(2) indicates that residue from agricultural crops returned to the soil as fertilizers are solid wastes, but not hazardous wastes.<sup>159</sup> Judge Paez stated that Congress could not have intended to exclude from the scope of RCRA agricultural waste that is first burned before being used as a fertilizer, given Congress's expressed concern with waste which is burned and results in harmful air pollution.<sup>160</sup> "Thus, the fact that the residue is burned, rather than mulched and returned to the soil, is relevant to whether the residue constitutes 'solid waste' under RCRA."<sup>161</sup>

Judge Paez criticized the majority for finding the extra-circuit cases persuasive in its analysis, because those cases were dealing with solid wastes that were also hazardous wastes, thus implicating the narrower regulatory definition of solid waste.<sup>162</sup> He stated that, once again, even if he were to find those cases persuasive, there were genuine issues of material fact as to whether the materials had been discarded, thus making summary judgment inappropriate.<sup>163</sup> The crux of the dispute was that Safe Air contended that the farmers' primary purpose in burning the grass residue is to remove it, whereas the farmers contended that the grass residue is an important and valuable material used in the agricultural process. "Thus, there are decidedly different accounts of whether and how the post-harvest crop residue factors into the continuing growth process."<sup>164</sup> In fact, Safe Air presented expert testimony vigorously contesting the farmers' assertion that they reuse the grass residue in a continuous process.<sup>165</sup>

In the last part of his dissent, Judge Paez addressed whether the burning of the grass residue "constituted past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous

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<sup>157</sup> *Id.* (Paez, J. dissenting) (quoting 42 U.S.C. § 6903(27)) (ellipses omitted).

<sup>158</sup> *Id.* (Paez, J. dissenting) (citing H.R. REP. No. 94-1491, pt. I, at 15).

<sup>159</sup> *Id.* (Paez, J. dissenting) (citing 40 C.F.R. § 261.4(b)(2)).

<sup>160</sup> *Id.* at 1050 (Paez, J. dissenting) (citing H.R. REP. No. 94-1491, pt. I, at 17-24, 37-38, 90).

<sup>161</sup> *Id.* at 1050 n.6 (Paez, J. dissenting).

<sup>162</sup> *Id.* at 1051. (Paez, J. dissenting).

<sup>163</sup> *Id.* (Paez, J. dissenting).

<sup>164</sup> *Id.* (Paez, J. dissenting).

<sup>165</sup> *Id.* at n.9 (Paez, J. dissenting).



waste which may present an imminent and substantial endangerment to health or the environment.”<sup>166</sup> He concluded, based on the statutory definitions of “treatment” and “disposal” that RCRA applies to the burning of the grass residue and that he would reverse the summary judgment in favor of the farmers and remand the case for trial.<sup>167</sup>

#### IV. ANALYSIS: WHY THE NINTH CIRCUIT’S DECISION SHOULD BE OVERTURNED

There are several reasons why the Ninth Circuit’s decision in the *Safe Air* case should be overturned. First, the legislative history evinces congressional concern with the amount of agricultural waste being produced, coupled with existing poor disposal practices and a recognition that crop residues could be used as a source of energy and animal feedstock. Second, previously decided circuit court cases addressing the question of what is a solid waste have never addressed the question of agricultural waste. All of the prior cases dealt with industrial and mining wastes. Congress recognized the difference as is evident from the legislative history. The courts should recognize that difference as well. Third, common sense tells us that the farmers are primarily concerned with getting rid of the crop residue. That they derive some benefit from the ash that remains is inconsequential. I will address each of these reasons in turn.

##### *A. Legislative History*

First, the legislative history makes it clear that Congress intended crop residue to be considered a solid waste. Congress enacted RCRA to deal with the ever increasing problem of waste disposal in the United States. In a statement to the Senate, Senator Randolph stated that “our society generates 4.4 billion tons of solid waste annually. The principal sources are animal wastes, 1.7 billion tons; and agricultural wastes, 640 million tons. Industrial sources account for 140 million tons. Urban wastes amount to 230 million tons annually.”<sup>168</sup> Similarly, in a statement to the House, Congressman Brown stated:

Many kinds of waste are covered by the term “solid waste.” About 2.8 billion tons of all kinds of solid waste are generated every year in the United States. Of this, about 1.783 million tons are from mining; 687 million tons are agricultural; 260 million

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<sup>166</sup> *Id.* at 1053 (Paez, J. dissenting) (citing 42 U.S.C. § 6972(a)(1)(B)).

<sup>167</sup> *Id.* at 1053-54 (Paez, J. dissenting).

<sup>168</sup> 121 CONG. REC. 23849 (1975).

tons are industrial; 135 million tons are municipal; and 7 million tons are sewage sludge. These last two categories usually attract the most attention and present the worst problem because both our populations and the wastes are concentrated in the same places. Because of the volume of municipal waste generated and its concentration, municipal landfills are about to reach their capacity.<sup>169</sup>

The legislative history makes it clear that agricultural wastes were covered by the term “solid waste” under RCRA.

The agricultural wastes that Congress was concerned with when it enacted RCRA were, for the most part, crop residues. Congress recognized that agricultural wastes were not the kind of wastes that were overflowing municipal landfills. Instead, crop residues represented a potential source of energy. It is important to remember that RCRA is the Resource Conservation and *Recovery* Act. “The term ‘resource recovery’ means material or energy recovered from solid waste.”<sup>170</sup> Congress was not just concerned about overflowing landfills; it was also concerned with energy recovery and it saw the potential for energy recovery in crop residue. For example, David T. Bardin of the New Jersey State Environmental Protection Agency testified before Congress that:

The possible savings are even more dramatic in the case of agriculture and plant wastes, which could either be burned or converted to animal feed with a great savings in energy. Indeed if this country, rural areas as well as urbanized areas, were to recover only fifty percent of the energy potential of agricultural and other plant life, we would supply ten percent of the country’s total energy needs.<sup>171</sup>

In another hearing, Dr. James S. Kane, Deputy Assistant Administrator for the Conservation, Energy Research and Development Administration stated:

We must search for the hundreds of ways in which our society wastes energy and set about to correct each one. Waste utilization is an excellent example. Rather than using energy to get rid of waste, we will seek uses of all sorts which can yield useful energy. We are, therefore, planning a high priority program that includes research and development of technologies for the recovery of energy from all kinds of wastes: municipal,

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<sup>169</sup> 122 CONG. REC. 32598 (1976).

<sup>170</sup> 42 U.S.C. § 6903(22) (2000).

<sup>171</sup> EPA, ERDA, Interior, Commerce and Justice Testimony at House Interstate and Foreign Commerce Subcommittee Symposium on Resource Conservation and Recovery, 94th Cong. 56 (1976) (statement of David T. Bardin).

industrial, agricultural, and forestry. The potential energy from utilization of solid wastes is large, totaling something over 1 billion tons per year, with a carbon content equivalent to about 500 million tons of coal. This includes municipal residues—trash and garbage; agricultural residues—such as wheat and cornstalks and including animal wastes; and forestry wastes—sawdust, shavings, bark, and scrap, but excluding slash remaining in the forests. Nearly three-fourths of this is associated with agricultural and animal wastes.<sup>172</sup>

During that same hearing, Roger W. Sant, Assistant Administrator for Energy Conservation and the Environment of the Federal Energy Administration testified that “[a]gricultural residues contain significantly more latent energy than urban wastes. Most agricultural waste is quite dispersed and much of it is unavailable from energy and economic standpoints. However, given the large volume of agricultural wastes, utilizing even a small percentage of it as an energy source would be significant.”<sup>173</sup>

Thus, there is an extensive legislative history focusing on the recovery of energy from crop residue. RCRA was enacted when the country was still suffering economically from the oil embargo of 1973 and the resulting energy crisis, so, it makes sense that Congress intended to include crop residue under RCRA. What, other than crop residue, could Congress have been concerned with when it stated that “[t]he term ‘solid waste’ means *any* garbage, refuse . . . or other discarded material . . . resulting from . . . agricultural operations”?<sup>174</sup>

There are two portions of the legislative history that might appear to undermine this argument. However, I will demonstrate that these portions provide further support for my argument. The first of these was a comment in a Senate Committee Report which stated that:

If guidelines on open dumping are published for agricultural waste management, the Committee intends that such guidelines reflect that fire (prescribed or controlled burning) has historically been a tool in agriculture, forestry, and wildlife management operations. These uses of prescribed or controlled fire are being

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<sup>172</sup> *Resource Conservation and Recovery Act of 1976: Hearing on H.R. 5487 and H.R. 406 Before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, 94th Cong. 457 (1976) (Statement of Dr. James S. Kane, Deputy Assistant Administrator, New Jersey Department of Environmental Protection).*

<sup>173</sup> *Id.* at 532 (Statement of Roger W. Sant, Assistant Administrator for Energy Conservation and the Environment of the Federal Energy Administration).

<sup>174</sup> 42 U.S.C. § 6903(27) (2000) (emphasis added).

regulated by the States under the Clean Air Act and the Federal Water Pollution Control Act.<sup>175</sup>

It would be a mistake to read this comment to exclude all types of agricultural burning from the scope of RCRA. First, the comment was made with reference to guidelines on open dumping. This is not what the farmers are doing with the grass residue here. Second, and more importantly, Congress was aware that fire had historically been a tool used in agriculture, yet it did not choose to include prescribed or controlled burning in its list of exceptions to the definition of “solid waste.”<sup>176</sup> Thus, the comment should not be read to insert language that Congress could have, but did not write into the statute.

The second comment from the legislative history that might be read adversely to my argument was referenced in note thirteen of the majority opinion and is discussed in part three of this comment, regarding agricultural wastes which are returned to the soil as fertilizers.<sup>177</sup> The specific comment from the legislative history was that “agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.”<sup>178</sup> Agricultural interests would contend, in light of this comment, that by burning the crop residue, they are returning fertilizers to the soil. Safe Air argued that this portion of the legislative history is applicable to crop residue that is mulched or ploughed under. Interestingly, the majority agreed with Safe Air that its argument had some weight but did not find it dispositive.<sup>179</sup> If the argument had some weight, then the court, looking at the evidence in a light most favorable to Safe Air, should not have granted summary judgment for the farmers. The majority included a standard recitation of the standard of review for summary judgment.<sup>180</sup> However, it is a question of fact, not a question of law, whether the

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<sup>175</sup> S. REP. NO. 94-988, at 13 (1976).

<sup>176</sup> Recall that under 42 U.S.C. § 6903(27), the exceptions to the definition of “solid waste” is limited to “solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits . . . or source, special nuclear, or byproduct material . . . .”

<sup>177</sup> *Safe Air*, 373 F.3d at 1046 n.13.

<sup>178</sup> H.R. REP. NO. 94-1491, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6239.

<sup>179</sup> *Safe Air*, 373 F.3d at 1046 n.13.

<sup>180</sup> *Id.* at 1040 n.4. Here, the court stated:

Viewed in this light, we will review the ruling de novo. Viewing the evidence in the light most favorable to the nonmoving party, we determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. We do not weigh the evidence or determine the truth of the matter, but only determine whether a genuine issue of material fact exists for trial.

*Id.* (internal citation omitted).

farmers were returning fertilizers to the soil or whether they were getting rid of the crop residue.

Unfortunately for *Safe Air*, the majority did, in fact, weigh the evidence and in doing so granted summary judgment to the farmers.

#### *B. Prior Circuit Court Cases*

The second reason that *Safe Air* should be overturned is that the prior circuit court cases that addressed the issue of what is a solid waste all dealt with industrial and mining wastes that were also hazardous wastes. Agricultural wastes are different. Thus there is no reason to believe that EPA regulations for hazardous waste disposal, nor judicially created factors used to help determine whether an industrial or mining waste is a solid waste, should also be used to help determine whether agricultural wastes are solid wastes. This is because RCRA was supposed to address not only the problems of overflowing landfills and hazardous waste disposal, but also the need to convert animal and agricultural waste into fuels for energy recovery. The legislative history makes it clear that industrial waste was contributing to the problem of overflowing landfills, but that agricultural waste, primarily crop residue, was not. When the majority stated that “[t]he burning of bluegrass residue by farmers is not the evil against which Congress took aim,”<sup>181</sup> it focused on the landfill problem addressed by RCRA but ignored the other purpose of RCRA, energy recovery. Crop residue does not need to be part of the problem in order to be a “solid waste,” because it was hoped that it could be part of the solution to the country’s energy needs.

#### *C. Common Sense*

The third reason that *Safe Air* should be overturned is based on common sense reasoning. Common sense tells us that what the farmers are doing in this case is disposing or getting rid of the grass residue. If the farmers burn their fields and ninety-nine percent of the crop residue is either consumed in the fire or drifts off into neighboring communities in the form of smoke and only one percent of the crop residue remains in the field, does it make any sense to say that what the farmers are doing is returning fertilizers to the soil? They burn it to get rid of it and the burning happens to leave some useful ash residue behind. An analogous argument was used by the United States Court of Appeals for the District of Columbia Circuit in *National Mining Ass’n v. United States Army*

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<sup>181</sup> *Id.* at 1046.

*Corps of Engineers*.<sup>182</sup> That case was concerned with incidental fallback during dredging operations and whether this incidental fallback of the dredged materials constituted an addition of a pollutant under the Clean Water Act. The court held that:

[T]he straightforward statutory term “addition” cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge. . . . Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away.<sup>183</sup>

Like the dredged material in *National Mining Ass’n*, Congress could not have intended that burning agricultural residue, which leaves only trace amounts of usable material behind, could constitute a return to the soil as fertilizer. Here, there is clearly a net disposal through burning, not a return to the soil as fertilizer. Therefore, common sense tells us that the farmers are discarding the crop residue, not recycling or reusing it in a continuous process.

Similarly, the farmers contended that burning is an integral step in a continuous process. However, when there was money to be made, they sold the crop residue to area cattle farmers for use as cattle feedstock. Thus, burning is not an essential step in a recycling process. This strengthens Safe Air’s argument that the farmers want to get rid of the grass residue in the most economic way possible. Can it really be said that this is the same thing as “recycling or reuse” or “returning the fertilizers to the soil?” The farmers’ actual intent as it can be inferred from their actions is the issue here, not their post-hoc stated intent. If the Ninth Circuit follows its own precedent,<sup>184</sup> then it should look to the farmers’ actual intent, and if it does look to the farmers’ actual intent, then there is clearly a genuine issue of material fact in dispute.

Finally, common sense tells us that Congress intended to include crop residue in its definition of solid waste because any other conclusion would render superfluous the words “agricultural waste” contained within the statute. It would make no sense for Congress to include in its definition of solid waste the term “agricultural waste” if it did not intend that crop residue would be covered by RCRA. Keeping in mind that one

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<sup>182</sup> *Nat’l Mining Ass’n v. United States Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998).

<sup>183</sup> *Id.* at 1404.

<sup>184</sup> *See United States v. Fiorillo*, 186 F.3d 1136 (9th Cir. 1999).

of the primary purposes of RCRA was to find alternative energy sources,<sup>185</sup> what else, besides crop residue, could Congress have been concerned with when it included agricultural waste within its definition of solid waste? What was Senator Randolph referring to when he said that our society produces 640 million tons of agricultural waste annually, if not crop residue?<sup>186</sup>

Because the legislative history and common sense tell us that Congress intended crop residue to be included in the definition of solid waste, and because none of the prior circuit court cases deal with the unique character of agricultural waste, the Ninth Circuit's decision in *Safe Air* should be overturned. The farmers should be enjoined from burning the grass residue because it poses a substantial and imminent endangerment to both health and the environment.

In conclusion, it is evident that the Ninth Circuit's opinion was poorly reasoned. A more searching analysis of RCRA's legislative history, viewed through the lens of the energy crisis of the early 1970's, would have revealed that Congress clearly intended that crop residues should be included in the definition of "solid waste" because crop residues were seen as a potential source of energy. Thus, applying the industrial and manufacturing solid waste model to agricultural wastes makes no sense, given the two purposes of RCRA: (1) stemming the rising tide of waste in landfills from industrial, manufacturing and municipal solid wastes, and (2) finding new sources of energy from agricultural and animal wastes.<sup>187</sup> Moreover, common sense tells us that these farmers are simply getting rid of the waste in the least expensive manner possible. Their intent is to discard the waste. Therefore, the crop residue is a solid waste and the plaintiff should be able to enjoin the farmers from burning their fields and causing health problems for the citizens of the surrounding communities.

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<sup>185</sup> 42 U.S.C. § 6901(d) (2000).

<sup>186</sup> 122 CONG. REC. 23849 (1975).

<sup>187</sup> See 42 U.S.C. § 6901 (2000).

