

RCRA Corrosivity Hazardous Waste Characteristic: Federal Appellate Court Addresses Denial of Petition Requesting Expansion



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The United States Court of Appeals for the District of Columbia (“Court”) addressed in a July 25th decision an issue involving the Resource Conservation and Recovery Act (“RCRA”) hazardous waste characteristic of corrosivity. See *Public Employees for Environmental Responsibility v. Environmental Protection Agency*, 2023 WL 4714021.

The question addressed was whether the United States Environmental Protection Agency (“EPA”) properly declined to revise its definition of corrosive.

EPA addressed in a June 15th Federal Register Notice a petition requesting two changes to the current RCRA corrosivity characteristic regulation. See 86 Fed. Reg. 31622.

The Public Employees for Environmental Responsibility (“PEER”) and an individual had submitted a petition in 2011 seeking two changes which include:

1. Revision of pH regulatory value for defining a waste as corrosive hazardous waste from the current pH 12.5 or higher, to pH 11.5 or higher; and
2. Expansion of the scope of the corrosivity regulation to apply to non-aqueous waste in addition to the aqueous waste addressed by the current regulation

A RCRA characteristic hazardous waste is a solid waste that exhibits at last one of four characteristics defined in 40 C.F.R. Part 261 Subpart C:

- Ignitability (D001)
- Corrosivity (D002)
- Reactivity (D003)
- Toxicity (D004-D043)

Corrosive wastes are currently described as acids or bases (pH less than or equal to 2, or greater than or equal of 12.5) and/or capable of corroding metal containers, such as storage tanks, drums, and barrels.

The Court notes that RCRA grants:

... any person the right to petition the EPA for the promulgation, amendment, or repeal of any regulation under the statute.

EPA is noted to have denied PEER's petition for rulemaking and determined that changes to the corrosivity characteristic regulation were not supported by available information.

After reviewing timing and standing issues, the Court addresses PEER's claims that are described as seeking a rule revision based on post-rulemaking events that it asserts fatally undermined the original justification for the rule. The argument that PEER puts forth is that new evidence supports amending the corrosivity characteristic regulation by lowering the upper pH threshold and removing the requirement of aqueousness.

The Court in addressing this claim states that, while it is timely, the appropriate review of EPA's decision is "highly deferential." The PEER arguments considered include:

International Standards for Corrosivity

Peer argues that EPA should have revised the corrosivity characteristic regulation to match the Basel Convention.

EPA declined to do so stating that the pH thresholds are used differently in the Basal Convention than in the corrosivity characteristic regulation.

The Court determines EPA's reasoning is not necessarily wrong and does not constitute a "compelling cause" to reverse the agency's decision.

Non-Aqueous Waste

Peer argued that non-aqueous high-pH substances can cause serious health effects and therefore should be considered corrosive. They cite as examples both dust generated by the World Trade Center attack and cement kiln dust. The organization claims they have caused injuries to the respiratory systems of those affected.

The Court defers to EPA's conclusion that the World Trade Center evidence does not support reconsideration of the aqueous requirement. This is based on the view that a variety of potentially harmful substances present in the aftermath of the 9/11 attacks meant it was not possible to establish a causal connection between the potential corrosive properties of the dust and the resulting injuries to those exposed.

EPA is also stated to have determined that the respiratory effects of the World Trade Center dust:

. . . while serious, are not consistent with the gross tissue injuries the Agency sought to prevent when it established the corrosivity characteristic regulation.

As to cement kiln dust, EPA noted it has separately assessed the hazards of such material and despite its high pH did not find corrosive injury to potentially exposed workers. Also cited were studies that did not find corrosive injuries in the exposed worker populations.

The Court upholds EPA's decision to deny PEER's petition for review.

A copy of the decision can be downloaded [here](#).