

Analysis

For purposes of the Department's regulatory jurisdiction over waste transportation, the term "regulated waste" includes "industrial-commercial waste," which, in turn, includes "hazardous waste," ECL §27-0303(2)(e), (4), 6 NYCRR 364.1(d)(2). The first stage of this analysis is to determine whether the subject material is a "regulated waste" by reason of it being a "hazardous waste." If not, the next step is to determine whether it is some other "industrial-commercial waste."

The term "hazardous waste" is generically defined in ECL §27-0901(3), and the universe of "hazardous waste" subject to regulation is more particularly defined in 6 NYCRR Part 371. Thus, if a material is defined as a regulated "hazardous waste" by those regulations, such material is necessarily a "regulated waste," pursuant to Part 364.

Before a determination can be made as to whether dross is a regulated waste, it is necessary to define the nature of substance in question. Basically, there are three types of dross:

1. Solder Scrap

Solder scrap is resolidified solder material left over from the end use of solder in bonding metal surfaces. Its basic constituents are tin and lead; but, as a result of use, the material may be

contaminated with other metals. The term also includes resolidified molten solder baths or solder "pots," which, as a result of contamination with other metals, no longer meet specifications for use.

2. Drosses From Manufacturing Operations

Operations, such as primary smelting or solder manufacturing, may produce low-grade drosses as a true by-product of the operation. These drosses, which are mixtures of metals and metal oxides, are separated from the product and reclaimed through use as feedstock material in secondary smelting operations.

3. Drosses from End Use

Drosses can also be generated by the end use of molten metals such as in coating operations that are considered to be part of the electroplating/metal finishing industry. Such drosses, which are combinations of metals and metal oxides, form on the surface of a molten metal bath as a result of oxidation. Like dross from manufacturing operations, dross from end use is separated out and generally reclaimed through use as a feedstock in secondary smelting operations.

Solder scrap meets the definition of "scrap metal," defined in 6 NYCRR 370.2(c)(6). Scrap metal, although it can be a hazardous waste, is currently exempt from regulation pursuant to 6 NYCRR 372.1(e)(2)(iv), 6 NYCRR 373-1.1(d)(1)(vi)(c), and 364.1(e)(2)(vi).

To determine whether drosses, which are not considered to be "scrap metal" because of high oxide content, are a "hazardous waste," as defined by 6 NYCRR 371.1(d), it must first be determined that they are "solid waste," as defined by 6 NYCRR 371.1(c). By definition, if a material is not a "solid waste," it is not a hazardous waste. The terms utilized in 6 NYCRR 371.1(c) are defined at 6 NYCRR 370.2(c). Within those definitions, and based upon the representations made in the petition, the Department assumes that drosses from both manufacturing uses and end uses are "by-products" [6 NYCRR 370.2(c)(2)] which are intended to be "recycled" [6 NYCRR 370.2(c)(4)] through being "reclaimed" [6 NYCRR 370.2(c)(3)] by being processed to recover a usable material (i.e., metals). "By-products," when reclaimed, are not listed as solid wastes in 6 NYCRR 371.1(c)(4)(iii), and Column 3 of Table 1 to which that regulation refers, even if such by-products exhibit one or more of the hazardous waste characteristics described in 6 NYCRR 371.3.¹ Nor are drosses listed as hazardous wastes from non-

¹ Of course, the identical material, if not "reclaimed," or if accumulated speculatively [6 NYCRR 371.1(c)(4)(iv)], or if stored or placed in a manner constituting disposal [6 NYCRR 371.1(c)(4)(a)], would be a "solid waste," and, if it exhibited an appropriate characteristic, a hazardous waste. It is to be

specific sources at 6 NYCRR 371.4(b), or as hazardous wastes from specific sources at 6 NYCRR 371.4(c). Thus, drosses that are reclaimed are not "solid wastes" for the purposes of Part 371, and they cannot be "hazardous wastes."

Although not a hazardous waste, drosses would be a "regulated waste" for purposes of the Department's regulatory jurisdiction over waste transportation activities, if they are "industrial-commercial waste." The definition of "industrial-commercial waste," contained in 6 NYCRR 364.1(d)(3), is broad enough to include drosses, if drosses are a "solid waste," as defined in 6 NYCRR 364.1(d)(1).² If a material is not a "solid waste" within subdivision (d)(1), it cannot be an "industrial-commercial waste" within subdivision (d)(3).

The definition of "solid waste," contained in 6 NYCRR 364.1(d)(1), includes "a manufacturing or mining by-product [that] is sometimes discarded." Whether the subject dross is sometimes discarded must therefore be ascertained.

Petitioner asserts that such drosses are never discarded on an industry-wide basis. Assuming that the drosses are never discarded, they are not "solid wastes," and thus cannot be "industrial-commercial wastes."

noted that, in an enforcement proceeding, the burden is upon the respondent to prove an asserted defense that the material in question is not a "solid waste" or is exempt or conditionally exempt from regulation, in accordance with 6 NYCRR 371.1(c)(7).

²Although not a solid waste for purposes of regulatory jurisdiction under Part 371, a material could be a "solid waste" under Part 364 since the definition of "solid waste" at 6 NYCRR 364.1(a) differs from that at 371.1(c).

The foregoing factual conclusion is based on the assertion in the petition that drosses are never discarded on an industry-wide basis. Consequently, the binding effect of this ruling is limited to that state of facts. Power Authority of the State of New York v. New York State Department of Environmental Conservation, 58 N.Y.2d 427, 461 N.Y.S.2d 769 (1983). If the facts are other than as represented, or if the facts change as the result of changing economic conditions or industrial practices, or otherwise, then the conclusion may be different. This is particularly true if the market for such drosses becomes depressed and such materials are discarded. In this regard, producers and acceptors of drosses should note the burden placed on them, pursuant to 6 NYCRR 371.1(c)(7) and 6 NYCRR 364.1(d)(1), to prove that the drosses are not solid wastes.

Conclusion

Solder scrap meets the definition of "scrap metal" and is presently exempt from regulation under 6 NYCRR Parts 364, 372, and 373.

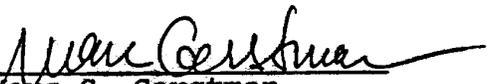
Reclaimed drosses are not "solid wastes," pursuant to 6 NYCRR 371.1(c)(4)(iii) and the associated Table 1, because they are non-listed "by-products" and, therefore, are not subject to regulation under 6 NYCRR Parts 372 or 373.

Since drosses are never discarded and, therefore, are not "solid wastes" pursuant to 6 NYCRR 364.1(d)(1), they are not "regulated wastes," for the purposes of 6 NYCRR 364.

Therefore, based upon the facts alleged in the petition, solder scrap and drosses described therein, when intended for reclamation, may be transported within New York State without a permit obtained pursuant to Part 364, and without being accompanied by a hazardous waste manifest.

This ruling is applicable only to transportation within the State of New York. If it is intended to transport solder scrap or lead-containing drosses across State lines or national boundaries, it is the responsibility of the parties involved to secure the regulatory status of the materials from the appropriate regulatory agency in the other state or foreign country. If any exemption described herein is not recognized by the other state or foreign government, then these materials must be transported and handled in such a manner as to comply with the laws, rules, and regulations of any such state or foreign country.

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Deputy Commissioner
and General Counsel