

Closing Statement

Waste Not, Want Not — An Instruction for Regulatory Reform?

At ELI, we have adhered to a centrist approach on the question of regulatory reform, seeing our current system of environmental protection as neither fatally flawed nor beyond improvement. But the question remains where to aim the reform effort.

A suggestion: waste recycling activity. Why? Because the RCRA program has become increasingly difficult to reconcile with sustainability ideals.

There are a number of different takes on what is meant by environmental sustainability, but I like the one that derives from Section 102 of the National Environmental Policy Act: a key goal of today's society is to avoid the irreversible commitment of resources. That way, tomorrow's needs can also be met. At first blush, RCRA would appear to be complementary in thrust, since, it is, after all, called the Resource Conservation and Recovery Act. But the regulatory system that emerged and has prevailed under the statute has always been preoccupied with guaranteeing proper disposal, and this preoccupation has at times pushed deployable secondary material toward end of life rather than recycling and reuse.

This orientation is understandable, given where we started. The initial National Priorities List under Superfund was populated with sites around the country that were the product of chemical reclamation activities gone awry. Many of the cases that I litigated back in the 1980s involved such circumstances. Take *U.S. v. Monsanto*, which involved the Bluff Road site in South Carolina. That site was envisioned by its operators as a collection and staging area for reclamation of organic chemicals. Nearly 10,000 drums would make their way to the site, but, as often seemed to be the case in those days, the operators could not keep up with the volume of material that they

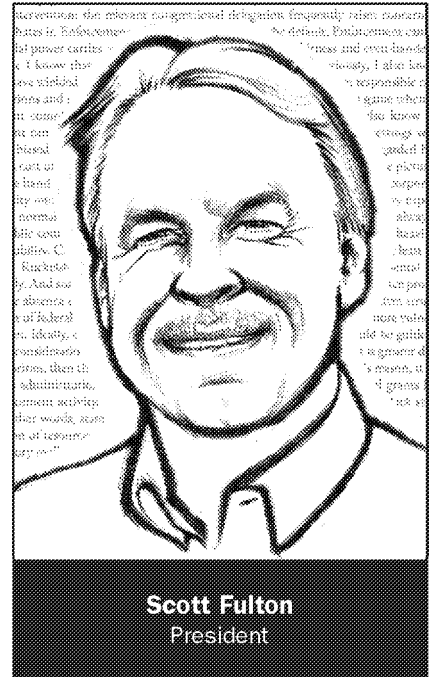
received and were unsuccessful in finding markets for repurposing the waste. As a result, the drums never left, the containers corroded, and a chemical stew contaminated land and groundwater, resulting in millions of dollars of liability and cleanup.

RCRA, with its cradle-to-grave system and stringent requirements for hazardous waste management and disposal, was in part intended as a “never again” response to scenarios like these. It presumed mismanagement and then applied a belt and suspenders approach to overcome it.

Fast forward to the present. RCRA has largely been successful in reining in industrial chemical waste mismanagement. Though Superfund continues to chug along in cleaning up legacy sites, very few new NPL sites have emerged based on behaviors post-dating the promulgation of RCRA's regulations. Indeed, the chemical manufacturing and waste management sectors, having labored under RCRA controls for decades now, have largely internalized these controls in their compliance management systems.

The question now is whether RCRA should be turned more decisively in the direction of resource conservation and recovery — particularly in view of the emergence of sustainability and smart materials management as core objectives in much of the business community. At their root, these objectives are grounded in conservation thinking, focused on designing products with end-of-life in mind and strong reuse and recycling programs, allowing for an increasingly circular economy.

The difficulty is that the RCRA program in its current form has proven a straight jacket when it comes to recycling. The flip switches that operate around the questions of whether a material is a waste and whether a waste



is hazardous, coupled with the absence of clear statutory authority to develop customized programs for recyclables, drives resource loss rather than reuse.

Take, for example, what is happening in the retail sector with discarded aerosol cans. By virtue of their propellant, these hit the trip wire for RCRA ignitability and are treated as hazardous waste. This waste stream accounts for nearly half of the RCRA-regulated material in the retail sector and drives the status of retail stores as RCRA large-quantity generators. Awkwardly, these same cans, when disposed of by consumers, are treated as household solid waste rather than hazardous.

Treated as hazardous waste, the fate of the material is certain — the vast majority is incinerated. Apart from the enormous cost of this approach, there is a sustainability tragedy — both the cans and the propellant are recoverable and either recyclable or reusable, the cans for their metal and the propellant as fuel. It seems virtually assured that reharvesting these materials can be undertaken in an environmentally protective manner.

Can we work together to find a better path for waste streams like this? To me, that sounds like smart reform, anchored by the sustainability ideal.