

## environmental lawflash

February 5, 2014

## Court Holds Reused Water and Condensate Are Not RCRA Solid or Hazardous Waste

*U.S. district court rules that coke oven gas condensate is not subject to federal waste rules when reintroduced into the coke-making process.*

On January 14, the U.S. District Court for the Northern District of West Virginia issued an order in *United States v. Mountain State Carbon, LLC*,<sup>1</sup> granting the defendant's summary judgment motion and rejecting the United States' claim that the defendant had violated the Resource Conservation and Recovery Act (RCRA) by failing to manage as a hazardous waste coke oven gas condensate (COGC) reused in the coke-making process.<sup>2</sup>

In so holding, the court agreed with defendant Mountain State Carbon (MSC) that coke oven gas condensate is not a RCRA waste because it is reused and not discarded. Chief Judge John Preston Bailey wrote that "COGC is not abandoned through disposal or accumulated as is required to be a solid waste."<sup>3</sup> Because the reused COGC is not a solid waste,<sup>4</sup> it cannot be considered to be a RCRA hazardous waste. Judge Bailey further explained that, even if COGC were a solid waste, it would still be exempt from RCRA because MSC beneficially recycles the COGC as an ingredient in an industrial process to make a product.

### Background

MSC operates a coke-making facility in Follansbee, West Virginia. Coke is produced by heating metallurgical coal at high temperatures. The coke is then used as an essential ingredient in steelmaking operations. In the process of "coking" the coal, coke oven gas is also produced. As the coke oven gas is cooled, various products are separated from the gas and the remainder of the coke oven gas is used as a fuel or must be flared. COGC is mostly water that also contains useful constituents. COGC is returned to the coke-making process, where it is used to cool and condition coke oven gas and to recover the constituents.

In 2012, the United States sued MSC for alleged violations of West Virginia air regulations and RCRA. In RCRA claims, the United States alleged that MSC had failed to handle COGC as a hazardous waste pursuant to RCRA. Under RCRA, a solid waste is a material that is discarded by abandonment, such as disposal, burning, incineration, accumulation, storage, and treatment.<sup>5</sup> However, discarded materials may be exempt from the regulation if they are recycled by being (i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; (ii) used or reused as effective substitutes for commercial products; or (iii) returned to the original process from which they were generated, without first being reclaimed or land disposed.<sup>6</sup>

1. No. 5:12-CV-19 (N.D. W. Va. Jan. 14, 2014), available at [https://ecf.wvnd.uscourts.gov/cgi-bin/show\\_public\\_doc?2012cv0019-182](https://ecf.wvnd.uscourts.gov/cgi-bin/show_public_doc?2012cv0019-182).

2. The court denied the United States' cross-motion for summary judgment on the same claim.

3. *Mountain State Carbon*, slip op. at 19.

4. RCRA broadly defines the term "solid waste" to include liquid, solid, semi-solid, and contained gaseous wastes.

5. 40 C.F.R. § 261.2.

6. 40 C.F.R. § 261.2(e).

## District Court's Opinion

In *Mountain State Carbon*, the United States argued that COGC is a solid waste because it is discarded through accumulation and storage in drip legs. MSC countered that the COGC's brief presence in the drip legs does not rise to the level of accumulation or storage. MSC also argued that, even if COGC were discarded in the drip legs, it was being returned to the process in satisfaction of the recycling exemption. The United States also argued that a material that is mostly water cannot be and is not being legitimately recycled.

The district court rejected the government's claims and agreed with MSC. It held that COGC is not a solid waste, noting the COGC's short duration in the drip legs in between daily collections. The court further declined to classify COGC as "hazardous waste" under RCRA because it is not a RCRA solid waste. Additionally, the court found that, even if COGC were a solid waste, MSC's management of it satisfies the recycling exemption for materials reused or used in an industrial process to make a product. In support of its determination, the court pointed to COGC's role in cooling and conditioning the coke oven gas.

## Implications

The court's order represents a significant win for an industry hit hard by the recession. Recycling of COGC is a common practice in the coke-making industry because it is efficient and yields valuable by-products, which translate into reduced costs and increased revenue. The case is scheduled for trial in May 2014, at which time the court will address the remaining air issues relating to opacity and desulfurization emissions.

## Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

### Pittsburgh

Kenneth S. Komoroski	412.560.7430	<a href="mailto:kkomoroski@morganlewis.com">kkomoroski@morganlewis.com</a>
Steven E.H. Gibbs	412.560.7434	<a href="mailto:sgibbs@morganlewis.com">sgibbs@morganlewis.com</a>
Daniel Carmeli	412.560.7433	<a href="mailto:dcarmeli@morganlewis.com">dcarmeli@morganlewis.com</a>
Matthew H. Sepp	412.560.7432	<a href="mailto:msepp@morganlewis.com">msepp@morganlewis.com</a>
Ted B. Bosquez, IV	412.560.7431	<a href="mailto:ted.bosquez@morganlewis.com">ted.bosquez@morganlewis.com</a>

### Philadelphia

Glen R. Stuart	215.963.5583	<a href="mailto:gstuart@morganlewis.com">gstuart@morganlewis.com</a>
----------------	--------------	--

### Washington, D.C.

Michael W. Steinberg	202.739.5141	<a href="mailto:msteinberg@morganlewis.com">msteinberg@morganlewis.com</a>
----------------------	--------------	--

## About Morgan Lewis's Environmental Practice

Morgan Lewis's Environmental team includes former high-ranking federal and state government lawyers, including the U.S. Department of Justice's former Assistant Attorney General for the Environment and Natural Resources Division, and a number of former U.S. attorneys. The firm's environmental lawyers represent companies across the United States in complex matters under both federal and state law, often in cases involving multiple parties with competing interests, including high-stakes Superfund cost-recovery matters, mass toxic torts, defense against citizen suits, defense against government enforcement actions, appeals, and insurance recovery disputes.

## About Morgan, Lewis & Bockius LLP

With 25 offices across the United States, Europe, Asia, and the Middle East, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Dubai,\* Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo

Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at [www.morganlewis.com](http://www.morganlewis.com).

\*In association with Mohammed Buhashem Advocates & Legal Consultants

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2014 Morgan, Lewis & Bockius LLP. All Rights Reserved.