2006

Safe Air for Everyone v. Meyer: Weeding through the Resource Conservation and Recovery Act's Definition of Solid Waste

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SAFEB AIR FOR EVERYONE v. MEYER: WEEDING THROUGH THE RESOURCE CONSERVATION AND RECOVERY ACT'S DEFINITION OF “SOLID WASTE”

I. INTRODUCTION

The Kentucky bluegrass seed grown in Idaho is distributed throughout the nation for lawns, golf courses and other uses. Bluegrass seed is usually planted in the spring and produces seed during the summer of the following year. When the seed is harvested, the growers cut down most of the plant to prepare the crop for combining - a process separating the seed from the rest of the plant. The straw and stubble remain in the field after the seed is taken from the field and prepared for commercial distribution. Growers burn this leftover residue in a practice known as “open burning.” It is estimated that over ninety-five percent of the acres registered by bluegrass growers are burned in this manner.

For decades, bluegrass growers have employed the technique of open burning. The practice has garnered closer scrutiny because of new health science information and recent allegations that open burning of bluegrass residue causes respiratory problems for nearby residents. Although bluegrass growers may be in compli-

2. See Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1037 (9th Cir. 2004) (explaining planting and harvesting process). Bluegrass plants are between fifteen and thirty-six inches tall when they produce seed that can be harvested. See id.
3. See id. (noting growers use “curing” process, before combining, to dry out and ripen head of crop where seed is located on bluegrass plant).
4. See id. (explaining separation process of bluegrass harvesting).
5. See id. (stating that despite open burning, entire planting process can be repeated as long as bluegrass field can sustain it and remain productive).
8. See Safe Air for Everyone, Health and Scientific Information, www.safeairforeveryone.com/index.php?id=health (last visited Sept. 12, 2004) (noting alleged respiratory problems include irritated eyes, nose and mouth; increased coughing and wheezing; decreased lung function; and possible development of

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ance with the Clean Air Act and Idaho state law, clean air advocates, such as Safe Air for Everyone, argue carcinogenic toxins in the smoke from the bluegrass fields endanger local residents.⁹

In Safe Air for Everyone v. Meyer¹⁰ (Safe Air), the Ninth Circuit asked whether the Resource Conservation and Recovery Act (RCRA) prohibited Idaho farmers (Farmers) from openly burning residue left in the fields after the Kentucky bluegrass harvest based on the idea that such residue constituted “solid waste” under RCRA.¹¹ In deciding this issue, the court found it necessary to examine the congressional intent behind RCRA, and how such legislation should be interpreted when words in the statute are not precisely defined.¹² The Ninth Circuit found in favor of the Farmers, holding that the bluegrass residue did not fall within RCRA’s definition of “solid waste.”¹³

This Note examines RCRA’s definition of “solid waste” in light of Safe Air.¹⁴ Section II discusses the facts leading up to the Ninth Circuit’s consideration of Safe Air.¹⁵ Section III explains the history and purpose of RCRA, the process of statutory interpretation, other circuit courts’ interpretations of RCRA’s language and the federal summary judgment standard.¹⁶ Section IV details the Ninth Circuit’s examination of the case.¹⁷ Section V analyzes the court’s determination of the case.¹⁸ Finally, Section VI contemplates the possible effects of this decision on the future enforcement of RCRA and within the bluegrass industry.¹⁹

⁹. See FAQs, supra note 7 (explaining that despite dangerous spikes in number of particulates during open burning season, Farmers continue burning because federal standards under Clean Air Act were designed for continuous smokestack polluters and allow distorted calculation of averages).

¹⁰. 373 F.3d 1035 (9th Cir. 2004).

¹¹. See id. at 1037 (explaining central issue of case).

¹². See id. at 1040-41 (discussing how court tried to tackle case’s primary question).

¹³. See id. at 1037 (stating holding of Ninth Circuit).

¹⁴. For a further discussion of “solid waste” in Safe Air, see infra notes 85-103 and accompanying text.

¹⁵. For a further discussion of the facts of Safe Air, see infra notes 20-39 and accompanying text.

¹⁶. For a further discussion of the history of RCRA, see infra notes 40-82 and accompanying text.

¹⁷. For a further discussion of the Ninth Circuit’s examination of Safe Air, see infra notes 83-114 and accompanying text.

¹⁸. For a further discussion of how the court handled Safe Air, see infra notes 115-64 and accompanying text.

¹⁹. For a further discussion of the impact of Safe Air, see infra notes 165-76 and accompanying text.
II. FACTS

Safe Air for Everyone (SAFE) petitioned the Ninth Circuit to enjoin the Farmers from their practice of openly burning bluegrass residue because the practice violated RCRA. SAFE is a "non-profit corporation formed by individuals in Idaho, Washington and Montana" created to stop the practice of open burning. SAFE brought this action under the "citizen suit" provision of RCRA, which prohibits the "disposal of any solid or hazardous waste which may present imminent or substantial endangerment to health or the environment . . . ." SAFE filed the action against seventy-five individuals and corporations that grew Kentucky bluegrass commercially in Idaho and practiced open burning. SAFE alleged that the smoke from the grass burning process was a public danger that could cause severe respiratory problems for nearby residents. In addition, SAFE argued the open burning of bluegrass residue constituted a "disposal" of "solid waste" within the meaning of RCRA.

The District Court of Idaho dismissed the action pursuant to the Farmers' Federal Rule of Civil Procedure Rule 12(b)(1) motion. Rule 12(b)(1) permits a defendant to make a motion against the plaintiff's claim if the court lacks subject matter jurisdiction. Such a motion may be factual or facial. In this case, the Farmers chose to make a factual attack. When asserting a factual attack, the challenger disputes the truth of the allegations that invoke federal jurisdiction. A court, however, is not obligated to

20. See Safe Air For Everyone v. Meyer, 373 F.3d 1035, 1038 (9th Cir. 2004) (explaining civil procedures in case which led up to Ninth Circuit review).
21. See id. at 1038 (detailing history of SAFE).
23. See Safe Air, 373 F.3d at 1038 (noting all bluegrass farmers named as defendants practice open burning).
25. See id. at 1037 (relating SAFE's argument to why RCRA is applicable in this case).
26. See Fed. R. Civ. P. 12(b)(1) (explaining when party can assert pleading for lack of subject matter jurisdiction); see also Safe Air, 373 F.3d at 1039 (noting factual 12(b)(1) challenge allows district court to receive evidence beyond initial complaint).
28. See Safe Air, 373 F.3d at 1039 (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)) (explaining that facial challenge attacks allegations on their face, while factual challenge attacks truth of allegations).
29. See id. (discussing Farmers' 12(b)(1) jurisdictional attack).
30. See id. (noting that factual challenge allows court to review evidence beyond pleadings to determine if allegations are true).
presume the truthfulness of the allegations. The Farmers argued that the jurisdictional and substantive issues were so closely related to the determination of RCRA's statutory provision that the court did not have the requisite subject matter jurisdiction to hear the action. The district court agreed and dismissed the claim for lack of subject matter jurisdiction.

SAFE then appealed the decision to the Ninth Circuit. SAFE argued that granting motions on federal subject matter jurisdiction is unusual and is warranted only when a claim cites the Constitution or a federal statute solely for the purpose of litigating in federal court. Furthermore, SAFE claimed that when a federal statute provides the court's jurisdiction and the plaintiff's substantive claim of relief, a grant of a factual Rule 12(b)(1) motion is only proper when the allegations are frivolous.

Although the Ninth Circuit affirmed the lower court's decision, it relied on different reasoning. The court found that it had subject matter jurisdiction but stated that bluegrass residue was not covered under RCRA. Ultimately, the court held SAFE did not have a sustainable RCRA claim.

III. BACKGROUND

A. Resource Conservation and Recovery Act

Enacted in 1976, RCRA aimed to control the three to four billion tons of discarded waste generated each year by Americans, and the problems arising from the anticipated eight percent annual in-

31. See id. (citing White, 227 F.3d at 1242) (noting that when moving party presents evidence of affidavits to support its motion to dismiss, motion to dismiss becomes factual motion).

32. See Sun Valley Gas. Inc. v. Ernst Enters. Inc., 711 F.2d 138, 139 (9th Cir. 1983) (stating that jurisdictional findings are inappropriate where jurisdictional and substantive issues are intertwined so that jurisdiction depends on facts); see also Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594 F.2d 730, 734-35 (9th Cir. 1979) (concluding that jurisdictional and substantive issues are dependant on each other when statute provides basis for both subject matter jurisdiction of federal court and plaintiff's claim for relief).

33. See Safe Air, 373 F.3d at 1039 (giving district court's holding).

34. See id. at 1038 (stating Ninth Circuit has jurisdiction to hear SAFE's appeal pursuant to 28 U.S.C. § 1291 (2000)).

35. See Bell v. Hood, 327 U.S. 678, 682-83 (1946) (explaining when such jurisdictional dismissals are required).

36. See Thornhill, 594 F.2d at 734 (discussing when motion to dismiss for lack of subject matter jurisdiction is proper).

37. See Safe Air, 373 F.3d at 1037 (giving holding of case).

38. See id. (explaining how Ninth Circuit has used different reasoning in reaching its opinion).

39. See id. (affirming lower court under different reasoning).
crease in the amount of such waste. RCRA’s strategy was to reduce generated waste and ensure proper treatment of discarded waste in order to lessen the harmful effects of such disposal on human health and the environment. Congress determined the traditional language used to describe these discarded materials, the term “solid waste,” was inappropriate because its ordinary definition was too limited for RCRA’s purposes. With this in mind, Congress expanded the statutory definition of solid waste to include “any garbage . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations . . . .”

Recognizing that the national concern over increasing amount of solid waste required federal action to supplement existing state, regional and local efforts, Congress placed the Environmental Protection Agency (EPA) in charge of waste regulation, assistance and planning under RCRA. RCRA contains a “citizen suit” provision which allows private citizens to enforce the statute in specific circumstances. The provision states that a civil action may be brought “against any person . . . who has contributed or who is contributing to the past or present handling . . . or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .” Confronted with the task of interpreting this provision of the RCRA, a

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42. See H.R. Rep. No. 94-1491(I), at 2-3 (discussing preference for term “discarded material,” over false connotations of term “solid waste”).


45. See H.R. Rep. No. 94-1491(I), at 4 (noting that EPA was also charged with task of studying sources of solid waste, existing disposal methods and potential dangers to human health and environment stemming from mishandling of such wastes).

46. See 42 U.S.C. § 6972(a)(1)(B) (2000) (stating that private citizens have opportunity to enforce RCRA); see also Meghrig, 516 U.S. at 484 (discussing remedies available in RCRA).

47. See 42 U.S.C. § 6972(a)(1)(B) (emphasis added) (explaining action can also be brought under this provision against someone who is storing, treating or transporting such wastes).
court's analysis depends heavily on the principles of statutory construction.48

B. Statutory Interpretation in the Ninth Circuit

1. Wilderness Society v. United States Fish & Wildlife Service49

In Wilderness Society, the Ninth Circuit laid out a two-step analysis to interpret a statute's meaning in accordance with the traditional canons of statutory interpretation.50 The first step of statutory interpretation is to look at the statute's language.51 If a particular word or phrase in the statute is not defined by the statute, the word should take on its "ordinary, contemporary, common meaning."52 The second step, should the word continue to remain unclear, is to determine the purpose of the statute by examining its legislative history.53

2. Hanford Downwinders Coalition, Inc. v. Dowdle54

In Hanford, EPA proposed adding the Hanford Nuclear Reservation to the country's list of serious hazardous waste sites.55 Plaintiffs, the Hanford Downwinders Coalition (Coalition), sought injunctive relief under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) against the Agency for Toxic Substances and Disease Registry (ATSDR), which

49. 353 F.3d 1051 (9th Cir. 2003).
50. See id. at 1060 (laying out process for interpretation of statutes). The plaintiffs argued the U.S. Fish and Wildlife Service violated the Wilderness Act by granting an unsound permit for an enhancement project which would allow the release of hatchery-raised salmon into Tustumena Lake. See id. at 1055. The Wilderness Act contains a mandate to preserve the "natural conditions" as part of the "natural character" of the area where Tustumena Lake is located. See id. The court found for the plaintiffs. See id. at 1060.
52. See id. (citing United States v. Smith, 155 F.3d 1051, 1057 (9th Cir. 1998)) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)) (describing process when words in statutes are not defined); see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (explaining that unambiguous meaning of language should be adopted unless there is clear legislative intent to contrary).
53. See Wilderness Society, 353 F.3d at 1060 (stating legislative history can elucidate what Congress intended statute to accomplish if language remains unclear).
54. 71 F.3d 1469 (9th Cir. 1995).
55. See id. at 1471-72 (explaining Hanford's plutonium producing history beginning with Manhattan Project and continuing for thirty years).
was in charge of preparing a health assessment of the area. The Coalition wanted the ATSDR to begin a health surveillance program to satisfy CERCLA’s definition of “removal or remedial action.” Although the Ninth Circuit found the ATSDR satisfied its statutory obligations, the court indicated that because CERCLA was enacted to protect public health, CERCLA should be read broadly to best satisfy Congress’ purpose of protecting public health. The court held that the ATSDR’s health surveillance assessment was a “removal or remedial action” that was entitled to protection.

C. Interpretations of RCRA before Safe Air

1. D.C. Circuit

The D.C. Circuit determined that “discarded materials,” one of the subsets created by Congress’ statutory definition of “solid waste,” did not include materials that were part of a continuous process for beneficial reuse or recycling by the generating industry. In *American Mining Congress v. EPA* (AMC I), a group of mining and oil refining companies challenged EPA’s right to regulate reused materials in their respective industries. The D.C. Circuit held that EPA’s jurisdiction was limited to materials that were “truly discarded, disposed of, thrown away, or abandoned.” The *AMC I* court held that Congress did not intend EPA to regulate reused materials as they did not contribute to the waste disposal problem.

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56. See id. at 1472-73 (noting government was trying to clean up hazardous waste at Hanford Nuclear Reservation after its thirty years of producing plutonium).

57. See id. at 1473 (discussing plaintiff’s claim).

58. See id. at 1477-78 (noting Congress’ authorization of President to take health-related removal action in CERCLA provision as evidence that ATSDR health study constituted removal action); see also United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1376-77 (8th Cir. 1989) (noting RCRA is remedial statute).

59. See Hanford, 71 F.3d at 1477 (explaining interpretation of CERCLA).


61. 824 F.2d 1177 (D.C. Cir. 1987).

62. See id. at 1186 (explaining waste is not “disposed” if used in continuous process).

63. See Safe Air, 373 F.3d at 1041 (noting degree to which D.C. Circuit wished materials to be abandoned to qualify as “discarded”).

64. See *AMC I* at 1186 (explaining why materials reused by generating industry are not “discarded” for purposes of RCRA’s definition of “solid waste”).
The D.C. Circuit refined this interpretation with its decision in *American Mining Congress v. United States EPA* (AMC II). In that case, the petitioner objected to the EPA's classification of wastewater sludge kept in land disposal units as "discarded" material. The petitioner argued that the sludge had the potential to be reused in the future and should not be considered "discarded." The D.C. Circuit held that AMC I applied to materials "destined for immediate reuse in another phase of the industry's ongoing process." This meant there was nothing improper about EPA classifying the petitioner's wastewater sludge as "discarded."

2. Second Circuit

The Second Circuit found the length of time materials accumulate while awaiting potential reuse is important in determining if materials are "solid waste." In *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.* (Connecticut Fishermen), the Connecticut Department of Environmental Protection (DEP) brought an action against a gun club, alleging that debris from the club's bullet casings and clay targets, which had fallen into the waters near the Long Island Sound, constituted "solid waste." The court determined that the debris "had accumulated long enough" to be considered "discarded" within the RCRA's definition of "solid waste." The court's holding, however, did not set a bright line rule for determining how long of an accumulation period is necessary for waste to qualify as "discarded material."

65. 907 F.2d 1179 (D.C. Cir. 1990).
66. See id. (modifying D.C. Circuit's earlier ruling in AMC I).
67. See id. at 1186 (noting EPA classified stored sludge as "discarded" because it threatened health of nearby residents).
68. See id. at 1185 (explaining ability to be "disposed" is requirement of "solid waste" definition under RCRA).
69. See id. at 1186 (emphasis added) (quoting AMC I, 824 F.2d at 1185) (finding nothing in AMC I to prevent treating sludge waste as "discarded").
70. See AMC II, 907 F.2d at 1186 (explaining court's analysis in AMC I).
71. See Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir. 1993) (arguing time before materials are reused fits into analysis).
72. 989 F.2d 1305 (2d Cir. 1993).
73. See Safe Air For Everyone v. Meyer, 373 F.3d 1035, 1042 n.5 (9th Cir. 2004) (emphasizing length of time debris remained in water); see also AMC II, 907 F.2d at 1179 (holding materials stored for potential reuse in future are "discarded materials" under RCRA).
74. See Connecticut Fishermen, 989 F.2d at 1316 (stating holding of case).
75. See id. (noting court intentionally did not decide on set time necessary for accumulation).
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3. Eleventh Circuit

The Eleventh Circuit held that whether material can be reused or has some value to a reclamer or salvager is irrelevant in determining whether the material is "solid waste." In United States v. ILCO (ILCO), a lead smelting company challenged the EPA's regulation of disposal of lead plates from recycled automobile batteries. The court found that even though the batteries were valuable to the smelting company that salvaged them, this value was insufficient to find they were not discarded, in light of the deference to EPA determination as supported by congressional authority.

D. Federal Summary Judgment Standard

When determining whether to grant a motion for summary judgment, the court must determine whether the claim contains a genuine issue of material fact. The court must view the evidence in the light most favorable to the nonmoving party. Where no genuine issue of material fact exists, the court must grant a motion to dismiss the matter.

IV. Narrative Analysis

The Ninth Circuit considered two issues in Safe Air. The first was whether the district court erred in granting the Farmers' motion to dismiss for lack of subject matter jurisdiction. The second and more central issue of the case was whether bluegrass residue

76. See United States v. ILCO Inc., 996 F.2d 1126, 1131 (11th Cir. 1993) (describing factors not determinative in defining solid waste).
77. 996 F.2d 1126 (11th Cir. 1993).
78. See Safe Air, 373 F.3d at 1042 (arguing company never disposed of lead plates); see also ILCO, 996 F.2d at 1129 (noting ILCO was reclaiming old batteries to run them through smelting process to produce lead ingots for sale).
79. See ILCO, 996 F.2d at 1132 (explaining reasonableness of EPA interpretation of "discarded" as meaning "discarded once"). The court stated "[w]here we to rule otherwise, waste such as these batteries would arguably be exempt from regulation under RCRA merely because they are potentially recyclable." Id.
80. See Navajo Nation v. Confederated Tribes and Bands of the Yamaka Indian Nation, 331 F.3d 1041, 1044 (9th Cir. 2003) (explaining how court reviews summary judgment motion).
81. See id. at 1044 (explaining court's process when applying Fed. R. Civ. P. 56(c)).
82. See Great W. Bank & Trust v. Kotz, 532 F.2d 1252, 1254 (9th Cir. 1976) (noting dismissal is improper if party has stated valid claim).
83. See Safe Air, 373 F.3d at 1038 (discussing two main issues).
84. See id. at 1038 n.2 (noting district court also dismissed SAFE's common law nuisance claim on this same matter).
could be classified as "solid waste" under RCRA. If the residue was classified as "solid waste," then the Farmers’ practice of open burning would be held unlawful.

The Ninth Circuit quickly dispensed with the issue of whether the district court erred in granting the Rule 12(b)(1) motion. The court found that the district court erred in granting the motion because the Farmers failed to show that SAFE’s federal claims were frivolous or set forth solely to obtain federal jurisdiction. The court went on to examine SAFE’s allegations using a summary judgment standard rather than a Rule 12(b)(1) challenge by the Farmers because dismissal was based on the conclusion that bluegrass residue was not "solid waste" under the RCRA.

To prevail in an action brought under RCRA’s “citizen suit” provision, SAFE needed to establish that the Farmers contributed to the "disposal of solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." In the instant case, SAFE argued that the bluegrass residue constituted "solid waste" under RCRA. To determine if a genuine issue of material fact existed on this issue, the court reviewed RCRA’s definition of “solid waste,” interpretations of statutory language in case law and RCRA’s legislative history.

A. RCRA’s Definitions

SAFE argued bluegrass residue could be classified under the “other discarded material” subset within RCRA’s definition of “solid waste.” See id. at 1040 (noting that this question will determine whether summary judgment will be granted).

See 42 U.S.C. § 6972(a)(1)(B) (2000) (stating disposal of solid waste must also present “imminent and substantial endangerment to health or the environment” to garner standing under RCRA “citizen suit provision”).

See Safe Air, 373 F.3d at 1038-40 (stating court’s analysis of district court’s grant of 12(b)(1) motion).

See id. at 1039 (explaining standard for granting factual 12(b)(1) challenges).

See id. at 1040 (citing Great W. Bank & Trust v. Kots, 532 F.2d 1252, 1254 (9th Cir. 1976)) (reviewing district court’s dismissal for lack of jurisdiction as a grant of summary judgment where dismissal was based on interpretation of phrase in statute).

See id. at 1041 (noting that SAFE does not allege that bluegrass residue is hazardous waste); see also 42 U.S.C. § 6972(a)(1)(B) (2000) (stating against whom suit can be brought).

See Safe Air, 373 F.3d at 1040 (discussing court’s handling of second issue regarding statutory interpretation).

See id. (explaining application of RCRA to SAFE’s allegations).
SAFE claimed the primary purpose of burning the bluegrass residue was "sunlight absorption and enhancing productive life of bluegrass fields." The Farmers responded that they did not "discard" bluegrass residue; and therefore, it could not be considered "solid waste" under RCRA. In addition, the Farmers maintained they reused the residue as part of a continuous process of growing bluegrass. They contended the reused material served several crucial functions, such as extending the life of the fields, restoring fertilizers and minerals to the soil, reducing the threat of insects and maximizing the soil's sunlight absorption.

In response to House Report 94-1491's declaration that "[m]uch... agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem," SAFE argued that "much" does not mean "all" agricultural waste so that bluegrass residue could still be "discarded" under RCRA. SAFE also claimed Congress's assertion that "agricultural wastes which are returned to the soil as fertilizers are not considered discarded materials in the sense of this legislation" did not exempt bluegrass residue because it is burned rather than mulched back into the soil. The Farmers responded that RCRA's legislative history showed the statute's purpose was to handle waste products that contributed to landfill problems and not those waste products that were reused as fertilizers.

The Ninth Circuit held that because RCRA does not define "discarded material," the court would define the word "discard" by

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93. See id. at 1041 (citing 42 U.S.C. § 6903(27) (2000)) (defining term "solid waste"). Solid waste is "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..." (emphasis added)). Id.

94. See id. at 1044 (discussing SAFE's argument of why bluegrass residue fulfills definition of "discarded").

95. See id. at 1043 (arguing bluegrass residue should not be defined under RCRA as "solid waste" because it was continuously reused).

96. See Safe Air, 373 F.3d at 1043 (defending against allegation that residue is "discarded material").

97. See id. at 1043-44 (explaining alleged benefits of openly burning bluegrass residue).


100. See id. at 1045 (noting legislative history in favor of Farmers' position); see also H.R. REP. No. 94-1491(I), at 2-3 (stating increasing reclamation and reuse as RCRA objective).
its ordinary meaning in accordance with the rules of statutory interpretation.\textsuperscript{101} The court defined “discard” as “[to] cast aside; reject; abandon; give up.”\textsuperscript{102} Agreeing with the Farmers’ arguments that bluegrass was not “discarded” but rather used in a continuous growth process, the court held bluegrass residue was not “discarded material” and thus could not be “solid waste” under the RCRA.\textsuperscript{103}

B. Applicability of Previous Interpretations of RCRA

The Ninth Circuit, for further guidance, examined other circuit courts’ interpretations of the definition of “discarded” within RCRA’s definition of “solid waste.”\textsuperscript{104} The court found further support that bluegrass residue was not “solid waste” by examining the facts of Safe Air alongside the circuit courts’ holdings.\textsuperscript{105}

1. D.C. Circuit

SAFE did not contest the Farmers’ use of bluegrass residue in a continuous farming process, which was the main consideration in AMC I.\textsuperscript{106} The Farmers were able to produce evidence that the industry practice of burning bluegrass residue was designed to help promote the continuous process of growing and harvesting bluegrass.\textsuperscript{107} Unlike the stored wastewater sludge in AMC II, the bluegrass residue in Safe Air was immediately reused, rather than being stored for possible future use.\textsuperscript{108}

2. Second Circuit

The Ninth Circuit held that SAFE presented no evidence that bluegrass residue was left out in the fields for long periods of time.\textsuperscript{109} This made the residue distinguishable from the bullet casings in Connecticut Fishermen.\textsuperscript{110} Considering the technique used in

\textsuperscript{101} See Safe Air, 373 F.3d at 1041 (stating term “discard” should be defined by ordinary meaning in order to determine whether statute was violated).

\textsuperscript{102} Id. (citing The New Shorter Oxford English Dictionary 684 (4th ed., 1993)) (providing dictionary definition of “discard”).

\textsuperscript{103} See id., 373 F.3d at 1047 (holding Kentucky bluegrass residue is not “solid waste” within RCRA meaning).

\textsuperscript{104} See id. at 1041 (examining other circuits’ interpretation to determine definition of “solid waste”).

\textsuperscript{105} See id. at 1045 (comparing Safe Air to other circuit cases).

\textsuperscript{106} See Safe Air, 373 F.3d at 1045 (examining open burning practice against AMC I).

\textsuperscript{107} See id. (discussing continuous process of growing bluegrass).

\textsuperscript{108} See id. (explaining AMC II’s additional requirement to AMC I standard for EPA classifications under RCRA).

\textsuperscript{109} See id. (noting bluegrass is reused, not discarded).

\textsuperscript{110} See id. (comparing Safe Air to Connecticut Fishermen).
working bluegrass fields, it is in the best interest of growers to clear the field quickly after harvest in order to plant the next bluegrass crop (while it really does not matter how long you leave bullet casings in a field).  

3. Eleventh Circuit

In Safe Air, there was no dispute over the fact that the Farmers who reused the bluegrass residue were the residue’s original owners. The straw and stubble, which forms bluegrass residue, remained after the Farmers harvested their own bluegrass plants. This was unlike the situation in ILCO where reclaimers or salvagers were recycling automobile batteries.

V. CRITICAL ANALYSIS

The Ninth Circuit’s holding that bluegrass residue is not “solid waste” under the RCRA is not supported by previous case law for numerous reasons. First, the court limited RCRA’s language where unambiguous meanings should have controlled. Second, the court should not have considered interpretations from other circuit cases because those cases involved more stringent EPA standards that were not applicable to the facts of Safe Air. Third, the court created a sizable loophole in RCRA by allowing any reuse process as long as waste is returned to the soil, thereby undermining RCRA’s purpose. Fourth, the court ignored the genuine issue of material fact that existed as to the value of the bluegrass residue to the Farmers in the bluegrass growing process. Fifth, the court

111. See Safe Air, 373 F.3d at 1037 (determining Farmers’ best interest). For a discussion of bluegrass growing procedure, see supra notes 1-5 and accompanying text.

112. See Safe Air, 373 F.3d at 1045 (distinguishing between principle case’s facts and ILCO facts).

113. See id. at 1037 (noting Farmer’s process of growing bluegrass).

114. See id. at 1045 (comparing ownership in ILCO and principle case).

115. See id. at 1048-53 (Paez, J., dissenting) (detailing reasons why holding is not supported by previous case law).

116. See id. at 1048 (Paez, J., dissenting) (arguing bluegrass residue was “discarded” within meaning of RCRA).

117. See Safe Air, 373 F.3d at 1050 (Paez, J., dissenting) (discussing differences between principle case and other circuit cases).

118. See id. at 1051-52 (Paez, J., dissenting) (examining loophole created by court’s decision).

119. See id. at 1052-53 n.9 (Paez, J., dissenting) (recognizing different arguments to how much bluegrass residue actually contributes to process of growing bluegrass).
failed to follow its own rule of broadly interpreting a public health statute.120

A. Limitation of RCRA’s Definitions

The Ninth Circuit misinterpreted the definition of “solid waste” because it failed to adhere to the *Wilderness Society* rule of applying the “ordinary, common meaning” of a term when it is undefined by a statute.121 Here, the word in question was “discarded.”122 The majority defined “discarded” as “cast aside; reject; abandon; give up.”123 But the majority modified this plain meaning definition of “discarded” to reflect other circuits’ interpretations of RCRA in such cases as *AMC I, AMC II* and *ILCO*.124 Overlooking plain meaning, the Ninth Circuit complicated the definition of “discarded” by inquiring whether the material was destined for beneficial reuse, had the reuse potential, or the original owner was reusing the material.125

SAFE suggested the primary reason why the Farmers burn the bluegrass residue is to clear the bluegrass fields for the next planting.126 Although the Farmers claimed open burning produces numerous secondary benefits, they did not dispute SAFE’s contention that open burning to clear the fields, the Farmers’ primary objective, constituted “discarding.”127 With no dispute, the Ninth Circuit should have found that burning bluegrass residue to remove it was within the ordinary definition of the word “discard.”128

The Ninth Circuit’s attempts to cite to RCRA’s legislative history in supporting its decision also fail because its reading of RCRA

120. See Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469, 1481 (9th Cir. 1995) (noting public health statutes should be broadly interpreted).

121. See Safe Air, 373 F.3d at 1047 (Paez, J., dissenting) (citing *Wilderness Soc’y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003)).

122. See id. at 1048 (explaining question of whether bluegrass residue constitutes “solid waste” depends on whether residue is “discarded material” within RCRA’s definition).

123. See id. at 1041 (citing “discarded” as defined by *The New Shorter Oxford English Dictionary* 686 (4th ed. 1993)).

124. See id. at 1041-42 (discussing definition of “discarded”).

125. See id. at 1043 (discussing analysis required to determine whether material is “discarded” under RCRA).

126. See Safe Air, 373 F.3d at 1047-48 (Paez, J., dissenting) (noting even Farmers’ experts acknowledged primary reason open burning was practiced was to remove bluegrass residue).

127. See id. (Paez, J., dissenting) (noting secondary benefits include fertilization).

128. See id. at 1048 (Paez, J., dissenting) (explaining SAFE must also prove open burning endangered public health to succeed under this specific provision of RCRA).
was misguided.\textsuperscript{129} Congress intended “solid waste” to include “any . . . discarded materials resulting from . . . agricultural operations . . . .”\textsuperscript{130} House Report 94-1491 demonstrates that Congress used “discarded materials” to broaden RCRA’s reach.\textsuperscript{131} At the time of RCRA’s enactment, agricultural practices such as open burning of bluegrass residue created 687 million tons of waste per year, the second largest source of waste in the nation.\textsuperscript{132} Therefore, the majority’s interpretation of “solid waste” is inconsistent with RCRA’s intent.

B. Inapplicability of Other Circuit Cases

Failing to apply the plain meaning of “discarded,” the Ninth Circuit supported its decision by using other circuit cases such as \textit{AMC I}, \textit{AMC II} and \textit{ILCO} that hinged on the stricter definition of “solid waste” created by EPA’s RCRA regulations.\textsuperscript{133} Although RCRA defines “solid waste” as “any discarded material,” EPA’s definition of “discarded material” as any “abandoned, recycled, or inherently wastelike” material is more strict.\textsuperscript{134} The main issue in the other circuit cases was whether EPA exceeded its authority to regulate RCRA by imposing its own definition of “solid waste” rather than using RCRA’s broader definition.\textsuperscript{135} In \textit{AMC I}, plaintiffs questioned the EPA’s authority to regulate reused materials in the mining and oil refining industries.\textsuperscript{136} In \textit{AMC II}, petitioners tried to circumvent EPA classifications by arguing wastewater sludge had the potential to be reused.\textsuperscript{137} Finally, in \textit{ILCO}, the plaintiffs raised the issue of whether EPA could regulate automobile batteries and

\textsuperscript{129} See id. at 1049 (Paez, J., dissenting) (arguing legislative history shows Congress chose RCRA’s language to broaden statute’s reach).

\textsuperscript{130} See id. at 1049 (citing to 42 U.S.C. § 6903(27) (2000) (discussing Congress’ intent in defining “solid waste”).

\textsuperscript{131} See \textit{H.R. Rep. No. 94-1491(I), at 3 (indicating Congress intended RCRA to have broad reach).}

\textsuperscript{132} See id. at 15 (showing Congress enacted RCRA to alleviate agricultural waste disposal problems).

\textsuperscript{133} See \textit{Safe Air}, 373 F.3d at 1051 (Paez, J., dissenting) (explaining why other circuit cases are not persuasive).

\textsuperscript{134} See \textit{id. at 1051 (Paez, J., dissenting) (referencing 40 C.F.R. pt. 261.2(b)(1) (1992)) (noting EPA’s strict definition of “discarded materials”).

\textsuperscript{135} See \textit{id. at 1048-49 (Paez, J., dissenting) (explaining that Congress does not define “discarded materials” in RCRA so ordinary definition of “discarded” should apply).

\textsuperscript{136} See \textit{AMC I}, 824 F.2d 1177, 1178 (D.C. Cir. 1987) (highlighting EPA involvement in case).

\textsuperscript{137} See \textit{AMC II}, 907 F.2d 1179, 1185-86 (D.C. Cir. 1990) (noting EPA-related issue).
their components when the batteries are salvaged.138 Given that Safe Air does not stem from the enforcement of an EPA regulation like AMC I, AMC II and ILCO, but rather from the alleged violation of RCRA, these cases fail to provide persuasive authority.139

C. Creation of a Loophole

The Ninth Circuit’s holding created a loophole that permits any disposal process as long as the waste is eventually returned to the soil.140 The court cited House Report 94-1491’s exception for “agricultural wastes which are returned to the soil as fertilizers or soil conditioners” as evidence that bluegrass residue is outside RCRA’s scope.141 The court indicated that determining whether materials were “discarded” was independent from the method in which such materials were handled.142 Such a posture disregards crucial differences among waste handling methods.143 For example, this analysis treats fertilization via burning and mulching equally, ignoring that burning waste creates possible air pollution, while mulching does not.144 The legislative history indicates that this aspect of the majority’s holding is contrary to Congress’ overall environmental policy; House Report 94-1491 demonstrates that Congress considered burning, as a disposal method for waste, the “last remaining loophole in environmental law.”145 Furthermore, no evidence shows that Congress wanted to create a special exception for burning bluegrass residue among other types of waste.146

138. See ILCO, 996 F.2d 1126, 1127-28 (11th Cir. 1993) (explaining action arose in response to EPA enforcing regulating against secondary lead smelter).

139. See Safe Air, 373 F.3d at 1035 (noting reasons why action was brought in principle case); see also id. at 1051 (Paez, J., dissenting) (explaining that EPA has responsibility of regulating “solid wastes” that are also “hazardous” under Subtitle C of RCRA).

140. See id. at 1050 (Paez, J., dissenting) (responding to claim that because burned bluegrass residue acts as fertilizer for fields that it is not “discarded” under RCRA).

141. See id. at 1049-50 (Paez, J., dissenting) (quoting from H.R. REP. No. 94-1491(I), at 2) (explaining that bluegrass residue falls outside RCRA’s scope).

142. See id. at 1050 n.6 (Paez, J., dissenting) (noting investigation into whether residue is solid waste cannot be disentangled from residue handling).

143. See id. (discussing waste handling).

144. See Safe Air, 373 F.3d at 1050 n.6 (Paez, J., dissenting) (giving example of different effects that alternate disposal techniques have on environment).

145. See H.R. REP. No. 94-1491(I), at 37-38, 90 (showing concern for air pollution that could result from burning).

146. See Safe Air, 373 F.3d at 1050 (Paez, J., dissenting) (indicating there are no statutes or other declarations from Congress creating special exception for bluegrass residue burning).
The Ninth Circuit, therefore, should not have ignored the important issue of handling methods.\textsuperscript{147}

D. Genuine Issues of Material Fact Remain

Even if one were to follow the Ninth Circuit's reasoning, the court failed to recognize that a genuine issue of material fact existed in the case.\textsuperscript{148} The question still remains of how the bluegrass residue is destined for immediate reuse as part of the industry's ongoing production process.\textsuperscript{149} Inquiries into the Farmers' intent, the purpose of removing the residue, and the mechanics of the process are relevant.\textsuperscript{150}

On a summary judgment motion, dismissal is only appropriate where no genuine issue of material fact exists.\textsuperscript{151} Using the majority's analysis of "discarded" materials, the court requires an inquiry into whether the bluegrass residue was reused in a continuous process by the generating industry.\textsuperscript{152} A genuine issue of material fact resulted, then, as to the value of the bluegrass residue to the Farmers.\textsuperscript{153} While both sides acknowledged the benefits of bluegrass residue to the growth process, the parties disagreed over whether it was these benefits or the inexpensive nature of open burning that determined why farmers utilized this method.\textsuperscript{154} With such a significant issue left unanswered, the Ninth Circuit should have reversed the district court's holding and remanded the case.\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{147} See id. at 1049 (Paez, J., dissenting) (stating court was mistaken in considering other circuit court cases when determining definition of "discard" rather than applying plain meaning).
\item \textsuperscript{148} See id. at 1051-53 (Paez, J., dissenting) (explaining unresolved issues of material fact still exist).
\item \textsuperscript{149} See id. at 1052 (Paez, J., dissenting) (raising question of Farmers' intent behind burning of bluegrass residue).
\item \textsuperscript{150} See id. (referring to length of time that residue is out in fields before it is burned when speaking of "mechanics" of process).
\item \textsuperscript{151} See \textit{Great W. Bank \& Trust v. Koiz}, 532 F.2d 1252, 1254 (9th Cir. 1976) (noting dismissal is improper if party has stated valid claim).
\item \textsuperscript{152} See \textit{Safe Air}, 373 F.3d at 1052 n.9 (Paez, J., dissenting) (reviewing steps in majority's analysis of term "discarded").
\item \textsuperscript{153} See id. at 1052-53 (Paez, J., dissenting) (noting failure to resolve issue of whether burning bluegrass residue is part of continuous process).
\item \textsuperscript{154} See id. at 1052 (Paez, J., dissenting) (explaining different accounts as to value of bluegrass residue to Farmers).
\item \textsuperscript{155} See id. at 1052-53 (Paez, J., dissenting) (stating summary judgment is inappropriate where genuine issue of material fact exists).
\end{itemize}
E. Unanswered Public Health Questions

The court's narrow interpretation of RCRA also diverges from the Ninth Circuit's decision in *Hanford*, which noted that remedial statutes aimed at protecting public health should be read broadly in order to best satisfy legislative intent. By dismissing *Safe Air* at such a preliminary stage, the court did not address the central question of the claim—whether the open burning of bluegrass residue threatens public health.

Currently, open burning of bluegrass residue is satisfactory under EPA regulations and Idaho state law. Open burning of bluegrass residue, however, causes dangerous spikes in the number of airborne pollutants, which could pose serious health problems to local residents. This means unhealthy levels of airborne pollutants are in the air during the field burning season but, when viewed over the course of an entire year, the average amount of air pollution falls within acceptable standards. If the court interpreted RCRA broadly to include bluegrass residue as "solid waste," it could advance to a subsequent level of analysis and determine whether the public health remains threatened despite compliance with *annual* air pollution rates.

The majority's decision to read RCRA's language narrowly prohibits this statute from serving its legislative purpose of safely managing the nation's solid waste. In doing so, the majority leaves unresolved a material issue regarding the true value of bluegrass residue for the Farmers, creating a possible loophole for future producers of solid waste to avoid RCRA as long as they return waste to the soil, regardless of the environmental effects.

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156. 71 F.3d 1469 (9th Cir. 1995).
157. *See Safe Air*, 373 F.3d at 1049 n.4 (Paez, J., dissenting) (citing *Hanford*, 71 F.3d at 1481) (describing when remedial statutes should be read broadly).
158. *See id.* at 1038 n.1 (noting SAFE's contention that open burning causes public health problems).
160. *See id.* (explaining that these days usually occur in summertime).
161. *See id.* (discussing problems created by yearly standards for airborne pollutants).
162. *See Safe Air*, 373 F.3d at 1041 (noting process of determining claim under RCRA "citizen suit provision").
163. *See id.* at 1040-41 (citing purpose behind RCRA stated in *AMC I*).
164. *See id.* at 1047-54 (Paez, J., dissenting) (objecting to majority's holding in principal case).
VI. IMPACT

Given that the primary issue in *Safe Air* involves the narrow question of defining the term “discard,” the direct effect of this decision will likely be limited in scope. In future Ninth Circuit cases, bluegrass residue will not be considered “solid waste” under RCRA. Furthermore, other circuit courts will, at the very least, consider this case when deciding similar fact patterns in their own jurisdictions.

The prevailing consequence of *Safe Air* may be the court’s method of determining whether a material is “solid waste.” First, the court interpreted RCRA using the accepted steps of statutory interpretation: analysis of language and legislative history. Next, the court adopted the reasoning of other circuits when refining its definition of “solid waste.” The Ninth Circuit’s decision to narrowly read the undefined term “discarded materials” within the greater definition of “solid waste” indicates that new measures might be required within the field of environmental law. Such measures, starting with a clearer statutory definition for “discarded materials,” would allow future litigants to proceed to the next, and arguably more important, stage of the analysis: whether burning agricultural waste is harmful to the public.

The Ninth Circuit failed to answer this question even though it had legitimate means to do so. The court could have read “discarded materials” broadly to include bluegrass residue. Instead, the court chose to use a restricted definition of “discarded materi-

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165. See id. at 1041 (noting that issue of whether bluegrass residue is “solid waste” under RCRA is “crux of the case”).
166. See id. at 1047 (giving holding of case).
167. See Safe Air, 373 F.3d at 1041-43 (showing how Ninth Circuit examined other circuit courts’ precedents in determining definition of “solid waste”).
168. See id. at 1040-41 (noting how court approached its review of RCRA and its definitions).
169. See id. at 1045 (interpreting RCRA required court to examine statute’s language).
170. See id. at 1041-43 (discussing court’s use of other circuit court cases in defining “solid waste”).
171. See id. at 1048-49 (Paez, J., dissenting) (noting court’s definition of “discarded materials” extends beyond plain, ordinary meaning).
172. See Safe Air, 373 F.3d at 1048 n.3 (noting district court did not address issue of whether burning bluegrass residue is dangerous to health or environment).
173. See id. at 1049 (explaining court could have stopped analysis at plain meaning of “discard”).
174. See id. at 1048-51 (noting bluegrass residue could fit within ordinary definition of “solid waste”).
Als" for EPA regulation cases.\textsuperscript{175} Because of the destructive nature of SAFE’s allegations against open burning, future litigants will need a forum that will allow their complaints to be heard.\textsuperscript{176} Otherwise, RCRA, which was created to reduce the negative health effects arising from the disposal of solid waste, will fail.

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\textsuperscript{175} See \textit{id.} (noting court’s decision to use restricted definition of “solid waste”).

\textsuperscript{176} See, e.g., \textit{FAQs, supra} note 7, (detailing SAFE’s allegations of ill health effects caused by open burning of bluegrass residue).