

9441.1993(11)

CLARIFICATION OF RCRA REGULATORY APPLICATION TO SOILS
CONTAMINATED BY CEMENT KILN DUST

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

June 30, 1993

MEMORANDUM

Subject: Clarification of RCRA Regulatory Application
to Soils Contaminated by Cement Kiln Dust

FROM: Sylvia K. Lowrance
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To: Robert L. Duprey
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This memorandum is in response to your memorandum dated March 9, 1993, in which you seek clarification of whether soils which are contaminated by constituents from cement kiln dust (CKD), and which, as a result, fail the toxicity characteristic leaching procedure (TCLP), must be managed as RCRA hazardous waste.

As you know, Section 3001(b)(3)(A) of RCRA exempts CKD from regulation under RCRA Subtitle C pending a Report to Congress and subsequent determination of whether the waste should be regulated under Subtitle C. The exemption for CKD means that CKD cannot be regulated as hazardous waste under Subtitle C prior to the Report to Congress and subsequent regulatory determination, even if it exhibits one of the characteristics of hazardous waste identified at 40 CFR Part 261 Subpart C. With respect to CKD-contaminated soils described in your letter that exhibit the TC because of that

CKD contamination, we believe that the statutory exemption must be read to exempt those soils from regulation under Subtitle C of RCRA. The rationale for this interpretation of the Bevill amendment is that the CKD exemption remains with the CKD, even when it migrates into soils, provided that the exempt CKD is the only reason that the contaminated soil would, absent the Bevill amendment, be considered a RCRA hazardous waste. As a result, the contaminated soil would, in effect, be Bevill exempt. (See *Chemical Waste Management v EPA*, 869 F.2d 1526, 1537-1540 (D.C. Cir. 1989) and *Solite v EPA*, 952 F.2d 473, 493-494 (D.C. Cir. 1991).)

The Agency faced a similar issue in its regulatory determination for mining waste, and the approach taken in this memorandum is similar to the Agency's mining waste determination. In the *Mining Waste Exclusion; Final Rule* (54 FR 36592, September 1, 1989), the Agency states, with respect to mixtures of Bevill wastes and non-Bevill wastes, that if "the mixture exhibits one or more hazardous characteristics exhibited by the Bevill waste, but not by the non-excluded characteristic waste, then the mixture would not be a hazardous waste." 54 FR at 36622. Similar logic applies to the situation described in your memorandum. If the contaminated soils are exhibiting the TC because of the presence of CKD constituents, then the Bevill exemption applies to the contaminated media. However, if the soil is hazardous for reasons other than CKD contamination, then the contaminated soil is not excluded from Subtitle C requirements by the Bevill amendment.

In light of the above discussion, a couple of issues concerning the contaminated soils described in your memorandum must be clarified prior to confirming their regulatory status. First, do the metals that cause the soil to exhibit the TC come from the CKD itself or was either (1) the CKD mixed with a listed or characteristic hazardous waste bearing such metals prior to being brought into contact with the soil or (2) did the soil already exhibit the TC prior to being contaminated by CKD? If the metals in the CKD are not the reason for the soil exhibiting the TC, then the contaminated soil would not enjoy the Bevill exemption from RCRA Subtitle C requirements.

A second question, which you have also raised, is whether it is possible that secondary mobilization is taking place, such that constituents in the CKD are not directly causing the contaminated soil to exhibit the TC, but rather, that the pH of the groundwater in contact with and affected by the CKD is causing otherwise

non-available metals in the soil to become mobilized and thus cause the soil to fail the TCLP? We are still taking this issue under consideration, and have not conducted a complete analysis at this time.

If you have any comments or further questions, please have your staff contact either Mark Badalamente (OGC, 202-260-9745) or Bill Schoenborn (WMD, 703-803-8483) of our respective staffs.

1 In the 1991 Boilers and Industrial Furnaces (BIF) Final Rule 56 FR 7134 (February 21, 1991), EPA specified the extent to which CKD wastes from cement kilns that burn hazardous waste would still be subject to the Bevill exemption. See 40 CFR §266.112. Since it is our understanding that, regardless of whether the CKD was produced by a kiln that burned hazardous waste, the CKD at issue in your inquiry was generated and deposited on the ground before the effective date of the BIF rule, that rule, and specifically the provision at 40 CFR §266.112, would not be applicable. Of course, for CKD generated after the effective date of the BIF rule, section 266.112 would have to be consulted to determine whether the CKD would retain the Bevill exemption.