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BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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ENVIR. APPEALS BOARD

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In re: :  
: :  
Leed Foundry, Inc. : EAB RCRA No. 07-02  
: :  
RCRA Docket 03-2004-0061 :  
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Washington, D.C.

Thursday, December 6, 2007

The above-entitled matter came on  
for ORAL ARGUMENT at approximately 10:32 a.m.  
at the Environmental Protection Agency, EPA  
East Building, 1201 Constitution Avenue, NW,  
Washington, D.C.

BEFORE:

KATHIE A. STEIN  
EDWARD E. REICH  
ANNA L. WOLGAST  
Presiding Judges

2	<p>1 APPEARANCES:</p> <p>2 On behalf of Leed Foundry, Inc.:</p> <p>3 TIMOTHY J. BERGERE, ESQUIRE</p> <p>4 Montgomery McCracken Walker &amp; Rhoads, LLP</p> <p>5 123 South Broad Street</p> <p>6 Avenue of the Arts</p> <p>7 Philadelphia, Pennsylvania 19109</p> <p>8 (215) 772-7431</p> <p>9</p> <p>10 On behalf of Environmental Protection Agency:</p> <p>11</p> <p>12 PETER J. RAACK, ESQUIRE</p> <p>13 RCRA Enforcement Division (2246-A)</p> <p>14 Ariel Rios Building</p> <p>15 Room 4140-A</p> <p>16 1200 Pennsylvania Avenue, NW</p> <p>17 Washington, D.C. 20460</p> <p>18 (202) 564-4075</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	4
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 state their names for the record and whom</p> <p>2 they represent, beginning with counsel for</p> <p>3 Region III.</p> <p>4 MR. RAACK: My name is Pete Raack,</p> <p>5 Office of Civil Enforcement. I'm</p> <p>6 representing Region III in this matter.</p> <p>7 MR. BERGERE: My name is Tim</p> <p>8 Bergere. I'm with Montgomery McCracken in</p> <p>9 Philadelphia, and I represent Leed Foundry.</p> <p>10 Thank you.</p> <p>11 JUDGE REICH: Thank you.</p> <p>12 Mr. Raack, you may take the podium and begin</p> <p>13 MR. RAACK: Good morning, members</p> <p>14 of the Board. Thank you for the opportunity</p> <p>15 today to come and discuss the Region's appeal</p> <p>16 in this matter. I'd like to reserve five</p> <p>17 minutes of my time for rebuttal.</p> <p>18 First this morning, I'd like to</p> <p>19 spend approximately five to seven minutes</p> <p>20 briefly summarizing the case background and</p> <p>21 the three key points that form the foundation</p> <p>22 of our appeal, and then I'll use the balance</p>	<p>3</p>

3	<p>1 PROCEEDINGS</p> <p>2 MS. DURR: The Agency is now in</p> <p>3 session for Oral Argument In re: Leed</p> <p>4 Foundry, Inc., Docket No. RCRA-03-2004-0061,</p> <p>5 RCRA Appeal No. 07-02, the Honorable Judges</p> <p>6 Anna Wolgast, Ed Reich, Kathy Stein</p> <p>7 presiding.</p> <p>8 Please be seated.</p> <p>9 JUDGE REICH: Good morning. We're</p> <p>10 hearing argument this morning on the matter</p> <p>11 of Leed Foundry, Inc., a RCRA enforcement</p> <p>12 appeal pursuant to the Board's order of</p> <p>13 August 22, 2007.</p> <p>14 EPA Region III has been allocated</p> <p>15 30 minutes for its argument. The Region may</p> <p>16 reserve up to five minutes of its allocated</p> <p>17 time for rebuttal, and counsel for the Region</p> <p>18 should advise the Board at the beginning of</p> <p>19 his argument whether he is reserving time.</p> <p>20 Leed Foundry has also been</p> <p>21 allocated 30 minutes for its argument. I</p> <p>22 would like to begin by asking counsel to</p>	5
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 of my time to discuss each point in turn more</p> <p>2 fully.</p> <p>3 The initial decision in this case</p> <p>4 is contrary to a regulatory determination</p> <p>5 issued by the administrator as mandated by</p> <p>6 Congress in RCRA's Bevill amendment. As a</p> <p>7 final concluded regulatory matter, the</p> <p>8 presiding officer should not have entertained</p> <p>9 a collateral challenge to it in an</p> <p>10 enforcement case.</p> <p>11 EPA has always interpreted the</p> <p>12 Bevill exemption to be limited in scope to</p> <p>13 utility and other steam production operations</p> <p>14 in boiler and boiler-like units. EPA has</p> <p>15 never considered, nor even implied that</p> <p>16 baghouse dust from grey iron foundries is</p> <p>17 excluded from RCRA's Hazardous Waste Program</p> <p>18 under the Bevill amendment.</p> <p>19 It is undisputed that grey iron</p> <p>20 foundries are not energy or steam production</p> <p>21 operations. And the waste at issue in this</p> <p>22 appeal does not come from a boiler or</p>	<p>4</p>

6	<p>1 boiler-like unit.</p> <p>2 Within three months of the</p> <p>3 enactment of the Bevill amendment, EPA</p> <p>4 announced in a Federal Register notice its</p> <p>5 position that this exact waste is subject to</p> <p>6 regulation, and that generators are obligated</p> <p>7 to test it to determine whether it exhibits a</p> <p>8 hazardous characteristic.</p> <p>9 The presiding officer's decision</p> <p>10 directly contradicts this 25-year-old Agency</p> <p>11 position as well as the D.C. Circuit Court's</p> <p>12 Horsehead, Solite and EDF II decisions that</p> <p>13 address EPA's interpretation of the Bevill</p> <p>14 amendment.</p> <p>15 Before I summarize the three issues</p> <p>16 we've raised on appeal, I'd like to note some</p> <p>17 background and factual and procedural points.</p> <p>18 The subject of this case is highly</p> <p>19 contaminated baghouse dust generated at</p> <p>20 Respondent's cupola furnace.</p> <p>21 The cupola furnace is used to</p> <p>22 co-process contaminated scrap metal to make</p>	8	<p>1 the term of art as used in the Bevill</p> <p>2 amendment?</p> <p>3 MR. RAACK: That's correct.</p> <p>4 JUDGE REICH: And is that true as</p> <p>5 to fly ash as well? For instance, if we were</p> <p>6 to conclude that the Bevill amendment did in</p> <p>7 fact cover waste from grey iron foundries,</p> <p>8 would the Region dispute that the waste we</p> <p>9 are talking about here would then be</p> <p>10 considered fly ash?</p> <p>11 MR. RAACK: Well, we think there's</p> <p>12 only one operative definition of fly ash, and</p> <p>13 it's the one the Agency developed during the</p> <p>14 rulemaking, during the regulatory process,</p> <p>15 and that's uncombusted particles that come</p> <p>16 out of a boiler. And as it's not disputed</p> <p>17 they don't have a boiler, we would</p> <p>18 specifically assert that they do not have the</p> <p>19 kind of fly ash that's exempted under this.</p> <p>20 JUDGE REICH: But the way you've</p> <p>21 framed that, it sounds like in the broader</p> <p>22 sense you are admitting this is fly ash;</p>
7	<p>1 iron products such as manhole covers, and</p> <p>2 it's that co-processing that generates the</p> <p>3 baghouse dust.</p> <p>4 JUDGE REICH: Can I ask a couple of</p> <p>5 questions to clarify what is within the scope</p> <p>6 of your appeal? I did not see you contesting</p> <p>7 in your appeal, as you did below, whether</p> <p>8 Leed's wastes were generated primarily from</p> <p>9 the combustion of fossil fuel. Is that in</p> <p>10 your mind still a factual issue, or have you</p> <p>11 acceded to the ALJ's finding in that regard?</p> <p>12 MR. RAACK: We think that those</p> <p>13 terms, as they show up first in the statute</p> <p>14 and then in EPA's regulation, have been</p> <p>15 determined through the regulatory decision</p> <p>16 process that EPA engaged in. And it's still</p> <p>17 our contention, because EPA has defined those</p> <p>18 terms, that they do not qualify from that.</p> <p>19 JUDGE REICH: So you're saying they</p> <p>20 don't qualify not because they're not</p> <p>21 51 percent or more, but because it's a term</p> <p>22 of art, and they're not within the scope of</p>	9	<p>1 however, to the extent that you see that term</p> <p>2 having been circumscribed by the Bevill</p> <p>3 amendment and the way the Agency has defined</p> <p>4 it, it's not that kind of fly ash.</p> <p>5 MR. RAACK: I think that's right.</p> <p>6 We would concede that the baghouse picks up</p> <p>7 the uncombusted particles that come out of</p> <p>8 the cupola furnace.</p> <p>9 JUDGE REICH: Okay. Thank you.</p> <p>10 MR. RAACK: It is undisputed that</p> <p>11 this waste, the baghouse dust, generated over</p> <p>12 regulated levels for lead -- leachate samples</p> <p>13 were 180 times the regulated level, and for</p> <p>14 cadmium, the samples were 10 times the</p> <p>15 regulated level. After several inspections</p> <p>16 where EPA found this baghouse dust had been</p> <p>17 stockpiled at the facility for many years</p> <p>18 minimally covered and generally uncontained,</p> <p>19 EPA filed a complaint in 2004 which included</p> <p>20 both RCRA and Clean Water Act counts.</p> <p>21 The Clean Water Act counts are not</p> <p>22 at issue in this appeal.</p>

10	<p>1 JUDGE STEIN: Can I ask a question</p> <p>2 of whether today the company is managing this</p> <p>3 material as a hazardous waste? Do we have</p> <p>4 that before us in the record?</p> <p>5 MR. RAACK: On the record, we have</p> <p>6 a stipulation that the parties filed that</p> <p>7 after EPA's inspection, the facility began</p> <p>8 removing and properly disposing the material</p> <p>9 that had been stockpiled for many years. But</p> <p>10 we don't have in the record whether today</p> <p>11 they're in compliance with RCRA, and we know</p> <p>12 that inspections that have happened after the</p> <p>13 complaint had been issued have detected some</p> <p>14 violations. I don't know if that's in the</p> <p>15 record, but --</p> <p>16 JUDGE STEIN: Is the Agency seeking</p> <p>17 any injunctive relief here, or is this about</p> <p>18 sort of liability penalty issues?</p> <p>19 MR. RAACK: This is essentially a</p> <p>20 liability and penalty issue case.</p> <p>21 JUDGE STEIN: Okay. Thank you.</p> <p>22 MR. RAACK: In the answer to the</p>	12	<p>1 about how you label that particular</p> <p>2 determination.</p> <p>3 In footnote 57, you suggest, as I</p> <p>4 read it, but for American Portland Cement,</p> <p>5 you would be calling it a regulation, but you</p> <p>6 are not quite, but then at the end of that</p> <p>7 footnote, there's in fact a sentence that</p> <p>8 tries to distinguish American Portland</p> <p>9 Cement, and says the waste, "may properly be</p> <p>10 considered" -- that that determination "may</p> <p>11 properly be considered a regulation."</p> <p>12 And similarly, in footnote 88, you</p> <p>13 state that the regulatory determinations</p> <p>14 "might be deemed regulations." When I look</p> <p>15 at the 2002 determination, and I'm looking</p> <p>16 particularly at 65 FR 32235, it says,</p> <p>17 "Today's action is not a regulation."</p> <p>18 There's nothing that seems to</p> <p>19 distinguish between different components of</p> <p>20 that determination in that regard.</p> <p>21 So how can you in the face of that</p> <p>22 language expressly in the determination</p>
11	<p>1 complaint, Respondent raised an affirmative</p> <p>2 defense that its waste was statutorily exempt</p> <p>3 pursuant to the Bevill amendment. The</p> <p>4 parties filed opposing motions with the</p> <p>5 Region seeking to strike that affirmative</p> <p>6 defense, while the Respondent sought to</p> <p>7 obtain a partial accelerated decision. The</p> <p>8 presiding officer agreed with Respondent.</p> <p>9 I think the brief sufficiently has</p> <p>10 set forth the rest of the facts which are not</p> <p>11 in dispute here.</p> <p>12 Let me now turn to a brief overview</p> <p>13 of the three points I'll address in my</p> <p>14 remarks this morning. First, in line with</p> <p>15 well-established Board precedent, EPA's</p> <p>16 concluded Bevill amendment regulatory</p> <p>17 decision, issued after the extensive process</p> <p>18 laid out in the statute, should not be</p> <p>19 subject to collateral challenge in an</p> <p>20 enforcement case.</p> <p>21 JUDGE REICH: Can I ask about that?</p> <p>22 You in your appeal seemed to be cautious</p>	13	<p>1 itself even suggest that there's a</p> <p>2 possibility that this is a regulation?</p> <p>3 MR. RAACK: Well, first, our</p> <p>4 characterization is that it definitively is a</p> <p>5 final agency action, and appealable under the</p> <p>6 Administrative Procedures Act. And second,</p> <p>7 as the footnotes you referenced point out,</p> <p>8 there remains a question as to whether it</p> <p>9 could be characterized as a regulation.</p> <p>10 JUDGE REICH: How is there a</p> <p>11 question if the Agency states on the face of</p> <p>12 the document that it's not a regulation?</p> <p>13 MR. RAACK: Well, I think the</p> <p>14 regulation -- the case law will tell us that</p> <p>15 regulations can take many forms, and I think</p> <p>16 while we would potentially say it wouldn't</p> <p>17 be, what we're saying is there's an avenue</p> <p>18 for an outside party potentially</p> <p>19 arguing -- and I don't -- I'm not sure a</p> <p>20 court would look at only Agency's language</p> <p>21 and description to settle that --</p> <p>22 JUDGE REICH: So you're saying that</p>

4 (Pages 10 to 13)

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1 the Agency itself is not suggesting that it's  
2 a regulation, notwithstanding the language in  
3 your couple of footnotes.  
4 MR. RAACK: We're suggesting that a  
5 possibility remains for a party to argue  
6 that.  
7 JUDGE REICH: Okay.  
8 JUDGE WOLGAST: But why is that  
9 question live after American Portland Cement?  
10 Why isn't that case controlling as to the  
11 issue as to whether or not it's a regulation?  
12 MR. RAACK: In American Portland  
13 Cement, they looked specifically at the reg  
14 determination that was in question there, the  
15 cement kiln dust regulatory determination,  
16 and what seemed to be persuasive to the court  
17 there was what the substance of the  
18 announcement was, what was the determination  
19 in that case -- the substance of the  
20 determination was that additional regulations  
21 under subtitle C were warranted and were yet  
22 to be promulgated. And here, we don't have

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1 that situation. Here, it is a definitive and  
2 dispositive determination as to the exempt  
3 universe of wastes.  
4 So we think that there is again the  
5 potential that an argument could be made that  
6 because the nature of the determination is  
7 different, it didn't simply announce  
8 something yet to come that would be then ripe  
9 for review, that someone could make that  
10 claim. And that's why we think the case  
11 might be distinguishable.  
12 JUDGE STEIN: Did anyone appeal the  
13 regulatory determination? Any party?  
14 MR. RAACK: In this case, the  
15 fossil fuel combustion waste?  
16 JUDGE STEIN: Yes.  
17 MR. RAACK: No. There was not an  
18 appeal.  
19 JUDGE STEIN: Was there an appeal  
20 as to other wastes, like mineral processing  
21 wastes?  
22 MR. RAACK: There have been appeals

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1 of other regulatory determinations, if that's  
2 what you are asking. The May 2000 --  
3 JUDGE STEIN: Any Bevill-related  
4 case?  
5 MR. RAACK: Yes. Parties have  
6 appealed Bevill-related regulatory  
7 determinations.  
8 JUDGE STEIN: But no one appealed  
9 the 2002 determination?  
10 MR. RAACK: I think it's May 2000.  
11 JUDGE STEIN: May 2000? Okay.  
12 MR. RAACK: May 2000 regulatory  
13 determination, which was the final regulatory  
14 step in the process here. That's right.  
15 JUDGE STEIN: And no one appealed  
16 that, to your knowledge?  
17 MR. RAACK: No one appealed that.  
18 JUDGE STEIN: What difference does  
19 it make for our purposes in terms of -- when  
20 we're dealing -- let's assume that we in fact  
21 are dealing with final Agency action and that  
22 it's not a regulation. Why is it that the

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1 Board should treat that regulatory  
2 determination like a regulation for purposes  
3 of how the Board traditionally approaches  
4 those kinds of issues? What's similar,  
5 what's different?  
6 MR. RAACK: Well, in the Board's  
7 Echevarria line of cases that have  
8 established a presumption of  
9 non-reviewability of regulatory decisions,  
10 the Board has looked at things like the  
11 ability for a party to appeal in another  
12 forum as a mark of whether the decision ought  
13 to be opened up in a subsequent enforcement  
14 action, and that's exactly what we have here.  
15 So what our brief suggests is not  
16 only was it clearly appealable under the APA,  
17 but again, our footnote suggests there might  
18 be other avenues. So there's that hallmark  
19 that it was appealable elsewhere and  
20 challengeable judicially.  
21 Another hallmark is that it went  
22 through an elaborate process of notice and

1 comment, this regulatory determination, and  
2 the Board seemed to look at that as a  
3 persuasive factor -- Echevarria and a number  
4 of cases that have followed Echevarria.

5 JUDGE STEIN: You mentioned earlier  
6 in your remarks -- I believe you were  
7 referring to a proposed listing of this  
8 particular waste in which the -- back in I  
9 believe 1980 -- I don't think you mentioned  
10 the date -- can you tell me whether or not  
11 any appeals of -- well, I guess it wasn't  
12 final Agency action, it was simply a  
13 proposal; is that it?

14 MR. RAACK: That's right.

15 JUDGE STEIN: Okay.

16 MR. RAACK: It was 1981. The  
17 Agency had through a series of notices  
18 proposed to list baghouse dust from grey iron  
19 foundry cupola furnaces. And in 1981 when  
20 the Agency was extending -- saying that it  
21 was still under consideration, the  
22 Agency -- the administrator actually stated,

1 but of course, this does not mean that  
2 generators are not under an obligation to  
3 test their waste, because if it tests and  
4 exhibits hazardous characteristics, it is  
5 covered by the RCRA program.

6 And that was in the 1981 Federal  
7 Register notice that was talking about that  
8 waste, along with some other wastes and the  
9 proposal status the Agency was continuing to  
10 look at to determine whether listing status,  
11 above and beyond whether it would just be  
12 subject to the normal hazardous  
13 characteristic tests, was warranted.

14 The second point we address in our  
15 appeal is that if the Board were to look at  
16 the underlying question of statutory  
17 interpretation, the Board would readily  
18 conclude that Congress left to EPA's  
19 expertise the task of scoping out the exact  
20 universe of wastes that required further  
21 study before EPA determined whether they  
22 should be included in the hazardous waste

1 program.

2 JUDGE WOLGAST: Could you address  
3 Leed Foundry's argument that Congress chose  
4 not to, in the terms of the statute, limit  
5 the universe of Bevill to utilities and other  
6 power-generating boilers and other such  
7 activities?

8 MR. RAACK: Sure, sure. It may be  
9 helpful to look at the language and compare,  
10 and what I'd like to do is compare the  
11 Agency's 1978 proposal and the 1980 Bevill  
12 amendment language, if I can.

13 As you know, Congress specifically  
14 referenced in the conference report to the  
15 Bevill amendment that it was incorporating  
16 the 1978 proposal, EPA's special waste  
17 concept in the Bevill amendment. So I think  
18 it is instructive to look at what the  
19 language changes are.

20 Congress adopted some of EPA's  
21 language but not all of it. I don't know if  
22 I did that, but as you can see in the top

1 proposal, the Agency identified three types  
2 of wastes, and indicated it was solely from  
3 steam power -- generated by steam power  
4 plants solely from use of fossil fuels. The  
5 Bevill amendment changed this language  
6 slightly and we think there are likely four  
7 reasons that come out of legislative history  
8 for those changes.

9 The first change is an obvious one.  
10 Congress recognized that there was an  
11 additional type of waste that boilers and  
12 utilities could produce, that's slag. The  
13 second difference, we think, in the  
14 legislative history, clearly Congress wanted  
15 to encourage and didn't want this exemption  
16 to somehow work as a discouragement to  
17 facilities to use alternative fuels along  
18 with fossil fuels.

19 And so it didn't want a  
20 technicality to be raised that the use of,  
21 say, 5 or 10 percent of alternative fuels  
22 would somehow knock out this exemption

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1 applicability of a facility, so they  
2 broadened the language slightly.  
3       There's some indication, not as  
4 much as the alternative fuels indication,  
5 that Congress also wanted to ensure that  
6 co-managed wastes -- wastes that maybe didn't  
7 come from the combustion activity but were  
8 innocuous and may be just managed onsite with  
9 fly ash or some of this other material at a  
10 boiler or utility operation -- wouldn't also  
11 undo the exemption. There's some -- again,  
12 some legislative history indicates that.  
13       And the fourth is that Congress,  
14 likely as the Agency did, recognized that  
15 large-scale boiler operations -- and this  
16 exact kind of waste isn't just generated  
17 solely at power plants, but in fact boilers,  
18 large-scale boilers and the same kind of  
19 wastes are generated anywhere someone needs  
20 to produce steam.  
21       JUDGE REICH: What is the clearest  
22 indication of congressional intent that when

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1 they broadened the scope beyond utilities  
2 that they were intending it only to cover  
3 other facilities that were similar to  
4 utilities in terms of boiler operations?  
5 Where do we see that that was the limit of  
6 what they were intending by dropping out the  
7 more-limiting EPA language?  
8       MR. RAACK: Well, the clearest case  
9 I think would be the language itself, by  
10 dropping steam power plants. But I think  
11 there's some legislative testimony, if I'm  
12 not mistaken, that indicated that it knew  
13 this type of waste was not just a  
14 utility-based waste and may be generated in  
15 the "real world," as I think Bevill put it,  
16 at numerous types of facilities. But the  
17 conference report itself tied all of this  
18 language back to EPA's special waste concept,  
19 a concept itself that's limited to, of  
20 course, low-hazard, high-volume waste.  
21       And as the D.C. Circuit court has  
22 found in three relevant cases, that EPA

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1 is -- this was not only in reference to help  
2 EPA define it, but EPA was specifically  
3 required to go no farther than low-hazard,  
4 high-volume waste in interpreting Bevill.  
5       JUDGE STEIN: Is there any dispute  
6 between the parties in this case that this is  
7 not low-hazard waste?  
8       MR. RAACK: There is no dispute, as  
9 they've stipulated to the results of the TCLP  
10 testing, which as I indicated were as high as  
11 180 times the regulated level.  
12       JUDGE REICH: At one point in your  
13 appeal, you seem to ascribe some significance  
14 to the fact that Congress in the Bevill  
15 amendment adopted the same language that EPA  
16 had put in the May 1980 rulemaking, but am I  
17 not correct that the May 1980 rulemaking  
18 basically just put in what was already  
19 pending before Congress and what the Agency  
20 anticipated was going to come out of  
21 Congress?  
22       MR. RAACK: I think that's fair.

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1       JUDGE REICH: So there's really  
2 nothing about the fact that the language is  
3 similar to suggest that Congress was looking  
4 to EPA at that point. In fact, it was the  
5 reverse; EPA was looking to Congress at that  
6 point.  
7       MR. RAACK: I think that's right.  
8 At that point, the Congress didn't adjust the  
9 language any further. It had already  
10 adjusted the language and referred again in  
11 the conference report to EPA's 1978 proposal  
12 for its adoption of the concept.  
13       Our third point that we raise on  
14 appeal is that EPA has given more than  
15 adequate notice of its position that baghouse  
16 dust from grey iron foundries, the waste at  
17 issue here, is subject to RCRA's hazardous  
18 waste program and not categorically exempt  
19 under the Bevill amendment.  
20       This position has been articulated  
21 in Federal Register notices as part of the  
22 rulemakings, in definitive Agency statements

1 published during the Bevill regulatory  
2 process, and in Agency letters and guidance  
3 prepared for the regulating community.

4 I'd like to turn now and discuss  
5 what we'd like the Board to do. We ask that  
6 the Board reverse the ALJ's initial decision  
7 and allow the RCRA portion of the case to  
8 proceed. If this decision were to stand, it  
9 would leave the Agency with no authority to  
10 ensure proper day-to-day regulatory controls  
11 concerning this facility's waste, which is  
12 absolutely necessary given its high toxicity.

13 The decision could have very  
14 negative implications on, at the very least,  
15 the proper management of iron foundry wastes  
16 nationwide. The decision would potentially  
17 undermine 27 years of regulation of a large  
18 segment of the regulated community that has  
19 never considered itself exempt. And finally,  
20 affirming the ALJ's decision would require  
21 EPA to reopen the Bevill work.

22 After nearly a decade of believing

1 this matter concluded, the Agency would have  
2 to first figure out all the types of waste  
3 streams that potentially suddenly could be  
4 covered, and then begin conducting additional  
5 studies in anticipation of another report to  
6 Congress and another regulatory  
7 determination.

8 JUDGE REICH: Much of what you cite  
9 in support of your position seems to require  
10 us to infer that the Bevill amendment doesn't  
11 apply. Other than the Jim Scarborough  
12 determination, is there anything else that  
13 affirmatively discusses whether grey iron  
14 foundries are covered by the Bevill  
15 amendment, that specifically talks about the  
16 Bevill amendment?

17 MR. RAACK: The 1999 report to  
18 Congress very clearly laid out the universe  
19 of who was covered, and left no question as  
20 to the type of --

21 JUDGE REICH: But it never  
22 mentions -- what I'm looking for is something

1 that actually specifically talks about grey  
2 iron foundries, not an inference that we can  
3 come to by omission. And from what I can  
4 tell from what you've cited, and I want to  
5 make sure that I'm not missing anything, the  
6 only thing I saw that was of that character  
7 was the Jim Scarborough determination.

8 MR. RAACK: I think that's right.  
9 That was the Region IV letter that OSW  
10 participated in the drafting and issuing of.  
11 However, in the 1981 administrator statement,  
12 Federal Register notice about grey iron  
13 foundry baghouse dust, the administrator was  
14 talking about a number of different wastes,  
15 and one of the other wastes actually was  
16 pulled from the proposed listing because of  
17 the Bevill exemption.

18 And while it's still an inference,  
19 it's a very strong inference that the Agency  
20 knew exactly what the Bevill amendment meant  
21 at that time and what it meant to be exempt,  
22 and still went ahead with that notice about

1 this type of waste, saying that it's clearly  
2 covered by the hazardous waste program.

3 But again, we would look to the  
4 1999 report to Congress as leaving no  
5 question as to what the universe of wastes  
6 were, and that there's no question an iron  
7 foundry could not qualify under either the  
8 description of the waste, the type of  
9 technology studied, or the type of facilities  
10 that generate the material.

11 JUDGE REICH: You had indicated  
12 that there was a stipulation that this was a  
13 characteristic waste, as I understood it, or  
14 at least at levels that would constitute a  
15 characteristic waste. Was there any  
16 stipulation that but for the Bevill  
17 amendment, that Leed Foundry would be liable?  
18 I'm trying to determine if we came to a  
19 conclusion that the Bevill amendment did not  
20 apply, whether there's an open issue as to  
21 liability, or whether it then just becomes a  
22 question of whether a penalty is appropriate,



30	<p>1 and if so, how much.</p> <p>2 MR. RAACK: Well, the process was</p> <p>3 so truncated before the presiding officer</p> <p>4 that it didn't get to that point. There was</p> <p>5 no hearing and no suggestion, and certainly</p> <p>6 no stipulation as to liability. So we do</p> <p>7 think it has to be remanded for liability and</p> <p>8 penalty proceedings.</p> <p>9 JUDGE REICH: Okay.</p> <p>10 JUDGE STEIN: The Scarborough</p> <p>11 determination or letter that Judge Reich</p> <p>12 referred to a few moments ago, was that</p> <p>13 letter made publicly available? I mean, was</p> <p>14 it on the RCRA compendium or the Internet or</p> <p>15 any of those kinds of things? I don't know</p> <p>16 that the Internet was up and running back in</p> <p>17 1984, but --</p> <p>18 MR. RAACK: The '84 letter -- the</p> <p>19 December '84 Scarborough letter was part of a</p> <p>20 series of correspondence between EPA and the</p> <p>21 state. The first set -- the first letter</p> <p>22 which came directly from headquarters to</p>	32	<p>1 Respondent chose not to get involved in the</p> <p>2 process at that time and submit comments.</p> <p>3 Respondent chose not to seek review of EPA's</p> <p>4 decision not to include foundry waste within</p> <p>5 the exemption. Respondent chose not to avail</p> <p>6 itself of any administrative process where it</p> <p>7 could have raised this issue.</p> <p>8 Instead, it sat back and stockpiled</p> <p>9 this very toxic waste, and when the</p> <p>10 regulators became concerned about the</p> <p>11 mismanagement of the waste, Respondent</p> <p>12 claimed that EPA failed to finish the Bevill</p> <p>13 regulatory process, and that its waste is</p> <p>14 therefore statutorily exempt.</p> <p>15 This is a classic case of a</p> <p>16 noncompliant facility that made no effort to</p> <p>17 properly manage its waste, nor any effort to</p> <p>18 determine how to properly manage its waste;</p> <p>19 rather, it waited until it was discovered to</p> <p>20 attempt any compliance.</p> <p>21 JUDGE REICH: I think we get the</p> <p>22 message. Any further questions?</p>
31	<p>1 Tennessee is on RCRA online. I haven't been</p> <p>2 able to determine, and I know that the</p> <p>3 Scarborough letter is not currently on RCRA</p> <p>4 online. What I haven't been able to</p> <p>5 determine through research is whether in</p> <p>6 earlier versions of RCRA online pre-internet,</p> <p>7 there was a OSW (?) policy compendium, for</p> <p>8 example, whether it was made available then.</p> <p>9 I do know that that letter was sent</p> <p>10 out to the state directors, they were CC'ed</p> <p>11 on the cover memo to -- of that letter, and I</p> <p>12 do know that that letter was questioned or</p> <p>13 specifically discussed and a point of focus</p> <p>14 in the '92-91 Wheland Foundry decision, which</p> <p>15 is publicly available, of course.</p> <p>16 I see that my time is up. May I</p> <p>17 take a moment to conclude?</p> <p>18 JUDGE REICH: Sure.</p> <p>19 MR. RAACK: The bottom line in this</p> <p>20 case is that the Respondent and the ALJ</p> <p>21 concede that grey iron foundry wastes were</p> <p>22 not included in EPA's Bevill work.</p>	33	<p>1 Thank you, Mr. Raack.</p> <p>2 Mr. Bergere?</p> <p>3 MR. BERGERE: Thank you. May it</p> <p>4 please the panel; on a professional level,</p> <p>5 I'm delighted to be here, although I must say</p> <p>6 my client's appalled that they have to</p> <p>7 continue to spend money to have me chase this</p> <p>8 matter.</p> <p>9 To address a couple of points the</p> <p>10 court raised early, the matter -- the waste</p> <p>11 material in question was, from the date of</p> <p>12 EPA's inspection forward, by tacit agreement</p> <p>13 managed as a RCRA subtitle C waste until my</p> <p>14 client did what all public utilities do with</p> <p>15 respect to their waste, which was add a</p> <p>16 particular kind of limestone treatment to the</p> <p>17 emission flume, to the flue, which then</p> <p>18 neutralizes the lead and the cadmium.</p> <p>19 And the material that's coming out</p> <p>20 of the baghouse is not RCRA TCLP hazardous,</p> <p>21 that's not a fact of record, it's just a</p> <p>22 fact. And --</p>

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1 JUDGE REICH: For the period of  
2 time prior to the EPA inspection, I gather  
3 this was not handled as a hazardous waste?  
4 MR. BERGERE: That's correct. My  
5 client did not handle it as a RCRA hazardous  
6 waste. The material was being stockpiled; it  
7 was not in complete disregard of whatever its  
8 chemical composition was; it was bermed, it  
9 was tarped, it was covered, and you know,  
10 those issues -- and we don't contest the fact  
11 that using a TCLP test, that it tested  
12 RCRA-hazardous.  
13 JUDGE REICH: If in fact the Bevill  
14 amendment did not apply, is there any  
15 argument that your client is not in fact  
16 liable?  
17 MR. BERGERE: Well, I'm not going  
18 to -- I don't want to take a position that  
19 would take away any of the other defenses we  
20 raised to the complaint, but most of those  
21 defenses, I would say to the panel, are  
22 related to mitigation of the cascading list

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1 of violations, because the way RCRA works is,  
2 if in fact we stored for more than 90 days,  
3 then there's a cascading list of violations,  
4 and most of the defenses go to mitigation,  
5 not to liability.  
6 JUDGE REICH: Okay, thank you.  
7 MR. BERGERE: The liability case is  
8 really premised on this issue. Another point  
9 that was raised is that the material is  
10 contaminated, but that's completely  
11 irrelevant to a decision of this case. If  
12 you look at EPA's studies from the '90s and  
13 you look at the data in those studies -- in  
14 fact, fossil fuel wastes that are not  
15 generated by grey iron foundries also have  
16 toxic contaminants in them of the very same  
17 kind, perhaps not at these levels.  
18 What we don't know, because the EPA  
19 has never made it a matter of public record,  
20 is what the grey iron foundry industry as a  
21 whole, or what the toxicity of its waste  
22 streams are -- its fly ash waste streams.

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1 But to back up and address the very  
2 first question which the panel asked, which I  
3 think is a very astute one, which is this is  
4 unquestionably as a matter of fact a fly ash  
5 waste generated primarily from the combustion  
6 of fossil fuel.  
7 The judge below found it as a  
8 matter of fact and as a matter of science.  
9 It's not been contested by EPA. What EPA  
10 must contest, as it does, is it says -- it's  
11 stuck with two arguments. One is that  
12 Congress never really intended when it said  
13 fly ash waste to include foundry-generated  
14 fly ash waste, and then secondarily, even if  
15 it did, we promulgated -- we effectively  
16 created a regulation that complies with a  
17 statute that took it out of that realm, and I  
18 think both positions, as I've articulated in  
19 our brief, lack merit.  
20 JUDGE REICH: Is this the only  
21 facility operated by Leed Foundry?  
22 MR. BERGERE: Yes, it is.

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1 JUDGE REICH: Okay.  
2 MR. BERGERE: And in fact, there  
3 has been some mention of the Wheland  
4 decision, and in fact the Scarborough letter  
5 was included in that decision, because there  
6 was a vigorous debate in the late 1980s  
7 between Tennessee Wheland, which was a very  
8 large foundry -- the same type that they had  
9 six or eight cupolas in a row -- and, you  
10 know, my client has a single one -- but there  
11 was a debate that was triggered by the  
12 Scarborough memo, and the State of Tennessee  
13 and EPA were fighting over whether or not  
14 Tennessee should in fact regulate the same  
15 waste stream.  
16 In Tennessee, it's hazardous waste.  
17 Tennessee first said yes, we will. They then  
18 considered the Bevill issue and said no, we  
19 won't. EPA threatened to yank their  
20 authority under RCRA, and eventually, EPA  
21 stepped in and took enforcement action  
22 against Wheland, and they lost. And they

10 (Pages 34 to 37)

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1 lost before an administrative law judge here  
2 on exactly the same basis.  
3 I don't cite that as precedent. I  
4 understand it was withdrawn at the suggestion  
5 and recommendation of the parties as part of  
6 a settlement, but it's part of the public  
7 record that was out there.  
8 There was a decision in 1993 on  
9 this very issue where an administrative law  
10 judge, very much like Judge Moran, looked at  
11 the facts, looked at the law, and concluded  
12 that it was not even a close call that this  
13 is Bevill-exempt. In the face of that, EPA  
14 had two chances in '93 and '99 to clarify  
15 that in fact foundry-generated fly ash wastes  
16 are exempt. They had the ability to do that  
17 and they did not.  
18 JUDGE REICH: The Wheland Foundry  
19 decision came before Horsehead, didn't it?  
20 MR. BERGERE: Yes, it did.  
21 JUDGE REICH: So the ALJ in that  
22 case did not have the benefit of the D.C.

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1 Circuit's thinking in that case at the time  
2 the decision was issued.  
3 MR. BERGERE: That clearly would be  
4 the case.  
5 JUDGE REICH: So to the extent that  
6 we look to that decision at all, we have the  
7 benefit of that additional perspective.  
8 MR. BERGERE: Right. And the  
9 perspective I cite it for is really that  
10 there was a vigorous --  
11 JUDGE REICH: Right.  
12 MR. BERGERE: If there was a  
13 vigorous debate about it, it should have been  
14 then carried forth publicly in the two major  
15 reports EPA produced -- was dragged to  
16 produce kicking and screaming through the  
17 consent decree process -- that had it move  
18 forward. But --  
19 JUDGE STEIN: How does the  
20 existence of the Wheland decision suggest  
21 that this is really a closed issue?  
22 MR. BERGERE: It doesn't suggest

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1 that it's a closed issue on the law, because  
2 the case has no precedential value. What it  
3 does in my view is it undercuts the Agency's  
4 position that it made clear statements  
5 publicly to constitute a regulation for  
6 purposes of Bevill that would be clear to the  
7 public and be a clear rulemaking that in fact  
8 foundry-generated fly ash was not subject to  
9 regulation.  
10 JUDGE STEIN: But didn't they take  
11 the position in that litigation that in fact  
12 it was subject to regulation?  
13 MR. BERGERE: They did take that  
14 position in the litigation, but they then  
15 settled the case. They vacated the decision,  
16 obviously, for the reason that it was  
17 unfavorable. And then they went ahead and  
18 produced two reports to Congress that never  
19 addressed that debate, despite the fact that  
20 the one time it had gone before a judge for a  
21 decision, it had not gone their way, and a  
22 judge had ruled that the statute was

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1 unambiguous and did not support the Agency's  
2 position.  
3 JUDGE REICH: Do you read the 1999  
4 report and the 2000 regulatory determination  
5 as intending to address in any way the status  
6 of grey iron foundries?  
7 MR. BERGERE: I do not believe that  
8 they do.  
9 JUDGE REICH: Was it not clear in  
10 the 1999 report and the 2000 determination  
11 that at least in the Agency's view, it was  
12 addressing all remaining wastes that were  
13 subject to the Bevill amendment?  
14 MR. BERGERE: It's unclear -- you  
15 know, I can't speak for what the Agency  
16 thought it was doing. What it was required  
17 to do under the consent decree was address  
18 all remaining wastes. It said the RCRA --  
19 JUDGE REICH: There is in fact  
20 language in both those documents, though,  
21 that says --  
22 MR. BERGERE: I'm not --

1 JUDGE REICH: It addresses all  
2 remaining wastes.

3 MR. BERGERE: Right, which --

4 JUDGE REICH: Which are not --

5 MR. BERGERE: There is, and that in  
6 fact was the consent decree obligation.

7 JUDGE REICH: Right. So I mean, I  
8 understand you're arguing that they may not  
9 have correctly done what they needed to do,  
10 but it seems pretty clear from the Agency  
11 statement that it thought at least it was

12 covering all remaining wastes, and if it  
13 thought it was covering all remaining wastes  
14 and grey iron foundries were not in fact

15 being addressed, then did anybody -- do you  
16 know -- comment either on the 1999 report or

17 2000 regulatory determination along the lines  
18 of what about us, we're covered by the Bevill

19 amendment, why aren't we in there someplace?

20 MR. BERGERE: I can't speak for  
21 what the foundry industry generally would  
22 have felt. It's my belief in going back

1 There's no question. I'm not going to  
2 contend that we did.

3 But I'd also suggest that that  
4 regulatory determination is not a regulation  
5 for purposes of the Bevill section, and that  
6 the course that EPA had to take to pull this  
7 material out of Bevill was to study it, was  
8 to promulgate a -- make a finding, make a  
9 recommendation and a report to Congress, and  
10 then adopt a specific regulation, which it  
11 has not done. It did --

12 JUDGE STEIN: If it's --

13 MR. BERGERE: Specifically in  
14 1990 -- go ahead.

15 JUDGE STEIN: But if it's not  
16 within the scope of Bevill, why do they have  
17 to study and say it's not within the scope of  
18 Bevill?

19 MR. BERGERE: It is within the  
20 scope of Bevill. I don't know --

21 JUDGE STEIN: Well, that's the  
22 debate. I mean --

1 through the history today that probably  
2 people assumed that because there wasn't a  
3 specific category that said foundry-generated  
4 fly ash is to be treated differently, that it  
5 was generally within the scope of non-utility

6 generated waste, or that EPA simply hadn't  
7 addressed the issue and it was a mistake on  
8 the part of EPA. I don't think the regulated

9 community has been cited or lauded in the  
10 past for coming forward to the Agency and  
11 saying, hey, Jay, you forgot to regulate me,

12 but the essence of EPA argument is the --

13 JUDGE REICH: Yeah, here --

14 MR. BERGERE: The negative  
15 implication by --

16 JUDGE REICH: You forgot to say  
17 that I'm not regulated. I may think that's  
18 quite a different dynamic.

19 MR. BERGERE: That's true, and all  
20 I can speak for is that my client -- it's a  
21 small family-owned business up in the middle  
22 of nowhere in Pennsylvania -- didn't do it.

1 MR. BERGERE: That -- right, and I  
2 don't -- I think if you look at the  
3 legislative history, particularly the  
4 sections and the language that was cited by  
5 my opponent here, I think if you look at the  
6 special waste definition, it's very clear  
7 that EPA and Congress took a very different  
8 view of what that should be.

9 EPA took the view that there ought  
10 to be an industry limitation on what kind of  
11 facility was covered by Bevill, and Congress  
12 took a very different view. It's very clear  
13 from the language that they included wastes  
14 and dropped the industry-specific categories,  
15 dropped the steam boiler requirement  
16 category. And so I think under Chevron, you  
17 don't get beyond the language of the statute  
18 to find ambiguity.

19 But even if you could argue that it  
20 was ambiguous and you look back at the  
21 legislative history, even Bevill's statement,  
22 which is cited in EPA's position as perhaps

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1 the definitive statement, as was quoted here,  
2 Congressman Bevill specifically said that  
3 it's meant to be read broadly. And he allows  
4 in there implicitly that other materials can  
5 be in the waste streams other than fossil  
6 fuel combustion wastes.

7 JUDGE REICH: I'd like to follow up  
8 on a question that Judge Stein asked  
9 Region III, which is how we should view this  
10 process -- in the 1999 report and 2000  
11 determination -- even if we conclude it's not  
12 in fact a regulation, and therefore cases  
13 that dealt specifically with how the Agency  
14 looks at regulations did not apply.

15 It is a very formalized, structured  
16 process with many elements that occur in  
17 regulation such as notice and comment and so  
18 forth. Do you think it's appropriate that we  
19 give some degree of deference to that  
20 process, or do you think that none at all is  
21 appropriate?

22 MR. BERGERE: I don't think in the

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1 context of what this panel has to decide any  
2 deference is appropriate, because what EPA  
3 did was it carried out what was a statutory  
4 directive part one, do a study, and the study  
5 was comprehensive.

6 But what they also had to -- the  
7 statute also specifically said based on that  
8 study, you had to wait six months, and then  
9 you had to promulgate a regulation if you  
10 wanted to pull anything back into subtitle C  
11 and -- Subchapter C. So Congress  
12 specifically set up a process, and it would  
13 be wrong of this panel to then take what may  
14 be a regulatory determination, as indicated  
15 by these two reports, and then in fact after  
16 the fact convert them to the effect of a  
17 regulation that then pulls fly ash that's  
18 generated by grey iron foundries into the  
19 field of RCRA hazardous waste regulation.

20 I would posit to the Board that in  
21 1981, EPA did propose a rule that would have  
22 specifically addressed grey iron foundry

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1 waste. And as Judge Moran said, 26, now 27  
2 years later, that presumably they're still  
3 considering the comments on that proposed  
4 regulation. I submit --

5 JUDGE STEIN: But the mere fact  
6 that the Agency doesn't finalize a listing  
7 doesn't mean that something's not covered by  
8 the characteristics. I mean, I understand  
9 that they didn't finalize the rulemaking, but  
10 no one's suggesting your client's waste is  
11 covered by the mere fact by the fact that  
12 it's a listed waste. I mean, aren't there  
13 numerous instances where EPA has proposed to  
14 list waste and not finalized those listings?

15 MR. BERGERE: I'm sure that there  
16 are. They are not obviously at issue in this  
17 case, but it -- my point --

18 JUDGE STEIN: But you would concede  
19 that the mere fact that they didn't finalize  
20 a listing doesn't mean that it can't be a  
21 characteristic hazardous waste?

22 MR. BERGERE: I would concede that

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1 point, but that's not the point that I raise  
2 in citing to the regulation -- the proposed  
3 regulation. They prepared a proposed  
4 regulation and they never finalized it, and  
5 you know, one suggestion for that -- none of  
6 us know, but one suggestion for their never  
7 finalizing it is the fact that at that time,  
8 it would have been premature to promulgate a  
9 regulation because they hadn't done a study  
10 to determine that in fact that waste  
11 warranted regulation. And all you have  
12 before you is evidence of what Leed's  
13 specific waste stream was on the date that it  
14 was found.

15 That's not a determination that all  
16 grey iron foundry fly ash is the same, and  
17 that's one of the fundamental reasons  
18 Congress took the whole matter away from EPA  
19 and said before you get into  
20 regulating -- because what Congress was  
21 trying to protect was coal producers, and  
22 coal producers --

1 JUDGE STEIN: I want to go back for  
2 a second, because EPA in that proposal stated  
3 that this particular waste was covered if it  
4 failed the characteristic test. Now, my  
5 understanding of Bevill is that Bevill would  
6 apply both to listings and to  
7 characteristics.

8 MR. BERGERE: That's correct.

9 JUDGE STEIN: So how is it that EPA  
10 could have stated that this material was  
11 covered as a characteristic if in fact it  
12 was covered by Bevill?

13 MR. BERGERE: I would suggest to  
14 you the reason the regulation wasn't  
15 promulgated and the reason that language  
16 wasn't even in the proposed regulation was  
17 that they recognized that Bevill would have  
18 made it inappropriate for them to do that  
19 without first doing a study and then  
20 promulgating a regulation.

21 JUDGE STEIN: But then why did they  
22 say it was covered by characteristic waste?

1 that the Agency cites in support of  
2 its -- sort of the negative implication that  
3 because we didn't specifically include it, it  
4 must not have been meant by Congress to be  
5 covered.

6 The real question here is did  
7 Congress intend to cover it or not. And I  
8 suggest that the legislative history and  
9 statutory language as cited by Judge Moran  
10 make very clear that they did intend that  
11 this kind of fly ash would be covered. And  
12 again, go back to the opening point, there's  
13 no question that this is fly ash waste and  
14 that it's been generated primarily from the  
15 combustion of fossil fuel. The only question  
16 is did Congress intend to exclude  
17 foundry-generated fly ash waste.

18 JUDGE WOLGAST: How do you address  
19 the Agency's point that it was clear that  
20 Congress was adopting a high-volume,  
21 low-toxicity approach to the universe of  
22 Bevill?

1 MR. BERGERE: Because they --

2 JUDGE STEIN: I mean, consider it  
3 as characteristic?

4 MR. BERGERE: Because they hadn't  
5 yet formulated what their approach was to  
6 Bevill or how they would study it or how they  
7 would advance it. They came out with a  
8 regulation that followed --

9 JUDGE STEIN: Then why wouldn't  
10 they have stayed silent if they thought it  
11 was Bevill?

12 MR. BERGERE: I think they have  
13 stayed silent since they proposed it.

14 For 27 years.

15 JUDGE WOLGAST: But what's the  
16 record evidence of that --

17 MR. BERGERE: There is no --

18 JUDGE WOLGAST: Rationale that you  
19 posit?

20 MR. BERGERE: There is no record  
21 evidence. There's only the same implicit  
22 absence of action on the part of the Agency

1 MR. BERGERE: Well, that's  
2 anecdotal. What Congress was really doing  
3 was, EPA was proposing a special waste  
4 regulatory program, and the hue and outcry  
5 about it was primarily by utilities saying  
6 well wait a minute, we've got volumes and  
7 volumes of this stuff. If we have to start  
8 characterizing it, it's going to be a burden.  
9 EPA doesn't even know whether this is  
10 hazardous yet. This is a large volume waste  
11 with generally low toxicity.

12 And the whole thing Congress said  
13 was well, let's pull it back. EPA, go out  
14 and do a study. Define what this is and if  
15 you find areas where you think it's  
16 appropriate to regulation, submit the report,  
17 give us six months to do something  
18 legislatively, and if we don't, then go ahead  
19 and promulgate regulations. That's the  
20 process Congress set up.

21 And the fact is, we know that  
22 Leed's waste was toxic under characteristic

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1 tests, but that's the only thing we know.  
2 And I think it's completely irrelevant to a  
3 decision in the case whether it's high volume  
4 or low toxicity.  
5 That only goes to the question of  
6 whether or not when Congress pulled it away,  
7 what were they concerned about. What they  
8 were concerned about was an overly aggressive  
9 regulatory program, and a special waste  
10 exemption, frankly, that was too limited to  
11 address the congressional concern.  
12 JUDGE REICH: Let me ask a little  
13 bit about that, because when I look at  
14 Horsehead, for example -- I'm looking at page  
15 14, and I'll quote a couple of things and get  
16 your reaction to what that's telling me.  
17 It says, "As noted above, this  
18 court held in EDF II that EPA was required to  
19 limit Bevill wastes excluded from subtitle C  
20 to those wastes that are high-volume,  
21 low-hazard." In Solite, we held that EPA had  
22 discretion to define high-volume, low-hazard

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1 as a criteria so long as its definitions were  
2 permissible interpretations of the Bevill  
3 amendment.  
4 And then skipping a little bit, it  
5 says, "Although the Solite and EDF II  
6 decision involved only mining wastes under  
7 the Bevill amendment, the analyses in those  
8 opinions are wholly applicable to the instant  
9 case as well."  
10 Why does that not in fact say that  
11 in looking at the scope of the Bevill  
12 amendment, you do in fact look at  
13 high-volume, low-hazard criteria?  
14 MR. BERGERE: I think number one,  
15 that that's -- I think that's dicta in the  
16 case, but I think what the court is  
17 struggling with there is to come up with what  
18 are the world of things you're looking at.  
19 If we look at what Congress was concerned  
20 about, Congress was concerned clearly about  
21 the fact that EPA was stepping in with a very  
22 complicated cradle-to-grave regulatory

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1 program, into an area where there's a lot of  
2 high-volume, low-toxicity waste.  
3 But the fundamental point was, EPA  
4 was directed to study them to find out which  
5 ones were high-volume, high-toxicity, which  
6 ones were low-volume, high-toxicity, which  
7 ones were low-volume, low-toxicity. What  
8 Congress essentially said was you don't have  
9 enough information to make that  
10 determination, you need to do a series of  
11 studies, and based on those studies, you need  
12 to come back to us and propose regulations to  
13 say these ones, we need to pull back into the  
14 program; these ones, we don't.  
15 JUDGE WOLGAST: But the trouble I'm  
16 having with that in light of the -- the  
17 Horsehead, EDF I, II, and Solite decisions,  
18 are that the D.C. Circuit seems to be -- what  
19 you just stated would be the path if it were  
20 a Bevill waste, but what those decisions seem  
21 to be saying -- that it's appropriate for EPA  
22 to look at within the terms of the Bevill

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1 amendment high volume, low toxicity as a  
2 screening device to determine what's in and  
3 out of Bevill. What subsumes the universe of  
4 Bevill, and Solite, as well as the language  
5 of EDF II, seems to just very explicitly say  
6 that.  
7 MR. BERGERE: That language also  
8 specifically states -- and you were careful  
9 to caveat it -- that so long as consistent  
10 with the definitions contained in Bevill.  
11 And it gets back to -- it's a bit circular,  
12 but it gets back to the argument of what is  
13 fly ash waste generated primarily from the  
14 combustion of fossil fuel? What does that  
15 mean?  
16 JUDGE WOLGAST: Correct. But if  
17 the D.C. Circuit is saying that it's okay to  
18 construe the amendment's terms to exclude  
19 from Bevill's scope processing wastes that  
20 don't qualify as low-hazard.  
21 MR. BERGERE: Again, by regulation  
22 And --

1 JUDGE WOLGAST: No. Well, it  
 2 didn't say that.  
 3 MR. BERGERE: I think the way I  
 4 have read those decisions and understood them  
 5 in the context of the statutory language of  
 6 Bevill is that ultimately EPA needs to make  
 7 conclusions about what is high hazard, what  
 8 is low hazard, and then adopt regulations to  
 9 address the things that it pulls out or  
 10 leaves in.  
 11 JUDGE WOLGAST: Okay. But here's  
 12 another quote that I think is troublesome in  
 13 that regard, because in Solite again, they  
 14 say the low-hazard criterion is solely a  
 15 preliminary screening device to determine  
 16 which mineral processing wastes are special  
 17 wastes, and will not be used in determining  
 18 which wastes will subsequently be regulated  
 19 under subtitle C.  
 20 I mean, I think the regulations  
 21 you're talking about would be the ultimate  
 22 regulation to make a subtitle C

1 determination.  
 2 MR. BERGERE: Right. I would read  
 3 that provision also, though, to suggest that  
 4 what they may be talking about is simply  
 5 screening as to how EPA determines to manage  
 6 whatever investigation it's required to make,  
 7 but not a determination as to what  
 8 constitutes a special waste itself. I think  
 9 it talks about screening for purposes of  
 10 doing the investigation, and ultimately  
 11 promulgating a regulatory framework.  
 12 I think where I come from here is  
 13 that the regulation -- the statute itself  
 14 specifically exempts this material. And then  
 15 some action has to take place to then pull it  
 16 back. And Congress specifically said that  
 17 has to be done through a formal rulemaking,  
 18 not through various regulatory determinations  
 19 which in this case constitute determinations  
 20 that nothing needs to be regulated.  
 21 And I don't think you can infer by  
 22 negative implication that because EPA didn't

1 specifically then list every possible  
 2 category, including grey iron foundries, in  
 3 that list of materials, that therefore by  
 4 negative implication, a regulation has been  
 5 created that complies with the Bevill  
 6 provision that therefore means, again, by  
 7 negative implication, that my client's waste  
 8 material is in fact either not covered by the  
 9 original scope of the statute or therefore  
 10 and thereafter exempt.  
 11 JUDGE STEIN: It strikes me that  
 12 your approach to the statute is a  
 13 plain-meaning approach.  
 14 MR. BERGERE: That's correct.  
 15 JUDGE STEIN: It strikes me that  
 16 that's exactly what the D.C. Circuit has  
 17 rejected in these line of cases, that it's  
 18 basically into a Chevron step two analysis,  
 19 finding some measure of ambiguity for perhaps  
 20 different reasons depending on the particular  
 21 issue. But it seems to me that the D.C.  
 22 Circuit has effectively rejected the

1 plain-meaning language applied to this  
 2 particular amendment.  
 3 How do you respond to that?  
 4 MR. BERGERE: I don't think the  
 5 D.C. Circuit has done that to the amendment  
 6 as a whole. I think in very specific  
 7 instances -- and this is for some of the  
 8 other kinds of waste streams very  
 9 complicated. And in the one instance where  
 10 they addressed it for RCRA and they talked  
 11 about these specific kinds of provisions,  
 12 they were trying to reconcile two conflicting  
 13 provisions within RCRA: the BIF rule,  
 14 obviously, which allowed for the regulation  
 15 of Bevill waste or captured the regulation of  
 16 Bevill waste; and the Bevill exemption, which  
 17 stood alone and said it wasn't captured.  
 18 And in that context, the court said  
 19 well, you know, there is some ambiguity,  
 20 because on the one hand the statute is clear  
 21 that nothing is to be regulated. And later,  
 22 Congress gave them authority to regulate



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1 BIFs, boilers and industrial furnaces. And  
2 in that context, there's ambiguity. But I  
3 don't think in this -- I don't think the D.C.  
4 Circuit's decisions can be read for the  
5 context -- the Bevill Amendment itself is  
6 simply ambiguous and you can never use a  
7 plain language approach.  
8 I think in the case of -- in the  
9 very specific issues before this court, as  
10 found by Judge Moran, the plain language is  
11 clear. It's fly ash waste generated  
12 primarily from the combustion of fossil fuel.  
13 As a matter of fact and science before you,  
14 that is uncontested, that Leed's fly  
15 ash -- dust was fly ash waste generated  
16 primarily from the combustion of fossil fuel.  
17 And there isn't an ambiguity about that  
18 language. But even if there was and you went  
19 to the legislative history, that legislative  
20 history supports Judge Moran's finding that  
21 in fact Congress did not choose to go the way  
22 EPA has subsequently gone, by allowing some

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1 limited interpretation to steam boilers or  
2 utilities. I mean --  
3 JUDGE STEIN: But then what weight  
4 should we give to the D.C. Circuit opinions?  
5 I mean, it's clear that they have written  
6 several decisions. And the later decisions  
7 refer to the earlier decisions. And it  
8 strikes me that for us to decide this case  
9 without taking into account some fairly  
10 strong language in a number of these opinions  
11 is difficult.  
12 When I read your brief, other than  
13 distinguishing a little bit, I don't really  
14 see that you've really grappled with -- you  
15 know, I don't see us being able to write a  
16 decision without not just looking  
17 perhaps -- irrespective of what you do with  
18 legislative history -- the D.C. Circuit has  
19 interpreted the language of these amendments.  
20 MR. BERGERE: What I would suggest  
21 is that this is distinguishable from the  
22 instances in which the D.C. Circuit has found

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1 it appropriate to go deeper and actually do  
2 some deference to EPA on some level of  
3 interpretation. But even if we were to do  
4 that, again, EPA here has not -- there's no  
5 clear regulatory determination that says  
6 foundry-generated fly ash is not covered by  
7 the Bevill exemption.  
8 It's something that has to be  
9 cobbled together from transient actions by  
10 the Agency over a period of years, and then  
11 reading by negative implication these reports  
12 to say well, we did these reports and they  
13 only cover these things, so therefore, we can  
14 accept that -- you know, it's sort of like a  
15 back-door interpretation of the statute to  
16 say okay, well, they must not have meant  
17 these things.  
18 So I would suggest to you that the  
19 D.C. Circuit's decisions cannot be read to be  
20 a blanket statement that the Bevill exemption  
21 is just ambiguous, and every time, you have  
22 to get into EPA's mind to figure out what

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1 needs to be done.  
2 This is really a very specific and  
3 narrow issue about what --  
4 JUDGE REICH: In the Office of  
5 Compliance Sector Notebook on the Profile of  
6 the Metal Casting Industry, it says the  
7 wastes associated with metal casting melting  
8 operations include fugitive dust and slag.  
9 Lead and chromium contamination may cause the  
10 waste slag to be subject to RCRA as a  
11 hazardous waste.  
12 Is that a correct statement?  
13 MR. BERGERE: I think it's not a  
14 correct statement. I think it's an incorrect  
15 statement. Some of it deals with  
16 terminology. One of the things that I  
17 was -- I've been involved in this case since  
18 the citation was first filed. And when the  
19 EPA -- when I discussed with the EPA  
20 inspector and the EPA attorney the Bevill  
21 exemption, they didn't even know what the fly  
22 ash exemption was. They thought I was

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<p>1 talking about steel slag.</p> <p>2 This is a case where an enforcement</p> <p>3 action was taken. And after the fact, the</p> <p>4 Agency's had to come up with a reason why</p> <p>5 this material is exempt.</p> <p>6 I think that statement is an</p> <p>7 overbroad statement about what the Agency's</p> <p>8 authority is based on what Bevill allows.</p> <p>9 JUDGE REICH: This may go beyond</p> <p>10 what you know, in which case, feel free to</p> <p>11 say so. But the transmittal message from the</p> <p>12 administrator implies that these documents</p> <p>13 were prepared, among other things, with</p> <p>14 industry input.</p> <p>15 Do you have any idea about the</p> <p>16 genesis of this document, and why industry</p> <p>17 would not have objected to that language?</p> <p>18 MR. BERGERE: I don't know that</p> <p>19 industry didn't object to the language, so</p> <p>20 I'm not in a position to say. And I think</p> <p>21 what I would -- from my personal experience</p> <p>22 and being a government regulator in the past</p>	<p>1 anecdotal. And what the D.C. Circuit Court</p> <p>2 had to find; the predicate legal conclusions</p> <p>3 of law it had to find in the cases before it</p> <p>4 were that the terms of the statute were not</p> <p>5 clear enough to guide the Agency to make</p> <p>6 these kind of decisions especially when it</p> <p>7 came to co-processing, as it did in the</p> <p>8 Horsehead case and the co-processing here,</p> <p>9 the language of this statute is not clear</p> <p>10 enough.</p> <p>11 It's our position as it was the</p> <p>12 court's that the legislative history in that</p> <p>13 conference report is right on point that the</p> <p>14 high-volume, low-toxic criteria and standard</p> <p>15 was to be the way the Agency interpreted who</p> <p>16 was to be studied and what the process was to</p> <p>17 include.</p> <p>18 Just a couple of points about what</p> <p>19 counsel has said. He claims that utility</p> <p>20 wastes have similar contaminants, and that's</p> <p>21 true. Utility wastes were found to have lead</p> <p>22 and cadmium. But as he rightly noted, not at</p>
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<p>1 and working in -- on rulemakings and policies</p> <p>2 with the Agency, the fact that it was</p> <p>3 developed in conjunction with doesn't</p> <p>4 necessarily mean there was accord either.</p> <p>5 EPA ultimately is the arbiter of those issues</p> <p>6 and issues the policies it feels meet its</p> <p>7 needs, and doesn't necessarily agree with</p> <p>8 industry all the time.</p> <p>9 I have nothing further unless you</p> <p>10 have another question you'd like me to</p> <p>11 address.</p> <p>12 Thank you, I appreciate your time.</p> <p>13 JUDGE REICH: Mr. Raack, you have</p> <p>14 five minutes for rebuttal.</p> <p>15 MR. RAACK: I just have a couple of</p> <p>16 points. I may not need all that time.</p> <p>17 JUDGE REICH: That's fine.</p> <p>18 MR. RAACK: I just quickly want to</p> <p>19 come back and reaffirm that it is our</p> <p>20 position that the D.C. Circuit cases should</p> <p>21 be followed in this case. We think they are</p> <p>22 on point. This wasn't dicta, this isn't</p>	<p>1 these levels -- well, nowhere close to these</p> <p>2 levels. In fact, the TCLP results that were</p> <p>3 put into the report to Congress show some</p> <p>4 bare exceedences of the TCLP regs' regulatory</p> <p>5 levels. And these again are upwards of 180</p> <p>6 times the level. And that's the very point</p> <p>7 here. If the Agency is bound to interpret</p> <p>8 this as low hazard waste, then iron foundries</p> <p>9 don't categorically make it, they aren't</p> <p>10 categorically included.</p> <p>11 The second point is -- that he</p> <p>12 admitted the study that the Agency conducted</p> <p>13 was complete. And that's exactly right. The</p> <p>14 Agency's work under Bevill is complete. It</p> <p>15 studied all of the wastes that it believed</p> <p>16 were exempt, and it's made a final regulatory</p> <p>17 determination as to those wastes.</p> <p>18 The last thing I'll note about his</p> <p>19 statement was that this is not an</p> <p>20 after-the-fact theory, of course, as every</p> <p>21 document that we point to that indicates what</p> <p>22 the Agency's position is was published and</p>

18 (Pages 66 to 69)

1 issued before the complaint in this case.  
 2 Their entire argument is that the  
 3 statute is wholly unambiguous and  
 4 all-encompassing, and to find this, the Board  
 5 has to reopen a concluded regulatory matter,  
 6 disregard the Agency's 27-year position, the  
 7 clear legislative history, the D.C. Circuit  
 8 Court's Bevill decisions that are directly on  
 9 point, and the administrator's 1981  
 10 statement.

11 They have a heavy burden, and we  
 12 don't think they've even come close to giving  
 13 you what you need to disregard those  
 14 statements.

15 Thank you again for your  
 16 consideration.

17 That's all I have.

18 JUDGE REICH: Thank you, Mr. Raack.

19 I'd like to thank counsel for what  
 20 I found to be a really excellent argument,  
 21 and we will take the matter under advisement  
 22 and we stand adjourned.

1 (Whereupon, at approximately  
 2 11:33 a.m., the PROCEEDINGS were  
 3 adjourned.)

4 \* \* \* \* \*

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