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

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

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

APPEARANCES:

On behalf of Leed Foundry, Inc.:

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P R O C E E D I N G S

MS. DURR: The Agency is now in session for Oral Argument In re: Leed Foundry, Inc., Docket No. RCRA-03-2004-0061, RCRA Appeal No. 07-02, the Honorable Judges Anna Wolgast, Ed Reich, Kathy Stein presiding.

Please be seated.

JUDGE REICH: Good morning. We're hearing argument this morning on the matter of Leed Foundry, Inc., a RCRA enforcement appeal pursuant to the Board's order of August 22, 2007.

EPA Region III has been allocated 30 minutes for its argument. The Region may reserve up to five minutes of its allocated time for rebuttal, and counsel for the Region should advise the Board at the beginning of his argument whether he is reserving time.

Leed Foundry has also been allocated 30 minutes for its argument. I would like to begin by asking counsel to

state their names for the record and whom they represent, beginning with counsel for Region III.

MR. RAACK: My name is Pete Raack, Office of Civil Enforcement. I'm representing Region III in this matter.

MR. BERGERE: My name is Tim Bergere. I'm with Montgomery McCracken in Philadelphia, and I represent Leed Foundry.

Thank you.

JUDGE REICH: Thank you.

Mr. Raack, you may take the podium and begin.

MR. RAACK: Good morning, members of the Board. Thank you for the opportunity today to come and discuss the Region's appeal in this matter. I'd like to reserve five minutes of my time for rebuttal.

First this morning, I'd like to spend approximately five to seven minutes briefly summarizing the case background and the three key points that form the foundation of our appeal, and then I'll use the balance

of my time to discuss each point in turn more fully.

The initial decision in this case is contrary to a regulatory determination issued by the administrator as mandated by Congress in RCRA's Bevill amendment. As a final concluded regulatory matter, the presiding officer should not have entertained a collateral challenge to it in an enforcement case.

EPA has always interpreted the Bevill exemption to be limited in scope to utility and other steam production operations in boiler and boiler-like units. EPA has never considered, nor even implied that baghouse dust from grey iron foundries is excluded from RCRA's Hazardous Waste Program under the Bevill amendment.

It is undisputed that grey iron foundries were not energy or steam production operations. And the waste at issue in this appeal does not come from a boiler or

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boiler-like unit.
Within three months of the enactment of the Bevill amendment, EPA announced in a Federal Register notice its position that this exact waste is subject to regulation, and that generators are obligated to test it to determine whether it exhibits a hazardous characteristic.
The presiding officer's decision directly contradicts this 25-year-old Agency position as well as the D.C. Circuit Court's Horsehead, Solite and EDF II decisions that address EPA's interpretation of the Bevill amendment.
Before I summarize the three issues we've raised on appeal, I'd like to note some background and factual and procedural points The subject of this case is highly contaminated baghouse dust generated at Respondent's cupola furnace.
The cupola furnace is used to co-process contaminated scrap metal to make

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iron products such as manhole covers, and it's that co-processing that generates the baghouse dust.
JUDGE REICH: Can I ask a couple of questions to clarify what is within the scope of your appeal? I did not see you contesting in your appeal, as you did below, whether Leed's wastes were generated primarily from the combustion of fossil fuel. Is that in your mind still a factual issue, or have you acceded to the ALJ's finding in that regard?
MR. RAACK: We think that those terms, as they show up first in the statute and then in EPA's regulation, have been determined through the regulatory decision process that EPA engaged in. And it's still our contention, because EPA has defined those terms, that they do not qualify from that.
JUDGE REICH: So you're saying they don't qualify not because they're not 51 percent or more, but because it's a term of art, and they're not within the scope of

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the term of art as used in the Bevill amendment?
MR. RAACK: That's correct.
JUDGE REICH: And is that true as to fly ash as well? For instance, if we were to conclude that the Bevill amendment did in fact cover waste from grey iron foundries, would the Region dispute that the waste we are talking about here would then be considered fly ash?
MR. RAACK: Well, we think there's only one operative definition of fly ash, and it's the one the Agency developed during the rulemaking, during the regulatory process, and that's uncombusted particles that come out of a boiler. And as it's not disputed they don't have a boiler, we would specifically assert that they do not have the kind of fly ash that's exempted under this.
JUDGE REICH: But the way you've framed that, it sounds like in the broader sense you are admitting this is fly ash;

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however, to the extent that you see that term having been circumscribed by the Bevill amendment and the way the Agency has defined it, it's not that kind of fly ash.
MR. RAACK: I think that's right. We would concede that the baghouse dust picks up the uncombusted particles that come out of the cupola furnace.
JUDGE REICH: Okay. Thank you.
MR. RAACK: It is undisputed that this waste, the baghouse dust, generated over regulated levels for lead -- leachate samples were 180 times the regulated level, and for cadmium, the samples were 10 times the regulated level. After several inspections where EPA found this baghouse dust had been stockpiled at the facility for many years minimally covered and generally uncontained, EPA filed a complaint in 2004 which included both RCRA and Clean Water Accounts. (?)
The Clean Water Accounts are not at issue in this appeal.

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JUDGE STEIN: Can I ask a question of whether today the company is managing this material as a hazardous waste? Do we have that before us in the record?

MR. RAACK: On the record, we have a stipulation that the party filed that after EPA's inspection, the facility began removing and properly disposing the material that had been stockpiled for many years. But we don't have in the record whether today they're in compliance with RCRA, and we know that inspections that have happened after the complaint have been issued have detected some violations. I don't know if that's in the record, but --

JUDGE STEIN: Is the Agency seeking any injunctive relief here, or is this about sort of liability penalty issues?

MR. RAACK: This is essentially a liability and penalty issue case.

JUDGE STEIN: Okay. Thank you.

MR. RAACK: In the answer to the

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complaint, Respondent raised an affirmative defense that its waste was statutorily exempt pursuant to the Bevill amendment. The party filed opposing motions with the Region seeking to strike that affirmative defense, while the Respondent sought to obtain a partial accelerated decision. The presiding officer agreed with Respondent.

I think the brief sufficiently has set forth the rest of the facts which are not in dispute here.

Let me now turn to a brief overview of the three points I'll address in my remarks this morning. First, in line with well-established Board precedent, EPA's concluded Bevill amendment regulatory decision, issued after the extensive process laid out in the statute, should not be subject to collateral challenge in an enforcement case.

JUDGE REICH: Can I ask about that? You in your appeal seemed to be cautious

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about how you label that particular determination.

In footnote 57, you suggest, as I read it, but for American Portland Cement, you would be calling it a regulation, but you are not quite, but then at the end of that footnote, there's in fact a sentence that tries to distinguish American Portland Cement, and says the waste, "may properly be considered" -- that that determination "may properly be considered a regulation."

And similarly, in footnote 88, you state that the regulatory determinations "might be deemed regulations." When I look at the 2002 determination, and I'm looking particularly at 65 FR 32235, it says, "Today's action is not a regulation."

There's nothing that seems to distinguish between different components of that determination in that regard.

So how can you in the face of that language expressly in the determination

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itself even suggest that there's a possibility that this is a regulation?

MR. RAACK: Well, first, our characterization is that it definitively is a final ANC (?) action, and appealable under the Administrative Procedures Act. And second, as the footnotes you referenced point out, there remains a question as to whether it could be characterized as a regulation.

JUDGE REICH: How is there a question if the Agency states on the face of the document that it's not a regulation?

MR. RAACK: Well, I think the regulation -- the case law will tell us that regulations can take many forms, and I think while we would potentially say it wouldn't be, what we're saying is there's an avenue for an outside party potentially arguing -- and I don't -- I'm not sure a court would look at only Agency's language and description to settle that --

JUDGE REICH: So you're saying that

the Agency itself is not suggesting that it's a regulation, notwithstanding the language in your couple of footnotes.

MR. RAACK: We're suggesting that a possibility remains for a party to argue that.

JUDGE REICH: Okay.

JUDGE WOLGAST: But why is that question live after American Portland Cement? Why isn't that case controlling as to the issue as to whether or not it's a regulation?

MR. RAACK: In American Portland Cement, they looked specifically at the reg determination that was in question there, the cement kiln dust regulatory determination, and what seemed to be persuasive to the court there was what the substance of the announcement was, what was the determination in that case -- the substance of the determination was that additional regulations under subtitle C were warranted and were yet to be promulgated. And here, we don't have

that situation. Here, it is a definitive and dispositive determination as to the exempt universe of wastes.

So we think that there is again the potential that an argument could be made that because the nature of the determination is different, it didn't simply announce something yet to come that would be then ripe for review, that someone could make that claim. And that's why we think the case might be distinguishable.

JUDGE STEIN: Did anyone appeal the regulatory determination? Any party?

MR. RAACK: In this case, the fossil fuel combustion waste?

JUDGE STEIN: Yes.

MR. RAACK: No. There was not an appeal.

JUDGE STEIN: Was there an appeal as to other wastes, like mineral processing wastes?

MR. RAACK: There have been appeals

of other regulatory determinations, if that's what you are asking. The May 2000 --

JUDGE STEIN: Any Bevill-related case?

MR. RAACK: Yes. Parties have appealed Bevill-related regulatory determinations.

JUDGE STEIN: But no one appealed the 2002 determination?

MR. RAACK: I think it's May 2000.

JUDGE STEIN: May 2000? Okay.

MR. RAACK: May 2000 regulatory determination, which was the final regulatory step in the process here. That's right.

JUDGE STEIN: And no one appealed that, to your knowledge?

MR. RAACK: No one appealed that.

JUDGE STEIN: What difference does it make for our purposes in terms of -- when we're dealing -- let's assume that we in fact are dealing with final Agency action and that it's not a regulation. Why is it that the

Board should treat that regulatory determination like a regulation for purposes of how the Board traditionally approaches those kinds of issues? What's similar, what's different?

MR. RAACK: Well, in the Board's Echiverria line of cases that have established a presumption of non-reviewability of regulatory decisions, the Board has looked at things like the ability for a party to appeal in another forum as a mark of whether the decision ought to be opened up in a subsequent enforcement action, and that's exactly what we have here.

So what our brief suggests is not only was it clearly appealable under the EPA, but again, our footnote suggests there might be other avenues. So there's that hallmark that it was appealable elsewhere and challengeable judicially.

Another hallmark is that it went through an elaborate process of notice and

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

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

MR. RAACK: That's right.

JUDGE STEIN: Okay.

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

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

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

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

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

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

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

Congress adopted some of EPA's language but not all of it. I don't know if I did that, but as you can see in the top proposal, the Agency identified three types

of wastes, and indicated it was solely from steam power -- generated by steam power plants solely from use of fossil fuels. The Bevill amendment changed this language slightly and we think there are likely four reasons that come out of legislative history for those changes.

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

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

broadened the language slightly.
There's some indication, not as much as the alternative fuels indication, that Congress also wanted to ensure that co-managed wastes -- wastes that maybe didn't come from the combustion activity but were innocuous and may be just managed onsite with fly ash or some of this other material at a boiler or utility operation -- wouldn't also undo the exemption. There's some -- again, some legislative history indicates that.
And the fourth is that Congress, likely as the Agency did, recognized that large-scale boiler operations -- and this exact kind of waste isn't just generated solely at power plants, but in fact boilers, large-scale boilers and the same kind of wastes are generated anywhere someone needs to produce steam.
JUDGE REICH: What is the clearest indication of congressional intent that when they broadened the scope beyond utilities

that they were intending it only to cover other facilities that were similar to utilities in terms of boiler operations? Where do we see that that was the limit of what they were intending by dropping out the more-limiting EPA language?
MR. RAACK: Well, the clearest case I think would be the language itself, by dropping steam power plants. But I think there's some legislative testimony, if I'm not mistaken, that indicated that it knew this type of waste was not just a utility-based waste and may be generated in the "real world," as I think Bevill put it, at numerous types of facilities. But the conference report itself tied all of this language back to EPA's special waste concept, a concept itself that's limited to, of course, low-hazard, high-volume waste.
And as the D.C. Circuit court has found in three relevant cases, that EPA is -- this was not only in reference to help

EPA define it, but EPA was specifically required to go no farther than low-hazard, high-volume waste in interpreting Bevill.
JUDGE STEIN: Is there any dispute between the parties in this case that this is not low-hazard waste?
MR. RAACK: There is no dispute, as they've stipulated to the results of the TCLP testing, which as I indicated were as high as 180 times the regulated level.
JUDGE REICH: At one point in your appeal, you seem to ascribe some significance to the fact that Congress in the Bevill amendment adopted the same language that EPA had put in the May 1980 rulemaking, but am I not correct that the May 1980 rulemaking basically just put in what was already pending before Congress and what the Agency anticipated was going to come out of Congress?
MR. RAACK: I think that's fair.
JUDGE REICH: So there's really

nothing about the fact that the language is similar to suggest that Congress was looking to EPA at that point. In fact, it was the reverse; EPA was looking to Congress at that point.
MR. RAACK: I think that's right. At that point, the Congress didn't adjust the language any further. It had already adjusted the language and referred again in the conference report to EPA's 1978 proposal for its adoption of the concept.
Our third point that we raise on appeal is that EPA has given more than adequate notice of its position that baghouse dust from grey iron foundries, the waste at issue here, is subject to RCRA's hazardous waste program and not categorically exempt under the Bevill amendment.
This position has been articulated in Federal Register notices as part of the rulemakings, in definitive Agency statements published during the Bevill regulatory

process, and in Agency letters and guidance prepared for the regulating community.

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

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

After nearly a decade of believing this matter concluded, the Agency would have

to first figure out all the types of waste streams that potentially suddenly could be covered, and then begin conducting additional studies in anticipation of another report to Congress and another regulatory determination.

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

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

JUDGE REICH: But it never mentions -- what I'm looking for is something that actually specifically talks about grey

iron foundries, not an inference that we can come to by omission. And from what I can tell from what you've cited, and I want to make sure that I'm not missing anything, the only thing I saw that was of that character was the Jim Scarborough determination.

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

And while it's still an inference, it's a very strong inference that the Agency knew exactly what the Bevill amendment meant at that time and what it meant to be exempt, and still went ahead with that notice about this type of waste, saying that it's clearly

covered by the hazardous waste program.

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

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

MR. RAACK: Well, the process was so truncated before the presiding officer that it didn't get to that point. There was no hearing and no suggestion, and certainly no stipulation as to liability. So we do think it has to be remanded for liability and penalty proceedings.

JUDGE REICH: Okay.

JUDGE STEIN: The Scarborough determination or letter that Judge Reich referred to a few moments ago, was that letter made publicly available? I mean, was it on the RCRA compendium or the Internet or any of those kinds of things? I don't know that the Internet was up and running back in 1984, but --

MR. RAACK: The '84 letter -- the December '84 Scarborough letter was part of a series of correspondence between EPA and the state. The first set -- the first letter which came directly from headquarters at Tennessee is on RCRA online. I haven't been

able to determine, and I know that the Scarborough letter is not currently on RCRA online. What I haven't been able to determine through research is whether in earlier versions of RCRA online pre-internet, there was a OSW (?) policy compendium, for example, whether it was made available then.

I do know that that letter was sent out to the state directors, they were CC'ed on the cover memo to -- of that letter, and I do know that that letter was questioned or specifically discussed and a point of focus in the '92-91 Wheland Foundry decision, which is publicly available, of course.

I see that my time is up. May I take a moment to conclude?

JUDGE REICH: Sure.

MR. RAACK: The bottom line in this case is that the Respondent and the ALJ concede that grey iron foundry wastes were not included in EPA's Bevill work. Respondent chose not to get involved in the

process at that time and submit comments. Respondent chose not to seek review of EPA's decision not to include foundry waste within the exemption. Respondent chose not to avail itself of any administrative process where it could have raised this issue.

Instead, it sat back and stockpiled this very toxic waste, and when the regulators became concerned about the mismanagement of the waste, Respondent claimed that EPA failed to finish the Bevill regulatory process, and that its waste is therefore statutorily exempt.

This is a classic case of a noncompliant facility that made no effort to properly manage its waste, nor any effort to determine how to properly manage its waste; rather, it waited until it was discovered to attempt any compliance.

JUDGE REICH: I think we get the message. Any further questions?

Thank you, Mr. Raack.

Mr. Bergere?

MR. BERGERE: Thank you. May it please the panel; on a professional level, I'm delighted to be here, although I must say my client's appalled that they have to continue to spend money to have me chase this matter.

To address a couple of points the court raised early, the matter -- the waste material in question was, from the date of EPA's inspection forward, by tacit agreement managed as a RCRA subtitle C waste until my client did what all public utilities do with respect to their waste, which was add a particular kind of limestone treatment to the emission flume, to the flue, which then neutralizes the lead and the cadmium.

And the material that's coming out of the baghouse is not RCRA TCLP hazardous, that's not a fact of record, it's just a fact. And --

JUDGE REICH: For the period of

time prior to the EPA inspection, I gather this was not handled as a hazardous waste?

MR. BERGERE: That's correct. My client did not handle it as a RCRA hazardous waste. The material was being stockpiled; it was not in complete disregard of whatever its chemical composition was; it was bermed, it was tarped, it was covered, and you know, those issues -- and we don't contest the fact that using a TCLP test, that it tested RCRA-hazardous.

JUDGE REICH: If in fact the Bevill amendment did not apply, is there any argument that your client is not in fact liable?

MR. BERGERE: Well, I'm not going to -- I don't want to take a position that would take away any of the other defenses we raised to the complaint, but most of those defenses, I would say to the panel, are related to mitigation of the cascading list of violations, because the way RCRA works is

if in fact we stored for more than 90 days, then there's a cascading list of violations, and most of the defenses go to mitigation, not to liability.

JUDGE REICH: Okay, thank you.

MR. BERGERE: The liability case is really premised on this issue. Another point that was raised is that the material is contaminated, but that's completely irrelevant to a decision of this case. If you look at EPA's studies from the '90s and you look at the data in those studies -- in fact, fossil fuel wastes that are not generated by grey iron foundries also have toxic contaminants in them of the very same kind, perhaps not at these levels.

What we don't know, because the EPA has never made it a matter of public record, is what the grey iron foundry industry as a whole, or what the toxicity of its waste streams are -- its fly ash waste streams.

But to back up and address the very

first question which the panel asked, which I think is a very astute one, which is this is unquestionably as a matter of fact a fly ash waste generated primarily from the combustion of fossil fuel.

The judge below found it as a matter of fact and as a matter of science. It's not been contested by EPA. What EPA must contest, as it does, is it says -- it's stuck with two arguments. One is that Congress never really intended when it said fly ash waste to include foundry-generated fly ash waste, and then secondarily, even if it did, we promulgated -- we effectively created a regulation that complies with a statute that took it out of that realm, and I think both positions, as I've articulated in our brief, lack merit.

JUDGE REICH: Is this the only facility operated by Leed Foundry?

MR. BERGERE: Yes, it is.

JUDGE REICH: Okay.

MR. BERGERE: And in fact, there has been some mention of the Wheland decision, and in fact the Scarborough letter was included in that decision, because there was a vigorous debate in the late 1980s between Tennessee Wheland, which was a very large foundry -- the same type that they had six or eight cupolas in a row -- and, you know, my client has a single one -- but there was a debate that was triggered by the Scarborough memo, and the State of Tennessee and EPA were fighting over whether or not Tennessee should in fact regulate the same waste stream.

In Tennessee, it's hazardous waste. Tennessee first said yes, we will. They then considered the Bevill issue and said no, we won't. EPA threatened to yank their authority under RCRA, and eventually, EPA stepped in and took enforcement action against Wheland, and they lost. And they lost before an administrative law judge here

on exactly the same basis.

I don't cite that as precedent. I understand it was withdrawn at the suggestion and recommendation of the parties as part of a settlement, but it's part of the public record that was out there.

There was a decision in 1993 on this very issue where an administrative law judge, very much like Judge Moran, looked at the facts, looked at the law, and concluded that it was not even a close call that this is Bevill-exempt. In the face of that, EPA had two chances in '93 and '99 to clarify that in fact foundry-generated fly ash wastes are exempt. They had the ability to do that and they did not.

JUDGE REICH: The Wheland Foundry decision came before Horsehead, didn't it?

MR. BERGERE: Yes, it did.

JUDGE REICH: So the ALJ in that case did not have the benefit of the D.C. Circuit's thinking in that case at the time

the decision was issued.

MR. BERGERE: That clearly would be the case.

JUDGE REICH: So to the extent that we look to that decision at all, we have the benefit of that additional perspective.

MR. BERGERE: Right. And the perspective I cite it for is really that there was a vigorous --

JUDGE REICH: Right.

MR. BERGERE: If there was a vigorous debate about it, it should have been then carried forth publicly in the two major reports EPA produced -- was dragged to produce kicking and screaming through the consent decree process -- that had it move forward. But --

JUDGE STEIN: How does the existence of the Wheland decision suggest that this is really a closed issue?

MR. BERGERE: It doesn't suggest that it's a closed issue on the law, because

the case has no precedential value. What it does in my view is it undercuts the Agency's position that it made clear statements publicly to constitute a regulation for purposes of Bevill that would be clear to the public and be a clear rulemaking that in fact foundry-generated fly ash was not subject to regulation.

JUDGE STEIN: But didn't they take the position in that litigation that in fact it was subject to regulation?

MR. BERGERE: They did take that position in the litigation, but they then settled the case. They vacated the decision, obviously, for the reason that it was unfavorable. And then they went ahead and produced two reports to Congress that never addressed that debate, despite the fact that the one time it had gone before a judge for a decision, it had not gone their way, and a judge had ruled that the statute was unambiguous and did not support the Agency's

position.

JUDGE REICH: Do you read the 1999 report and the 2000 regulatory determination as intending to address in any way the status of grey iron foundries?

MR. BERGERE: I do not believe that they do.

JUDGE REICH: Was it not clear in the 1999 report and the 2000 determination that at least in the Agency's view, it was addressing all remaining wastes that were subject to the Bevill amendment?

MR. BERGERE: It's unclear -- you know, I can't speak for what the Agency thought it was doing. What it was required to do under the consent decree was address all remaining wastes. It said the RCRA --

JUDGE REICH: There is in fact language in both those documents, though, that says --

MR. BERGERE: I'm not --

JUDGE REICH: It addresses all

remaining wastes.
MR. BERGERE: Right, which --
JUDGE REICH: Which are not --
MR. BERGERE: There is, and that in fact was the consent decree obligation.
JUDGE REICH: Right. So I mean, I understand you're arguing that they may not have correctly done what they needed to do, but it seems pretty clear from the Agency statement that it thought at least it was covering all remaining wastes, and if it thought it was covering all remaining wastes and grey iron foundries were not in fact being addressed, then did anybody -- do you know -- comment either on the 1999 report or 2000 regulatory determination along the lines of what about us, we're covered by the Bevill amendment, why aren't we in there someplace?
MR. BERGERE: I can't speak for what the foundry industry generally would have felt. It's my belief in going back through the history today that probably

people assumed that because there wasn't a specific category that said foundry-generated fly ash is to be treated differently, that it was generally within the scope of non-utility generated waste, or that EPA simply hadn't addressed the issue and it was a mistake on the part of EPA. I don't think the regulated community has been cited or lauded in the past for coming forward to the Agency and saying, hey, Jay, you forgot to regulate me, but the essence of EPA argument is the --
JUDGE REICH: Yeah, here --
MR. BERGERE: The negative implication by --
JUDGE REICH: You forgot to say that I'm not regulated. I may think that's quite a different dynamic.
MR. BERGERE: That's true, and all I can speak for is that my client -- it's a small family-owned business up in the middle of nowhere in Pennsylvania -- didn't do it. There's no question. I'm not going to

contend that we did.
But I'd also suggest that that regulatory determination is not a regulation for purposes of the Bevill section, and that the course that EPA had to take to pull this material out of Bevill was to study it, was to promulgate a -- make a finding, make a recommendation and a report to Congress, and then adopt a specific regulation, which it has not done. It did --
JUDGE STEIN: If it's --
MR. BERGERE: Specifically in 1990 -- go ahead.
JUDGE STEIN: But if it's not within the scope of Bevill, why do they have to study and say it's not within the scope of Bevill?
MR. BERGERE: It is within the scope of Bevill. I don't know --
JUDGE STEIN: Well, that's the debate. I mean --
MR. BERGERE: That -- right, and I

don't -- I think if you look at the legislative history, particularly the sections and the language that was cited by my opponent here, I think if you look at the special waste definition, it's very clear that EPA and Congress took a very different view of what that should be.
EPA took the view that there ought to be an industry limitation on what kind of facility was covered by Bevill, and Congress took a very different view. It's very clear from the language that they included wastes and dropped the industry-specific categories, dropped the steam boiler requirement category. And so I think under Chevron, you don't get beyond the language of the statute to find ambiguity.
But even if you could argue that it was ambiguous and you look back at the legislative history, even Bevill's statement, which is cited in EPA's position as perhaps the definitive statement, as was quoted here,

Congressman Bevill specifically said that it's meant to be read broadly. And he allows in there implicitly that other materials can be in the waste streams other than fossil fuel combustion wastes.

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

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

MR. BERGERE: I don't think in the context of what this panel has to decide any

deference is appropriate, because what EPA did was it carried out what was a statutory directive part one, do a study, and the study was comprehensive.

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

I would posit to the Board that in 1981, EPA did propose a rule that would have specifically addressed grey iron foundry waste. And as Judge Moran said, 26, now 27

years later, that presumably they're still considering the comments on that proposed regulation. I submit --

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

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

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

MR. BERGERE: I would concede that point, but that's not the point that I raise

in citing to the regulation -- the proposed regulation. They prepared a proposed regulation and they never finalized it, and you know, one suggestion for that -- none of us know, but one suggestion for their never finalizing it is the fact that at that time, it would have been premature to promulgate a regulation because they hadn't done a study to determine that in fact that waste warranted regulation. And all you have before you is evidence of what Leed's specific waste stream was on the date that it was found.

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

JUDGE STEIN: I want to go back for

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a second, because EPA in that proposal stated that this particular waste was covered if it failed the characteristic test. Now, my understanding of Bevill is that Bevill would apply both to listings and to characteristics.

MR. BERGERE: That's correct.

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

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

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

MR. BERGERE: Because they --

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JUDGE STEIN: I mean, consider it as characteristic?

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

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

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

For 27 years.

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

MR. BERGERE: There is no --

JUDGE WOLGAST: Rationale that you posit?

MR. BERGERE: There is no record evidence. There's only the same implicit absence of action on the part of the Agency that the Agency cites in support of

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its -- sort of the negative implication that because we didn't specifically include it, it must not have been meant by Congress to be covered.

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

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

MR. BERGERE: Well, that's

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anecdotal. What Congress was really doing was, EPA was proposing a special waste regulatory program, and the hue and outcry about it was primarily by utilities saying well wait a minute, we've got volumes and volumes of this stuff. If we have to start characterizing it, it's going to be a burden. EPA doesn't even know whether this is hazardous yet. This is a large volume waste with generally low toxicity.

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

And the fact is, we know that Leed's waste was toxic under characteristic tests, but that's the only thing we know.

And I think it's completely irrelevant to a decision in the case whether it's high volume or low toxicity.

That only goes to the question of whether or not when Congress pulled it away, what were they concerned about. What they were concerned about was an overly aggressive regulatory program, and a special waste exemption, frankly, that was too limited to address the congressional concern.

JUDGE REICH: Let me ask a little bit about that, because when I look at Horsehead, for example -- I'm looking at page 14, and I'll quote a couple of things and get your reaction to what that's telling me.

It says, "As noted above, this court held in EDF II that EPA was required to limit Bevill wastes excluded from subtitle C to those wastes that are high-volume, low-hazard." In Solite, we held that EPA had discretion to define high-volume, low-hazard as a criteria so long as its definitions were

permissible interpretations of the Bevill amendment.

And then skipping a little bit, it says, "Although the Solite and EDF II decision involved only mining wastes under the Bevill amendment, the analyses in those opinions are wholly applicable to the instant case as well."

Why does that not in fact say that in looking at the scope of the Bevill amendment, you do in fact look at high-volume, low-hazard criteria?

MR. BERGERE: I think number one, that that's -- I think that's dicta in the case, but I think what the court is struggling with there is to come up with what are the world of things you're looking at. If we look at what Congress was concerned about, Congress was concerned clearly about the fact that EPA was stepping in with a very complicated cradle-to-grave regulatory program, into an area where there's a lot of

high-volume, low-toxicity waste.

But the fundamental point was, EPA was directed to study them to find out which ones were high-volume, high-toxicity, which ones were low-volume, high-toxicity, which ones were low-volume, low-toxicity. What Congress essentially said was you don't have enough information to make that determination, you need to do a series of studies, and based on those studies, you need to come back to us and propose regulations to say these ones, we need to pull back into the program; these ones, we don't.

JUDGE WOLGAST: But the trouble I'm having with that in light of the -- the Horsehead, EDF I, II, and Solite decisions, are that the D.C. Circuit seems to be -- what you just stated would be the path if it were a Bevill waste, but what those decisions seem to be saying -- that it's appropriate for EPA to look at within the terms of the Bevill amendment high volume, low toxicity as a

screening device to determine what's in and out of Bevill. What subsumes the universe of Bevill, and Solite, as well as the language of EDF II, seems to just very explicitly say that.

MR. BERGERE: That language also specifically states -- and you were careful to caveat it -- that so long as consistent with the definitions contained in Bevill. And it gets back to -- it's a bit circular, but it gets back to the argument of what is fly ash waste generated primarily from the combustion of fossil fuel? What does that mean?

JUDGE WOLGAST: Correct. But if the D.C. Circuit is saying that it's okay to construe the amendment's terms to exclude from Bevill's scope processing wastes that don't qualify as low-hazard.

MR. BERGERE: Again, by regulation. And --

JUDGE WOLGAST: No. Well, it

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didn't say that.
MR. BERGERE: I think the way I have read those decisions and understood them in the context of the statutory language of Bevill is that ultimately EPA needs to make conclusions about what is high hazard, what is low hazard, and then adopt regulations to address the things that it pulls out or leaves in.
JUDGE WOLGAST: Okay. But here's another quote that I think is troublesome in that regard, because in Solite again, they say the low-hazard criterion is solely a preliminary screening device to determine which mineral processing wastes are special wastes, and will not be used in determining which wastes will subsequently be regulated under subtitle C.
I mean, I think the regulations you're talking about would be the ultimate regulation to make a subtitle C determination.

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

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category, including grey iron foundries, in that list of materials, that therefore by negative implication, a regulation has been created that complies with the Bevill provision that therefore means, again, by negative implication, that my client's waste material is in fact either not covered by the original scope of the statute or therefore and thereafter exempt.
JUDGE STEIN: It strikes me that your approach to the statute is a plain-meaning approach.
MR. BERGERE: That's correct.
JUDGE STEIN: It strikes me that that's exactly what the D.C. Circuit has rejected in these line of cases, that it's basically into a Chevron step two analysis, finding some measure of ambiguity for perhaps different reasons depending on the particular issue. But it seems to me that the D.C. Circuit has effectively rejected the plain-meaning language applied to this

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particular amendment.
How do you respond to that?
MR. BERGERE: I don't think the D.C. Circuit has done that to the amendment as a whole. I think in very specific instances -- and this is for some of the other kinds of waste streams very complicated. And in the one instance where they addressed it for RCRA and they talked about these specific kinds of provisions, they were trying to reconcile two conflicting provisions within RCRA: the BIF rule, obviously, which allowed for the regulation of Bevill waste or captured the regulation of Bevill waste; and the Bevill exemption, which stood alone and said it wasn't captured.
And in that context, the court said well, you know, there is some ambiguity, because on the one hand the statute is clear that nothing is to be regulated. And later, Congress gave them authority to regulate BIFs, boilers and industrial furnaces. And

in that context, there's ambiguity. But I don't think in this -- I don't think the D.C. Circuit's decisions can be read for the context -- the Bevill Amendment itself is simply ambiguous and you can never use a plain language approach.

I think in the case of -- in the very specific issues before this court, as found by Judge Moran, the plain language is clear. It's fly ash waste generated primarily from the combustion of fossil fuel. As a matter of fact and science before you, that is uncontested, that Leed's fly ash -- dust was fly ash waste generated primarily from the combustion of fossil fuel. And there isn't an ambiguity about that language. But even if there was and you went to the legislative history, that legislative history supports Judge Moran's finding that in fact Congress did not choose to go the way EPA has subsequently gone, by allowing some limited interpretation to steam boilers or

utilities. I mean --

JUDGE STEIN: But then what weight should we give to the D.C. Circuit opinions? I mean, it's clear that they have written several decisions. And the later decisions refer to the earlier decisions. And it strikes me that for us to decide this case without taking into account some fairly strong language in a number of these opinions is difficult.

When I read your brief, other than distinguishing a little bit, I don't really see that you've really grappled with -- you know, I don't see us being able to write a decision without not just looking perhaps -- irrespective of what you do with legislative history -- the D.C. Circuit has interpreted the language of these amendments.

MR. BERGERE: What I would suggest is that this is distinguishable from the instances in which the D.C. Circuit has found it appropriate to go deeper and actually do

some deference to EPA on some level of interpretation. But even if we were to do that, again, EPA here has not -- there's no clear regulatory determination that says foundry-generated fly ash is not covered by the Bevill exemption. It's something that has to be cobbled together from transient actions by the Agency over a period of years, and then reading by negative implication these reports to say well, we did these reports and they only cover these things, so therefore, we can accept that -- you know, it's sort of like a back-door interpretation of the statute to say okay, well, they must not have meant these things.

So I would suggest to you that the D.C. Circuit's decisions cannot be read to be a blanket statement that the Bevill exemption is just ambiguous, and every time, you have to get into EPA's mind to figure out what needs to be done. This is really a very specific and narrow issue about what --

JUDGE REICH: In the Office of Compliance Sector Notebook on the Profile of the Metal Casting Industry, it says the wastes associated with metal casting melting operations include fugitive dust and slag. Lead and chromium contamination may cause the waste slag to be subject to RCRA as a hazardous waste.

Is that a correct statement?

MR. BERGERE: I think it's not a correct statement. I think it's an incorrect statement. Some of it deals with terminology. One of the things that I was -- I've been involved in this case since the citation was first filed. And when the EPA -- when I discussed with the EPA inspector and the EPA attorney the Bevill exemption, they didn't even know what the fly ash exemption was. They thought I was talking about steel slag.

This is a case where an enforcement action was taken. And after the fact, the

Agency's had to come up with a reason why this material is exempt. I think that statement is an overbroad statement about what the Agency's authority is based on what Bevill allows.

JUDGE REICH: This may go beyond what you know, in which case, feel free to say so. But the transmittal message from the administrator implies that these documents were prepared, among other things, with industry input. Do you have any idea about the genesis of this document, and why industry would not have objected to that language?

MR. BERGERE: I don't know that industry didn't object to the language, so I'm not in a position to say. And I think what I would -- from my personal experience and being a government regulator in the past and working in -- on rulemakings and policies with the Agency, the fact that it was developed in conjunction with doesn't

necessarily mean there was accord either. EPA ultimately is the arbiter of those issues and issues the policies it feels meet its needs, and doesn't necessarily agree with industry all the time.

I have nothing further unless you have another question you'd like me to address.

Thank you, I appreciate your time.

JUDGE REICH: Mr. Raack, you have five minutes for rebuttal.

MR. RAACK: I just have a couple of points. I may not need all that time.

JUDGE REICH: That's fine.

MR. RAACK: I just quickly want to come back and reaffirm that it is our position that the D.C. Circuit cases should be followed in this case. We think they are on point. This wasn't dicta, this isn't anecdotal. And what the D.C. Circuit Court had to find; the predicate legal conclusions of law had to find in the cases before it

were that the terms of the statute were not clear enough to guide the Agency to make these kind of decisions especially when it came to co-processing, as it did in the Horsehead case and the co-processing here, the language of this statute is not clear enough.

It's our position as it was the court's that the legislative history in that conference report is right on point that the high-volume, low-toxic criteria and standard was to be the way the Agency interpreted who was to be studied and what the process was to include.

Just a couple of points about what counsel has said. He claims that utility wastes have similar contaminants, and that's true. Utility wastes were found to have lead and cadmium. But as he rightly noted, not at these levels -- well, nowhere close to these levels. In fact, the TCLP results that were put into the report to Congress show some

bare exceedences of the TCLP regs' regulatory levels. And these again are upwards of 180 times the level. And that's the very point here. If the Agency is bound to interpret this as low hazard waste, then iron foundries don't categorically make it, they aren't categorically included.

The second point is -- that he admitted the study that the Agency conducted was complete. And that's exactly right. The Agency's work under Bevill is complete. It studied all of the wastes that it believed were exempt, and it's made a final regulatory determination as to those wastes.

The last thing I'll note about his statement was that this is not an after-the-fact theory, of course, as every document that we point to that indicates what the Agency's position is was published and issued before the complaint in this case.

Their entire argument is that the statute is wholly unambiguous and

all-encompassing, and to find this, the Board has to reopen a concluded regulatory matter, disregard the Agency's 27-year position, the clear legislative history, the D.C. Circuit Court's Bevill decisions that are directly on point, and the administrator's 1981 statement.

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

Thank you again for your consideration. That's all I have.

JUDGE REICH: Thank you, Mr. Raack. I'd like to thank counsel for what I found to be a really excellent argument, and we will take the matter under advisement and we stand adjourned.

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

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