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August 20, 2007

Clerk, Environmental Appeals Board
Colorado Building, Suite 600
1341 G Street, NW
Washington, D.C. 20005

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

Dear Sir or Madam:

Enclosed for filing please find five (5) copies of Respondent's Brief in Opposition to the appeal filed by the United States Environmental Protection Agency in the above-docketed RCRA matter. I am simultaneously serving copies on the other persons identified on the certificate of service attached to the Brief. Please call me if you have any questions regarding this filing.

This filing contains ***no*** Confidential Business Information. As always, I appreciate your time and consideration.

Sincerely,

Timothy J. Bergere

TJB:clk
Enclosure (5 copies)

cc: Peter Raack, Esquire (with enclosure) [By Hand Delivery]
John Ruggero, Esquire (with enclosure) [By Hand Delivery]
The Honorable William B. Moran (with enclosure) [By Hand Delivery]
Edmund Quirin (with enclosure)

BEFORE THE

ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In the Matter of:	:	
	:	**RCRA (3008) Appeal No. 07-(02)**
Leed Foundry, Inc.	:	
	:	
Respondent.	:	**RESPONDENT'S BRIEF IN**
	:	**OPPOSITION TO USEPA's**
Docket No. RCRA-03-2004-0061	:	**NOTICE OF APPEAL**
	:	

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INTRODUCTION

On April 24, 2007, after careful consideration of the stipulated record, expert testimony, extensive briefing, and oral argument, the Honorable William Moran issued a thoroughly researched, well-reasoned Initial Decision in this matter which should be affirmed by this Honorable Board. EPA seeks to overturn a portion of the Initial Decision, in which Judge Moran held that Leed Foundry's fly ash waste is Bevill-exempt from regulation as a hazardous waste under provisions of the Resource Conservation & Recovery Act ("RCRA"). EPA's postulate to this Board is that had Judge Moran afforded greater deference to the Agency's own interpretation of RCRA's Bevill exemption, the result would have been different. EPA is wrong.

Although many portions of RCRA and its implementing regulations are complex and in some instances warrant deference to EPA, the Bevill Amendment provision at issue is not one of them. Its simple direction to the Agency with respect to fly ash waste generated primarily from the combustion of fossil fuel led Judge Moran to the proper conclusion that EPA has not yet taken the steps prescribed by RCRA to regulate Leed Foundry's fly ash waste as a RCRA hazardous waste. Accordingly, Judge Moran's Initial Decision must be affirmed.

COUNTER-STATEMENT OF THE ISSUE PRESENTED

Whether the Presiding Officer properly concluded that EPA has not yet complied with RCRA's statutory predicates to remove from the Bevill exemption foundry-generated fly ash waste generated primarily from the combustion of fossil fuel.

SUMMARY OF ARGUMENT

Unquestionably, and as found by Judge Moran, the waste stream at issue is fly ash waste generated primarily from the combustion of fossil fuel. It is, therefore, properly excluded from

RCRA hazardous waste regulation at this time, in accordance with the plain language of 42 U.S.C. §6921(b)(3)(A). The statutory language and legislative history do not support EPA's view that the exemption was intended to apply only to utility-generated fly ash. EPA's own reports to Congress make clear that the Agency did not so limit its own interpretation of the statute until it had to come up with an argument to support this isolated enforcement action.

Judge Moran properly recognized that EPA has authority to subject any Bevill exempt waste to RCRA regulation provided it does so in accordance with the express statutory requirements found at 42 U.S.C. §6921(b)(3)(A). Those requirements are simple and clear: EPA must first (a) study the waste stream and present a report to Congress detailing its findings and bases for subjecting a waste to regulation as a RCRA hazardous waste, (b) wait six months, and (c) adopt specific regulations to implement any planned program. To date, EPA has not complied with this simple statutory mandate and, accordingly, its unilateral effort to lift the statutory exemption through an isolated enforcement action is arbitrary, capricious and unreasonable as a matter of law, as found by the Presiding Officer.

EPA's various arguments that the Bevill exemption is limited to utilities, or that the Agency effectively adopted a regulatory program sufficient to lift the statutory exemption as to foundry-generated fly ash, is pure pabulum and contrary to the public record on the issue. Moreover, the issues presented and decided by the Presiding Officer are not of a nature that required deference to the Agency's current *ad hoc* interpretation of the Bevill exemption offered in defense of this litigation. For all of the forgoing reasons, the Presiding Officer's Initial Decision must be affirmed.

FACTUAL BACKGROUND

Leed Foundry operates a small gray iron foundry in a rural Pennsylvania town to produce metal castings, primarily manhole covers and manhole collars. The castings are made from scrap iron heated to its melting point in a furnace referred to as a cupola. To generate the heat needed to melt the scrap iron, Leed Foundry burns metallurgical coke, a bituminous coal product and fossil fuel, a finding in the Initial Decision that is not disputed by EPA.[1]

Other than a small amount of fuel used to ignite the cupola, the coke is the exclusive fuel source used in the operation. When burned, coke, like the bituminous coal from which it was created, generates a fine particulate commonly referred to as fly ash. Although EPA's legal counsel carefully avoids the use of the term "fly ash" when referring to the emission control dust generated by Leed Foundry's cupola, Judge Moran properly found that this emission control dust is, in fact, fly ash waste.[2]

Importantly, EPA does not contest in this appeal Judge Moran's finding, based on the stipulated facts and expert testimony, that ***the fine particulate generated by Leed Foundry's cupola is fly ash***, even if EPA uses other names for it throughout its brief. Nor does EPA contest Judge Moran's finding, based on the same record, that Leed Foundry's fly ash is ***generated primarily from the combustion of fossil fuel*** (*e.g.*, the metallurgical coke).[3] EPA's entire case

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[1] EPA agrees that coke is a fossil fuel for purposes of the Bevill Amendment provision at issue. *See e.g.*, EPA Brief at p. 18, n64. This finding by the Presiding officer has not been challenged.

[2] Scrap iron, when melted, does not emit the fine particulate known as fly ash, although the testimony of the experts in this matter allowed that some fine particulate emissions could occur from paint that may be present on the scrap metal feed stock, or from rust particles loosened by air flow in the cupola. Judge Moran properly found that the contribution of these non-fossil fuel fine particulate emissions, along with other hazardous constituents in the vapor of the melting scrap, comprise significantly less than 50% of the fly ash waste stream collected in Leed Foundry's baghouse.

[3] Instead, EPA is resigned to arguing that this particular type of fly ash waste is not the "fly ash waste" referred to in 42 U.S.C. §6921(b)(3)(A). As discussed *infra*, EPA's interpretation of the statutory provision requires that words of

Continued...

rests on its singular contention that when Congress crafted the phrase "fly ash waste" in Section 3001(b)(3)(A), it really meant "fly ash waste ... ***at electric utilities and steam boilers***." While EPA's entire case requires the addition of language not included in the statute, Respondent has contended, and Judge Moran's decision below affirms, that Congress meant exactly what it said. Judge Moran's findings, based as they are on a thorough and careful review and evaluation of the stipulated facts, testimony presented, and relative experience and expertise of the witnesses, is entitled to deference from this Board.

ARGUMENT

A. EPA Has Failed To Take the Necessary Steps To Lift the Bevill Exemption For Fly Ash Waste.

RCRA Section 3001(b)(3) gives EPA authority to regulate "fly ash waste" as a RCRA hazardous waste only if, after study and reporting to Congress, it determines that such regulation is appropriate. *Envtl. Def. Fund II v. E.P.A.*, 852 F. 2d 1316, 1319-21 (D.C. Cir. 1988) ("*EDF II*"); *Horsehead Res. Dev. Co. v. Browner*, 16 F. 3d 1246, 1254 (D.C. Cir. 1994). If after such study and reporting EPA determines that fly ash waste, in any respect, warrants hazardous waste regulation, it needs to so advise Congress, ***wait six months***, then promulgate regulations. 42 U.S.C. §6921(b)(3)(A); *EDF II, supra* at 1320. The statutory language could not be clearer.

EPA has studied fly ash waste and, as the Agency notes in its Brief, authored two reports to Congress on the subject (the "Reports"), fulfilling one of the statutory pre-requisites to the regulation of fly ash waste under RCRA Subtitle C. But in neither one of those Reports did EPA suggest, let alone propose the regulation of fly ash waste from ***any*** fossil fuel combustion source.

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limitation be added to the plain language used by Congress, something Judge Moran was not prepared to do and a position this Board, in review, should also reject.

Indeed, EPA determined that fly ash waste should continue to be regulated under the provisions of other state and federal law, and not as a hazardous waste under RCRA Subtitle C.

That EPA has not adopted ***any*** regulations following its submission of the Reports is a point that is not subject to debate or discourse – no regulations have been promulgated. EPA did not and cannot cite this Board to any regulation that lifts the Bevill exemption created by Congress for any fly ash waste, because there are none.

EPA thus came before Judge Moran, and now comes before this Honorable Board, without having complied with the minimal statutory steps necessary to lift an exemption placed into the law by Congress. Judge Moran's Initial Decision correctly recognizes this fundamental flaw in EPA's legal position and properly holds that EPA has not yet taken the steps necessary to lift the Bevill exemption for fly ash waste, including the fly ash waste generated at Leed Foundry.

B. EPA's Reports Are Not Regulations.

To overcome this obvious flaw in its legal position, the Agency desperately attempts to recast the Reports to Congress as a regulation, because they purportedly represent the Agency's "definitive interpretation" of the Bevill exemption for fly ash waste. EPA does so as the cornerstone to its argument that Respondent's defense of the RCRA enforcement case is, in fact, an untimely collateral attack on this phantom rulemaking. Perhaps because it would strain credibility too much to come right out and claim the Reports are a regulation, the Agency dances around the issue, variously calling them "definitive interpretations", "Regulatory

Determinations" or "settled resolutions" that "might" be regulations. *See e.g.*, EPA Brief at pages 17, n57 and 25, n88.[4]

It hardly requires legal argument to note that there is a significant difference between a report to Congress and a promulgated regulation. Congress obviously thought of them as different events, when in Section 3001(b)(3), it told EPA that to lift the Bevill exemption for fly ash waste, it would need to ***both*** (i) report to Congress and (ii) promulgate a regulation. Also, as if anticipating just such an argument by the Agency, Congress also specifically told EPA that it could not propose regulations to lift the Bevill exemptions for at least six months ***after*** its submission of the required report(s). The six month waiting period obviously presents a logical conundrum for EPA, one that has not been addressed in its Brief.

Just like the cement kiln dust "determinations" reviewed by the D.C. Circuit in *Am. Portland Cement v. Browner*, 101 F 3d 772 (D.C. Cir. 1996), EPA's Reports are not the "ultimate stage in the rulemaking process" insofar as the possible regulation of fly ash waste is concerned. The statute directs that if the exemption is to be lifted, specific regulations must be published not sooner than six months after Report submission. If EPA intends to lift the Bevill exemption for any class of exempt waste, it cannot back into the process with preamble language from 1980 or by re-casting its Reports as "definitive interpretations" or "settled resolutions."[5]

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[4] Leed Foundry concedes the definitive nature of the Reports insofar as they reflect the Agency's view that the Bevill exemption for fly ash waste need not be lifted. If nothing else, the Reports make abundantly clear that EPA does not intend to propose formal regulations to nullify the Bevill exemption and pull fly ash waste in any respect into the full RCRA Subtitle C regulatory program. That concession by EPA should end the inquiry here.

[5] No less bizarre is the fact that EPA's so-called "definitive interpretation" concluded that fly ash waste should not be subjected to hazardous waste regulation. EPA attempts to wiggle out from under the great weight of its own "definitive interpretation" by arguing that the Reports did not specifically address foundry-generated fly ash waste and, therefore, by negative implication, such fly ash waste cannot reside under the cloak of non-regulation created by the "definitive interpretations" expressed in the Reports. This postulate ignores the simple fact that the cloak in question was not created by the Reports or any other action on the part of EPA prior to their issuance. Rather, the cloak in question was created by act of Congress, an act that did not rely upon any interpretive guidance or other type of scrivnership by EPA. Indeed, because of its concern in the late 1970s that EPA might be unnecessarily

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The public record is clear that EPA proposed **no** regulations on this subject after its submission of either report to Congress. EPA does not, because it cannot, cite this Board to a single provision of the Code of Federal Regulations adopted six months after publication of either Report, on the subject of fly ash waste.[6] It is axiomatic, therefore, that the Bevill Exemption for fly ash waste remains firmly intact. Judge Moran's Initial Decision is entirely consistent with the current state of the law and reflects a careful and insightful review of the Reports and their legal effect. Leed Foundry is not collaterally attacking a final regulation or rulemaking because there are none to attack – only the language of the statute (parroted word-for-word in EPA's regulation) is subject to interpretation in this appeal. EPA's attempt to construct an unassailable procedural fortress around the Reports or other transient documents attached to its Briefs here and below is a novel legal position, and ultimately is in vain.

C. Foundry-generated Fly Ash Is Not Excluded From the Bevill Exemption.

EPA next attempts to argue that foundry-generated fly ash waste was never intended to be covered by the statutory exemption. Instead, EPA contends, the exemption was meant to cover only utility-generated fly ash waste, even if Congress did not see fit to say so in the plain language it enacted into law. Although the court in *EDF II* notes that the Bevill Amendments

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saddling fossil fuel combustors with RCRA's cradle-to-grave system, Congress effectively took back from EPA the general authority to regulate certain waste streams, directing that a different course be taken with respect to Bevill wastes. EPA's citation to snippets of its pre-Bevill proposed rulemakings, or pre-report interpretive documents do not carry the day on its myopic view of the statute.

[6] Indeed, after receiving an adverse ruling on the same exact issue in *In re Wheland Foundry,* 1993 WL 569096 (EPA 1993) before releasing the second of its two Reports, one would have thought the Agency would have stepped to the fore with a definitive interpretation that made clear its position on the issue at hand. Instead, EPA quickly settled the case, negotiated a vacation of the adverse Decision, and remained mum on the issue.

encapsulate the "special waste" concept earlier abandoned by EPA, 852 F.2d at 1329, the court stopped well short of saying that the actual special waste program was being adopted.

In fact, when Congress adopted the Bevill Amendments as part of the Solid Waste Disposal Act Amendments of 1980,[7] Congress chose to use more generic language, ***without limiting the exemption to any particular industrial segment***, as EPA had done in its proposed rule. One need only compare the "special waste" language EPA originally proposed but abandoned, set forth on page 7 of its Brief, with the actual language included by Congress in the Bevill Amendment. The "special waste" description originally proposed by EPA included flue-gas desulfurization waste (clearly a utility waste stream) and only referred to:

> "bottom ash waste and fly ash waste generated by a steam power plant ... solely from the use of fossil fuels ...."

EPA Brief at p. 7. In contrast, the relevant Bevill Amendment language added "slag" (an industrial waste output) and substituted the broader phrase "flue gas emission control waste." More telling, however, Congress specifically chose not to limit the scope of the exemption to "steam power plants" by deleting any reference to an industry type, and substituting the word "primarily" for the word "solely" in reference to the composition of the fuel source. These changes are substantive, signaling that while Congress may have approved the concept of an exemption for "special wastes," it was not prepared to define the concept as narrowly as EPA had done. Congress must be presumed to have understood and intended these substantive changes and Judge Moran was required to give them legal effect.

Thus, while it may be fair for the *EDF II* court to have concluded that the Bevill Amendments concept was, as a general approach, derived from EPA's "special waste" proposal,

[7] Pub. L. No. 96-482, 94 Stat. 2334, 2337 §7.

clearly, EPA's "special waste" proposal was far more limited than the Bevill Amendment enacted by Congress. It is, therefore, facile to suggest, as EPA does, that the *EDF II* court's reference to EPA's "special waste" program means, *ipso facto*, that the two programs are one and the same – clearly they are not.

There is, thus, no language in the statute that excludes foundry-generated fly ash waste from the scope of the Bevill exemption, or which reflects an intent to restrict the exemption to utility-generated fly ash waste. In fact, just the opposite is true: *while using EPA's concept of an exemption for certain special wastes, Congress purposefully broadened the original EPA approach to cover a far wider spectrum of potential sources and it did so with full awareness of EPA's more narrow approach in its abandoned "special waste" proposal.*[8]

In 1980 EPA did, of course, publish a regulation "implementing" the Bevill Amendment provision at issue, but that regulation merely parroted the statutory language, offering no definitive interpretation or technical insight on the question presented. Wisely, EPA did not attempt in 1980 to rollback the Bevill language to its more narrow "special waste" program.[9] Had it done so, the Agency clearly would have overstepped its legal authority, just as it is doing in this proceeding.

EPA's discussion of the legislative history, at most, underscores the presentation of opposing views during the law-making process. After weighing and reconciling all of the

[8] It should by now be clear that Congress stepped into this field to begin with because it did not believe EPA had sufficient information to formulate a cogent regulatory program, and it was concerned that EPA's abandonment of the concept of excluding certain "special wastes" would lead to a significant and unnecessary regulatory burden on fossil fuel combustors and the mining industry that relied on this customer base.

[9] In point of fact, in 1980, ***before*** EPA completed the necessary studies directed by Congress, it would have been premature to establish a regulatory program that definitively interpreted the scope of the fly ash exemption. In any event, EPA did not do so and its only regulation on the subject does not offer any insightful guidance to which deference must be accorded.

information before him, Judge Moran reached the proper conclusion that Congress did not intend to limit the fly ash waste exemption to utilities and steam boilers, as EPA would do here.[10] Whatever debate may have taken place on the floor of the House and Senate, or in the various committees, the ultimate result was a simple, concise legislative declaration that included no scope-limiting language of the type EPA would infer into the statute. EPA's reliance on the legislative history is, thus, thoroughly misplaced and Judge Moran's more thorough and scholarly review of the legislative history leads to the ineluctable conclusion that EPA's enforcement proceedings here is ill-founded and beyond the scope of its statutory authority.

D. *Chevron* Requires That The Bevill Amendment Be Given its Plain Meaning.

It is axiomatic that if the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron,* 467 U.S. at 842-843 (footnote omitted). Moreover, administrative constructions which are contrary to clear congressional intent must always be rejected. *Id.* at 843 n9.

The most fundamental principle of statutory construction is that words in a statute must be given their ordinary meaning whenever possible. *Walters v. Metro. Educ. Enters., Inc.,* 519 U.S. 202, 207 (1997). *See also In Re Howmet Corp.*, 13 E.A.D. ___, RCRA (3008) Appeal No. 05-04 (EAB, May 24, 2007) (Slip Opinion p. 13). In his Initial Decision, Judge Moran properly applied principles of statutory construction in ascertaining that the statutory language in question is clear and unambiguous insofar as the key terms "fly ash waste" and "primarily" were concerned. The statutory path to EPA's potential RCRA regulation of fly ash waste also is clear

[10] That utility fly ash predominated certain segments of the floor debate and committee meetings merely reflect the reality of the situation: *that the vast majority of fly ash generation took place at electric generating stations, our largest fossil fuel combustors*. That predominance should not be construed to infer as a corollary that other fly ash waste generating industries were excluded from coverage by the exemption.

and unambiguous, requiring a study, a report to Congress, a six month wait and the promulgation of regulations in the event the Agency determines that the exemption should be lifted. *See e.g.*, *EDF II*, 852 F.2d at 1319-20; *Horsehead, supra* at 1254-55.

Although Respondent does not believe Judge Moran needed to delve into the legislative history to reach this conclusion, Judge Moran, giving far more credibility to EPA's arguments than they deserved, undertook an exhaustive and scholarly review of the legislative and regulatory history surrounding the Bevill exemption and EPA's reporting to Congress, and insightfully concluded that not only is the statute clear and unambiguous on the precise points at issue, but the legislative and regulatory history supports the plain reading of the statute advanced by Respondent. For this reason, Judge Moran was not required to reach the second prong of the *Chevron* test, one that analyzes an agency regulatory interpretation, because (i) the plain language used by Congress in the Bevill Amendment was capable of being given full effect and (ii) the interpretation offered by EPA here is contrary to the discernable Congressional intent. An objective review of the legislative history and a comparison between the EPA "special waste" program and the Bevill language affirms Judge Moran's conclusion below.

E. The Citizens' Suit Consent Decree Is Irrelevant.

EPA also strains credibility by implying in its Brief that its scoping of the second Report to Congress, in the context of a citizens' suit settlement, authoritatively elevates its own interpretation of the Bevill exemption. It does not.

EPA apparently was sued in the early 1990s because it was taking too long to complete the studies and publish appropriate regulatory determinations, as it was directed to do by Congress. EPA had no defense to the suit, so it entered a Consent Decree to obtain more time to complete the studies. The Consent Decree is not a matter of record, does not constitute a judicial

finding that the Bevill exemption for fly ash waste is limited to utility-generated fly ash and, as far as Respondent can tell, contains no analysis of the issues in this case and no judicial findings. Therefore, it has no precedential or authoritative value.

By its own admission, though, pursuant to the Consent Decree, EPA's second study was to cover "all remaining wastes subject to RCRA Sections 3001(b) and 8002(n)" an admonition that does not list the wastes that were or were not to be included. EPA Brief, p. 9. Such a broad direction does nothing to bolster EPA's claim that the statutory exemption was intended to cover only fly ash wastes from utility sources, or to exclude foundry-generated fly ash waste. Nor does this settlement agreement declaration render the statutory language that preceded it by some 13 years silent or ambiguous per *Chevron*.

Nevertheless, in self-serving fashion, EPA cites to its own scoping of the to-be-undertaken Report pursuant to the revised schedule in the Consent Decree, and notes that it did not specifically include fly ash waste generated by foundries. EPA then, in effect, argues that because it has not yet been sued for scoping the second report to include less than all fly ash generating sources, and the second study was intended by EPA to be the final study effort, foundry-generated fly ash must not be have been covered by the ***statutory*** exemption enacted 13 years before. Of course, the reason EPA must advance such a contorted construction of events is because its position is so clearly at odds with the plain language of the statute. Respondent posits that a more plausible interpretation of the EPA scoping of the second report is that EPA failed to comply with the Consent Decree as well as the statute, when it pursued a study scope for less than 'all of the remaining Bevill wastes.'[11] Whatever the case, Respondent's legal

[11] One presumes that the citizens' group in question could still pursue a request for sanctions against EPA for such non-compliance.

position is not diminished by such a self-serving argument. The existence of the Consent Decree, as well as EPA's efforts to meet its deadlines, is of no legal import.

F. The *Horsehead Development* Decision Does Not Affect the Outcome of this Appeal.

In Section II of its Brief, EPA relies heavily on the decision of the D.C. Circuit in *Horsehead, supra*, to establish silence and ambiguity in the Bevill language at issue in this case. Such reliance is misplaced.

In *Horsehead*, the court was faced with the task of reconciling two seemingly competing provisions of RCRA. The first was Section 3001(b), the same provision at issue here, and the second was a later-added provision, Section 3004(q), which authorized EPA to regulate the burning of hazardous wastes for energy recovery.[12] In implementation of Section 3004(q), EPA promulgated a regulation known as the Boilers & Industrial Furnaces Rule, or "BIF Rule." The purpose of the BIF Rule was to regulate certain Bevill exempt wastes that were generated, in part, through the combustion of regulated RCRA hazardous wastes in "Bevill devices." The court noted at the outset that for RCRA purposes, "burning hazardous waste constitutes 'treatment' of it, thus giving the EPA authority to regulate the activity." 16 F.3d at 1252. In the BIF Rule, EPA established a procedure for determining whether an otherwise Bevill exempt waste had become "significantly affected" by its contact with the already fully regulated RCRA Subtitle C hazardous wastes that were co-burned with the fossil fuels in Bevill devices. It was this regulatory effort, to conform the two programs, that was subject to challenge.

[12] Section 3004(q) was added to RCRA by the Hazardous & Solid Waste Amendments of 1984, Pub. L. No. 98-616, §204, 98 Stat. 3221.

Although the *Horsehead* case makes for interesting reading, it does not help EPA here. First, the *Horsehead* court did not find the language of 42 U.S.C. §6921(b)(3)(A) silent or ambiguous on the point at issue here. EPA's claim to the contrary is simply a misreading of the holding. The silence and ambiguity that existed between two competing regulatory provisions in the *Horsehead* case is not present here. Second, Leed is not a co-burner subject to the BIF Rule – it does not burn any regulated hazardous wastes, a point EPA attempts to obscure by its references to "toxic" and "highly contaminated" scrap iron feed stock.[13] If EPA believed that Leed Foundry's scrap iron was a RCRA hazardous waste, this would be a BIF Rule case, which it is not.

Third, the *Horsehead* court was faced with a set of EPA regulations that "spanned a gap" between two seemingly conflicting RCRA provisions. The court faced the task of determining whether the Agency had stepped into the gap with its rulemaking in a permissible manner. It was in that context that the court found EPA had permissibly stepped into the gap with a set of regulations that resolved the silence or ambiguity as between the statutory provisions. Here, EPA has no regulations to interpret – indeed, that is precisely the problem.

EPA could have promulgated regulations after completing its studies, thereby putting small family-owned businesses like Leed Foundry on notice, but it chose not to do so.[14] Instead,

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[13] EPA mischaracterizes the scrap iron feed used at Leed Foundry to inflame (no pun intended) the passions of this panel. Those characterizations are not facts of record. If the Board reviews EPA's Reports, including the accompanying tables, it will see that coal and other fossil fuels themselves contain lead and cadmium and that there were some cases where leachate testing on fly ash from "pure" coal combustion wastes contained elevated levels of hazardous substances. All scrap iron will contain some of these metals. Leed Foundry buys its scrap iron from the same sources every other scrap iron smelter or processor does – there is nothing unique about Leed's scrap iron feedstock.

[14] Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule. *CWM Chem. Serv., Inc.*, 6 E.A.B. 1, TSCA Appeal No. 93-1 (EAB 1995) (quoting *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)). The public record, as it were, is devoid of any regulation or other official pronouncement putting a foundry operator like Leed on notice that its fly ash waste is excluded from the broad statutory exemption. In this

Continued...

EPA has cobbled together for this Board a very loose portfolio of documents, containing, literally, thousands of pages, none of which pay anything but the most passing of references to the central issue raised by the enforcement action under appeal.

As noted in Sections B and E above, the Reports are not regulations which provide authority for lifting the Bevill exemption or narrowing its scope. Also, the Reports, the EPA-cited Consent Decree, and other ancillary documents, do not meld to become a "settled resolution" that foundry-generated fly ash is outside the scope of the Bevill exemption. Nor should this court infer a definitive interpretation or settled resolution about the scope of the fly ash waste exemption from the fact that EPA did not specifically include it as a study category in either Report; that gives too much credence to something that is most likely just an Agency oversight. In conclusion, lifting the Bevill exemption is not something EPA can do as a matter of policy – Congress foreclosed that possibility.

EPA is simply without the tools to make the arguments that it made in *Horsehead* and Judge Moran's probing and in-depth review of the regulatory and legislative background fully support his ruling on this matter.

....Continued
case, the "public record" is substantively composed of information from six primary sources: (1) the plain language of 42 U.S.C. §6921(b)(3)(A); (2) the equally plain language of 40 C.F.R. §261.4(b)(4); (3) the fairly exhaustive August 1993 and March 1999 Reports to Congress which do not mention or distinguish foundry-generated fly ash; (4) EPA's May 22, 2000 regulatory determination for non-utility fly ash, which, again, does not mention or distinguish foundry-generated fly ash, 65 Fed. Reg. 32214; (5) the various EPA correspondence accompanying its Brief below or its Brief on appeal which, again, almost to a document do not mention or distinguish foundry-generated fly ash, and (6) the administrative decision by this tribunal in *In Re Wheland Foundry*, 1993 WL 569096 (EPA 1993). Thus, even if this Board were to reverse the holding below, it should still find that no penalty is appropriate under general requirements of due process.

G. The Evidence Established That Leed's Fly Ash Waste Was Generated Primarily From the Combustion of Fossil Fuel.

Ultimately, the only issue on which evidence was needed was the question of whether Leed Foundry's fly ash waste was, in fact, "primarily" generated from the combustion of fossil fuel. The expert and factual testimony on this point was compelling and has not been challenged on appeal. Leed Foundry's experts were assessed by Judge Moran to be competent, credible and persuasive on this issue. Both had visited the foundry, observed the processes and raw materials, conducted testing and performed calculations, the results of which left no doubt that the fly ash waste stream generated by the cupola was, indeed, primarily generated from the combusted fossil fuel. In contrast, EPA's expert had not been to the foundry, had not seen the fly ash waste or the process by which it was generated, had performed no tests or technical analyses and, ultimately, erred in his calculations because he under-estimated the volume of coke burned at the facility on an annual basis. Judge Moran carefully evaluated the testimony, questioned the witnesses himself to clarify certain points and accorded the proper weight and credibility to the evidence before him. His findings must, therefore, be accorded appropriate deference by this Board.

CONCLUSION

Judge Moran's Initial Decision is a well-written, firmly grounded discussion of the law of this case. His logic is sound and the ruling is entirely consistent with the facts of record. EPA has overstepped its statutory authority in this enforcement proceeding and Judge Moran's Initial Decision should be affirmed.

Dated: August 20, 2007

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CERTIFICATE OF SERVICE

I, Timothy J. Bergère, hereby certify that true and correct copies of the foregoing Brief of Respondent Leed Foundry, Inc., filed in opposition to the Brief and Notice of Appeal of EPA in this matter, were served this 20th day of August, 2007, on the persons and at the addresses listed below, in the manner specified:

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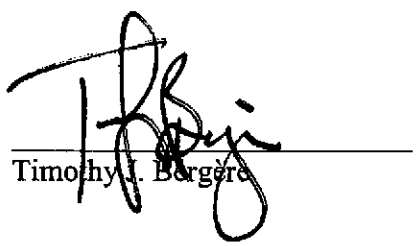

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