

BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 13 PM 1:27
WASHINGTON, D.C.

ENVIR. APPEALS BOARD

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

Thursday, December 6, 2007

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

BEFORE:

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

1 APPEARANCES:

2 On behalf of Leed Foundry, Inc.:
3 TIMOTHY J. BERGERE, ESQUIRE
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9 On behalf of Environmental Protection Agency:

10 PETER J. RAACK, ESQUIRE
11 RCRA Enforcement Division (2246-A)
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13 Room 4140-A
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15 Washington, D.C. 20460
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1 state their names for the record and whom
2 they represent, beginning with counsel for
3 Region III.

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

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

10 Thank you.

11 JUDGE REICH: Thank you.

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

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

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

1 PROCEEDINGS

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

8 Please be seated.

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

14 EPA Region III has been allocated
15 30 minutes for its argument. The Region may
16 reserve up to five minutes of its allocated
17 time for rebuttal, and counsel for the Region
18 should advise the Board at the beginning of
19 his argument whether he is reserving time.

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

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

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

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

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

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

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

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

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

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

21 JUDGE STEIN: Okay. Thank you.

22 MR. RAACK: In the answer to the

1 about how you label that particular
2 determination.

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

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

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

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

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

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

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

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

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

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

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

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

22 JUDGE REICH: So you're saying that

14	<p>1 the Agency itself is not suggesting that it's</p> <p>2 a regulation, notwithstanding the language in</p> <p>3 your couple of footnotes.</p> <p>4 MR. RAACK: We're suggesting that a</p> <p>5 possibility remains for a party to argue</p> <p>6 that.</p> <p>7 JUDGE REICH: Okay.</p> <p>8 JUDGE WOLGAST: But why is that</p> <p>9 question live after American Portland Cement?</p> <p>10 Why isn't that case controlling as to the</p> <p>11 issue as to whether or not it's a regulation?</p> <p>12 MR. RAACK: In American Portland</p> <p>13 Cement, they looked specifically at the reg</p> <p>14 determination that was in question there, the</p> <p>15 cement kiln dust regulatory determination,</p> <p>16 and what seemed to be persuasive to the court</p> <p>17 there was what the substance of the</p> <p>18 announcement was, what was the determination</p> <p>19 in that case -- the substance of the</p> <p>20 determination was that additional regulations</p> <p>21 under subtitle C were warranted and were yet</p> <p>22 to be promulgated. And here, we don't have</p>	16	<p>1 of other regulatory determinations, if that's</p> <p>2 what you are asking. The May 2000 --</p> <p>3 JUDGE STEIN: Any Bevill-related</p> <p>4 case?</p> <p>5 MR. RAACK: Yes. Parties have</p> <p>6 appealed Bevill-related regulatory</p> <p>7 determinations.</p> <p>8 JUDGE STEIN: But no one appealed</p> <p>9 the 2002 determination?</p> <p>10 MR. RAACK: I think it's May 2000.</p> <p>11 JUDGE STEIN: May 2000? Okay.</p> <p>12 MR. RAACK: May 2000 regulatory</p> <p>13 determination, which was the final regulatory</p> <p>14 step in the process here. That's right.</p> <p>15 JUDGE STEIN: And no one appealed</p> <p>16 that, to your knowledge?</p> <p>17 MR. RAACK: No one appealed that.</p> <p>18 JUDGE STEIN: What difference does</p> <p>19 it make for our purposes in terms of -- when</p> <p>20 we're dealing -- let's assume that we in fact</p> <p>21 are dealing with final Agency action and that</p> <p>22 it's not a regulation. Why is it that the</p>
15	<p>1 that situation. Here, it is a definitive and</p> <p>2 dispositive determination as to the exempt</p> <p>3 universe of wastes.</p> <p>4 So we think that there is again the</p> <p>5 potential that an argument could be made that</p> <p>6 because the nature of the determination is</p> <p>7 different, it didn't simply announce</p> <p>8 something yet to come that would be then ripe</p> <p>9 for review, that someone could make that</p> <p>10 claim. And that's why we think the case</p> <p>11 might be distinguishable.</p> <p>12 JUDGE STEIN: Did anyone appeal the</p> <p>13 regulatory determination? Any party?</p> <p>14 MR. RAACK: In this case, the</p> <p>15 fossil fuel combustion waste?</p> <p>16 JUDGE STEIN: Yes.</p> <p>17 MR. RAACK: No. There was not an</p> <p>18 appeal.</p> <p>19 JUDGE STEIN: Was there an appeal</p> <p>20 as to other wastes, like mineral processing</p> <p>21 wastes?</p> <p>22 MR. RAACK: There have been appeals</p>	17	<p>1 Board should treat that regulatory</p> <p>2 determination like a regulation for purposes</p> <p>3 of how the Board traditionally approaches</p> <p>4 those kinds of issues? What's similar,</p> <p>5 what's different?</p> <p>6 MR. RAACK: Well, in the Board's</p> <p>7 Echiverria line of cases that have</p> <p>8 established a presumption of</p> <p>9 non-reviewability of regulatory decisions,</p> <p>10 the Board has looked at things like the</p> <p>11 ability for a party to appeal in another</p> <p>12 forum as a mark of whether the decision ought</p> <p>13 to be opened up in a subsequent enforcement</p> <p>14 action, and that's exactly what we have here.</p> <p>15 So what our brief suggests is not</p> <p>16 only was it clearly appealable under the EPA,</p> <p>17 but again, our footnote suggests there might</p> <p>18 be other avenues. So there's that hallmark</p> <p>19 that it was appealable elsewhere and</p> <p>20 challengeable judicially.</p> <p>21 Another hallmark is that it went</p> <p>22 through an elaborate process of notice and</p>

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

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

14 MR. RAACK: That's right.

15 JUDGE STEIN: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 (Pages 22 to 25)

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

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

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

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

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

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

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

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

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

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

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

1 covered by the hazardous waste program.

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

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

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

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

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

12 JUDGE REICH: If in fact the Beville
13 amendment did not apply, is there any
14 argument that your client is not in fact
15 liable?

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

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

5 JUDGE REICH: Okay, thank you.

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

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

22 But to back up and address the very

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

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

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

21 MR. BERGERE: Yes, it is.

22 JUDGE REICH: Okay.

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

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

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<p>1 on exactly the same basis.</p> <p>2 I don't cite that as precedent. I</p> <p>3 understand it was withdrawn at the suggestion</p> <p>4 and recommendation of the parties as part of</p> <p>5 a settlement, but it's part of the public</p> <p>6 record that was out there.</p> <p>7 There was a decision in 1993 on</p> <p>8 this very issue where an administrative law</p> <p>9 judge, very much like Judge Moran, looked at</p> <p>10 the facts, looked at the law, and concluded</p> <p>11 that it was not even a close call that this</p> <p>12 is Bevill-exempt. In the face of that, EPA</p> <p>13 had two chances in '93 and '99 to clarify</p> <p>14 that in fact foundry-generated fly ash wastes</p> <p>15 are exempt. They had the ability to do that</p> <p>16 and they did not.</p> <p>17 JUDGE REICH: The Wheland Foundry</p> <p>18 decision came before Horsehead, didn't it?</p> <p>19 MR. BERGERE: Yes, it did.</p> <p>20 JUDGE REICH: So the ALJ in that</p> <p>21 case did not have the benefit of the D.C.</p> <p>22 Circuit's thinking in that case at the time</p>	<p>1 the case has no precedential value. What it</p> <p>2 does in my view is it undercuts the Agency's</p> <p>3 position that it made clear statements</p> <p>4 publicly to constitute a regulation for</p> <p>5 purposes of Bevill that would be clear to the</p> <p>6 public and be a clear rulemaking that in fact</p> <p>7 foundry-generated fly ash was not subject to</p> <p>8 regulation.</p> <p>9 JUDGE STEIN: But didn't they take</p> <p>10 the position in that litigation that in fact</p> <p>11 it was subject to regulation?</p> <p>12 MR. BERGERE: They did take that</p> <p>13 position in the litigation, but they then</p> <p>14 settled the case. They vacated the decision,</p> <p>15 obviously, for the reason that it was</p> <p>16 unfavorable. And then they went ahead and</p> <p>17 produced two reports to Congress that never</p> <p>18 addressed that debate, despite the fact that</p> <p>19 the one time it had gone before a judge for a</p> <p>20 decision, it had not gone their way, and a</p> <p>21 judge had ruled that the statute was</p> <p>22 unambiguous and did not support the Agency's</p>
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<p>1 the decision was issued.</p> <p>2 MR. BERGERE: That clearly would be</p> <p>3 the case.</p> <p>4 JUDGE REICH: So to the extent that</p> <p>5 we look to that decision at all, we have the</p> <p>6 benefit of that additional perspective.</p> <p>7 MR. BERGERE: Right. And the</p> <p>8 perspective I cite it for is really that</p> <p>9 there was a vigorous --</p> <p>10 JUDGE REICH: Right.</p> <p>11 MR. BERGERE: If there was a</p> <p>12 vigorous debate about it, it should have been</p> <p>13 then carried forth publicly in the two major</p> <p>14 reports EPA produced -- was dragged to</p> <p>15 produce kicking and screaming through the</p> <p>16 consent decree process -- that had it move</p> <p>17 forward. But --</p> <p>18 JUDGE STEIN: How does the</p> <p>19 existence of the Wheland decision suggest</p> <p>20 that this is really a closed issue?</p> <p>21 MR. BERGERE: It doesn't suggest</p> <p>22 that it's a closed issue on the law, because</p>	<p>1 position.</p> <p>2 JUDGE REICH: Do you read the 1999</p> <p>3 report and the 2000 regulatory determination</p> <p>4 as intending to address in any way the status</p> <p>5 of grey iron foundries?</p> <p>6 MR. BERGERE: I do not believe that</p> <p>7 they do.</p> <p>8 JUDGE REICH: Was it not clear in</p> <p>9 the 1999 report and the 2000 determination</p> <p>10 that at least in the Agency's view, it was</p> <p>11 addressing all remaining wastes that were</p> <p>12 subject to the Bevill amendment?</p> <p>13 MR. BERGERE: It's unclear -- you</p> <p>14 know, I can't speak for what the Agency</p> <p>15 thought it was doing. What it was required</p> <p>16 to do under the consent decree was address</p> <p>17 all remaining wastes. It said the RCRA --</p> <p>18 JUDGE REICH: There is in fact</p> <p>19 language in both those documents, though,</p> <p>20 that says --</p> <p>21 MR. BERGERE: I'm not --</p> <p>22 JUDGE REICH: It addresses all</p>

11 (Pages 38 to 41)

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1 remaining wastes.
2 MR. BERGERE: Right, which --
3 JUDGE REICH: Which are not --
4 MR. BERGERE: There is, and that in
5 fact was the consent decree obligation.
6 JUDGE REICH: Right. So I mean, I
7 understand you're arguing that they may not
8 have correctly done what they needed to do,
9 but it seems pretty clear from the Agency
10 statement that it thought at least it was
11 covering all remaining wastes, and if it
12 thought it was covering all remaining wastes
13 and grey iron foundries were not in fact
14 being addressed, then did anybody -- do you
15 know -- comment either on the 1999 report or
16 2000 regulatory determination along the lines
17 of what about us, we're covered by the Bevill
18 amendment, why aren't we in there someplace?
19 MR. BERGERE: I can't speak for
20 what the foundry industry generally would
21 have felt. It's my belief in going back
22 through the history today that probably

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

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1 contend that we did.
2 But I'd also suggest that that
3 regulatory determination is not a regulation
4 for purposes of the Bevill section, and that
5 the course that EPA had to take to pull this
6 material out of Bevill was to study it, was
7 to promulgate a -- make a finding, make a
8 recommendation and a report to Congress, and
9 then adopt a specific regulation, which it
10 has not done. It did --
11 JUDGE STEIN: If it's --
12 MR. BERGERE: Specifically in
13 1990 -- go ahead.
14 JUDGE STEIN: But if it's not
15 within the scope of Bevill, why do they have
16 to study and say it's not within the scope of
17 Bevill?
18 MR. BERGERE: It is within the
19 scope of Bevill. I don't know --
20 JUDGE STEIN: Well, that's the
21 debate. I mean --
22 MR. BERGERE: That -- right, and I

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

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

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

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

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

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

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

19 I would posit to the Board that in
20 1981, EPA did propose a rule that would have
21 specifically addressed grey iron foundry
22 waste. And as Judge Moran said, 26, now 27

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

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

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

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

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

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

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

22 JUDGE STEIN: I want to go back for

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<p>1 a second, because EPA in that proposal stated</p> <p>2 that this particular waste was covered if it</p> <p>3 failed the characteristic test. Now, my</p> <p>4 understanding of Bevill is that Bevill would</p> <p>5 apply both to listings and to</p> <p>6 characteristics.</p> <p>7 MR. BERGERE: That's correct.</p> <p>8 JUDGE STEIN: So how is it that EPA</p> <p>9 could have stated that this material was</p> <p>10 covered as a characteristic if in fact it</p> <p>11 was covered by Bevill?</p> <p>12 MR. BERGERE: I would suggest to</p> <p>13 you the reason the regulation wasn't</p> <p>14 promulgated and the reason that language</p> <p>15 wasn't even in the proposed regulation was</p> <p>16 that they recognized that Bevill would have</p> <p>17 made it inappropriate for them to do that</p> <p>18 without first doing a study and then</p> <p>19 promulgating a regulation.</p> <p>20 JUDGE STEIN: But then why did they</p> <p>21 say it was covered by characteristic waste?</p> <p>22 MR. BERGERE: Because they --</p>	<p>1 its -- sort of the negative implication that</p> <p>2 because we didn't specifically include it, it</p> <p>3 must not have been meant by Congress to be</p> <p>4 covered.</p> <p>5 The real question here is did</p> <p>6 Congress intend to cover it or not. And I</p> <p>7 suggest that the legislative history and</p> <p>8 statutory language as cited by Judge Moran</p> <p>9 make very clear that they did intend that</p> <p>10 this kind of fly ash would be covered. And</p> <p>11 again, go back to the opening point, there's</p> <p>12 no question that this is fly ash waste and</p> <p>13 that it's been generated primarily from the</p> <p>14 combustion of fossil fuel. The only question</p> <p>15 is did Congress intend to exclude</p> <p>16 foundry-generated fly ash waste.</p> <p>17 JUDGE WOLGAST: How do you address</p> <p>18 the Agency's point that it was clear that</p> <p>19 Congress was adopting a high-volume,</p> <p>20 low-toxicity approach to the universe of</p> <p>21 Bevill?</p> <p>22 MR. BERGERE: Well, that's</p>
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<p>1 JUDGE STEIN: I mean, consider it</p> <p>2 as characteristic?</p> <p>3 MR. BERGERE: Because they hadn't</p> <p>4 yet formulated what their approach was to</p> <p>5 Bevill or how they would study it or how they</p> <p>6 would advance it. They came out with a</p> <p>7 regulation that followed --</p> <p>8 JUDGE STEIN: Then why wouldn't</p> <p>9 they have stayed silent if they thought it</p> <p>10 was Bevill?</p> <p>11 MR. BERGERE: I think they have</p> <p>12 stayed silent since they proposed it.</p> <p>13 For 27 years.</p> <p>14 JUDGE WOLGAST: But what's the</p> <p>15 record evidence of that --</p> <p>16 MR. BERGERE: There is no --</p> <p>17 JUDGE WOLGAST: Rationale that you</p> <p>18 posit?</p> <p>19 MR. BERGERE: There is no record</p> <p>20 evidence. There's only the same implicit</p> <p>21 absence of action on the part of the Agency</p> <p>22 that the Agency cites in support of</p>	<p>1 anecdotal. What Congress was really doing</p> <p>2 was, EPA was proposing a special waste</p> <p>3 regulatory program, and the hue and outcry</p> <p>4 about it was primarily by utilities saying</p> <p>5 well wait a minute, we've got volumes and</p> <p>6 volumes of this stuff. If we have to start</p> <p>7 characterizing it, it's going to be a burden.</p> <p>8 EPA doesn't even know whether this is</p> <p>9 hazardous yet. This is a large volume waste</p> <p>10 with generally low toxicity.</p> <p>11 And the whole thing Congress said</p> <p>12 was well, let's pull it back. EPA, go out</p> <p>13 and do a study. Define what this is and if</p> <p>14 you find areas where you think it's</p> <p>15 appropriate to regulation, submit the report,</p> <p>16 give us six months to do something</p> <p>17 legislatively, and if we don't, then go ahead</p> <p>18 and promulgate regulations. That's the</p> <p>19 process Congress set up.</p> <p>20 And the fact is, we know that</p> <p>21 Leed's waste was toxic under characteristic</p> <p>22 tests, but that's the only thing we know.</p>

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

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

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

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1 screening device to determine what's in and
2 out of Bevill. What subsumes the universe of
3 Bevill, and Solite, as well as the language
4 of EDF II, seems to just very explicitly say
5 that.
6 MR. BERGERE: That language also
7 specifically states -- and you were careful
8 to caveat it -- that so long as consistent
9 with the definitions contained in Bevill.
10 And it gets back to -- it's a bit circular,
11 but it gets back to the argument of what is
12 fly ash waste generated primarily from the
13 combustion of fossil fuel? What does that
14 mean?
15 JUDGE WOLGAST: Correct. But if
16 the D.C. Circuit is saying that it's okay to
17 construe the amendment's terms to exclude
18 from Bevill's scope processing wastes that
19 don't qualify as low-hazard.
20 MR. BERGERE: Again, by regulation
21 And --
22 JUDGE WOLGAST: No. Well, it

58	<p>1 didn't say that.</p> <p>2 MR. BERGERE: I think the way I</p> <p>3 have read those decisions and understood them</p> <p>4 in the context of the statutory language of</p> <p>5 Bevill is that ultimately EPA needs to make</p> <p>6 conclusions about what is high hazard, what</p> <p>7 is low hazard, and then adopt regulations to</p> <p>8 address the things that it pulls out or</p> <p>9 leaves in.</p> <p>10 JUDGE WOLGAST: Okay. But here's</p> <p>11 another quote that I think is troublesome in</p> <p>12 that regard, because in Solite again, they</p> <p>13 say the low-hazard criterion is solely a</p> <p>14 preliminary screening device to determine</p> <p>15 which mineral processing wastes are special</p> <p>16 wastes, and will not be used in determining</p> <p>17 which wastes will subsequently be regulated</p> <p>18 under subtitle C.</p> <p>19 I mean, I think the regulations</p> <p>20 you're talking about would be the ultimate</p> <p>21 regulation to make a subtitle C</p> <p>22 determination.</p>	60	<p>1 category, including grey iron foundries, in</p> <p>2 that list of materials, that therefore by</p> <p>3 negative implication, a regulation has been</p> <p>4 created that complies with the Bevill</p> <p>5 provision that therefore means, again, by</p> <p>6 negative implication, that my client's waste</p> <p>7 material is in fact either not covered by the</p> <p>8 original scope of the statute or therefore</p> <p>9 and thereafter exempt.</p> <p>10 JUDGE STEIN: It strikes me that</p> <p>11 your approach to the statute is a</p> <p>12 plain-meaning approach.</p> <p>13 MR. BERGERE: That's correct.</p> <p>14 JUDGE STEIN: It strikes me that</p> <p>15 that's exactly what the D.C. Circuit has</p> <p>16 rejected in these line of cases, that it's</p> <p>17 basically into a Chevron step two analysis,</p> <p>18 finding some measure of ambiguity for perhaps</p> <p>19 different reasons depending on the particular</p> <p>20 issue. But it seems to me that the D.C.</p> <p>21 Circuit has effectively rejected the</p> <p>22 plain-meaning language applied to this</p>
59	<p>1 MR. BERGERE: Right. I would read</p> <p>2 that provision also, though, to suggest that</p> <p>3 what they may be talking about is simply</p> <p>4 screening as to how EPA determines to manage</p> <p>5 whatever investigation it's required to make,</p> <p>6 but not a determination as to what</p> <p>7 constitutes a special waste itself. I think</p> <p>8 it talks about screening for purposes of</p> <p>9 doing the investigation, and ultimately</p> <p>10 promulgating a regulatory framework.</p> <p>11 I think where I come from here is</p> <p>12 that the regulation -- the statute itself</p> <p>13 specifically exempts this material. And then</p> <p>14 some action has to take place to then pull it</p> <p>15 back. And Congress specifically said that</p> <p>16 has to be done through a formal rulemaking,</p> <p>17 not through various regulatory determinations</p> <p>18 which in this case constitute determinations</p> <p>19 that nothing needs to be regulated.</p> <p>20 And I don't think you can infer by</p> <p>21 negative implication that because EPA didn't</p> <p>22 specifically then list every possible</p>	61	<p>1 particular amendment.</p> <p>2 How do you respond to that?</p> <p>3 MR. BERGERE: I don't think the</p> <p>4 D.C. Circuit has done that to the amendment</p> <p>5 as a whole. I think in very specific</p> <p>6 instances -- and this is for some of the</p> <p>7 other kinds of waste streams very</p> <p>8 complicated. And in the one instance where</p> <p>9 they addressed it for RCRA and they talked</p> <p>10 about these specific kinds of provisions,</p> <p>11 they were trying to reconcile two conflicting</p> <p>12 provisions within RCRA: the BIF rule,</p> <p>13 obviously, which allowed for the regulation</p> <p>14 of Bevill waste or captured the regulation of</p> <p>15 Bevill waste; and the Bevill exemption, which</p> <p>16 stood alone and said it wasn't captured.</p> <p>17 And in that context, the court said</p> <p>18 well, you know, there is some ambiguity,</p> <p>19 because on the one hand the statute is clear</p> <p>20 that nothing is to be regulated. And later,</p> <p>21 Congress gave them authority to regulate</p> <p>22 BIFs, boilers and industrial furnaces. And</p>

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

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

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

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

66	<p>1 Agency's had to come up with a reason why 2 this material is exempt. I think that 3 statement is an overbroad statement about 4 what the Agency's authority is based on what 5 Bevill allows.</p> <p>6 JUDGE REICH: This may go beyond 7 what you know, in which case, feel free to 8 say so. But the transmittal message from the 9 administrator implies that these documents 10 were prepared, among other things, with 11 industry input. Do you have any idea about 12 the genesis of this document, and why 13 industry would not have objected to that 14 language?</p> <p>15 MR. BERGERE: I don't know that 16 industry didn't object to the language, so 17 I'm not in a position to say. And I think 18 what I would -- from my personal experience 19 and being a government regulator in the past 20 and working in -- on rulemakings and policies 21 with the Agency, the fact that it was 22 developed in conjunction with doesn't</p>	68	<p>1 were that the terms of the statute were not 2 clear enough to guide the Agency to make 3 these kind of decisions especially when it 4 came to co-processing, as it did in the 5 Horsehead case and the co-processing here, 6 the language of this statute is not clear 7 enough.</p> <p>8 It's our position as it was the 9 court's that the legislative history in that 10 conference report is right on point that the 11 high-volume, low-toxic criteria and standard 12 was to be the way the Agency interpreted who 13 was to be studied and what the process was to 14 include.</p> <p>15 Just a couple of points about what 16 counsel has said. He claims that utility 17 wastes have similar contaminants, and that's 18 true. Utility wastes were found to have lead 19 and cadmium. But as he rightly noted, not at 20 these levels -- well, nowhere close to these 21 levels. In fact, the TCLP results that were 22 put into the report to Congress show some</p>
67	<p>1 necessarily mean there was accord either. 2 EPA ultimately is the arbiter of those issues 3 and issues the policies it feels meet its 4 needs, and doesn't necessarily agree with 5 industry all the time.</p> <p>6 I have nothing further unless you 7 have another question you'd like me to 8 address.</p> <p>9 Thank you, I appreciate your time.</p> <p>10 JUDGE REICH: Mr. Raack, you have 11 five minutes for rebuttal.</p> <p>12 MR. RAACK: I just have a couple of 13 points. I may not need all that time.</p> <p>14 JUDGE REICH: That's fine.</p> <p>15 MR. RAACK: I just quickly want to 16 come back and reaffirm that it is our 17 position that the D.C. Circuit cases should 18 be followed in this case. We think they are 19 on point. This wasn't dicta, this isn't 20 anecdotal. And what the D.C. Circuit Court 21 had to find; the predicate legal conclusions 22 of law had to find in the cases before it</p>	69	<p>1 bare exceedences of the TCLP regs' regulatory 2 levels. And these again are upwards of 180 3 times the level. And that's the very point 4 here. If the Agency is bound to interpret 5 this as low hazard waste, then iron foundries 6 don't categorically make it, they aren't 7 categorically included.</p> <p>8 The second point is -- that he 9 admitted the study that the Agency conducted 10 was complete. And that's exactly right. The 11 Agency's work under Bevill is complete. It 12 studied all of the wastes that it believed 13 were exempt, and it's made a final regulatory 14 determination as to those wastes.</p> <p>15 The last thing I'll note about his 16 statement was that this is not an 17 after-the-fact theory, of course, as every 18 document that we point to that indicates what 19 the Agency's position is was published and 20 issued before the complaint in this case.</p> <p>21 Their entire argument is that the 22 statute is wholly unambiguous and</p>

18 (Pages 66 to 69)

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

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

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

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

19 (Whereupon, at approximately
20 11:33 a.m., the PROCEEDINGS were
21 adjourned.)

22 * * * * *

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