IN RE LEED FOUNDRY, INC.

RCRA (3008) Appeal No. 07-02

REMAND ORDER

Decided February 20, 2008

Syllabus

The United States Environmental Protection Agency ("Agency" or "EPA") Region 3 (the "Region") appeals an Initial Decision issued April 24, 2007, in which Administrative Law Judge William B. Moran (the "ALJ") dismissed thirteen counts of an administrative complaint filed by the Region. In its complaint, the Region alleged, among other things, that Respondent, Leed Foundry, Inc. ("Leed"), violated the Resource Conservation and Recovery Act ("RCRA" or "Act"), 42 U.S.C. §§ 6901-6992k, by failing to dispose of hazardous waste in a manner consistent with the hazardous waste management requirements of RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e ("Subtitle C"). In his Initial Decision, the ALJ concluded that Leed's wastes were exempt from regulation under Subtitle C under the plain meaning of the "Bevill Amendment." *See* 42 U.S.C. § 6921(b)(3)(A). The ALJ therefore dismissed counts one through thirteen of the Region's complaint.

Congress enacted the Bevill Amendment as part of the Solid Waste Disposal Act Amendments of 1980. Pub. L No. 96-482, 94 Stat. 2334 (1980). The Bevill Amendment suspended regulation of certain classes of solid waste as hazardous wastes until EPA completed studies concerning these wastes and submitted the results of these studies to Congress. The class of waste relevant to the present proceeding consists of fly ash residue generated primarily from the combustion of coal or other fossil fuel. Under the applicable study provision, EPA was required to conduct a detailed study and submit a report to Congress on the adverse affects on human health and the environment, if any, of the disposal and utilization of fly ash waste. RCRA § 8002(n); 42 U.S.C. § 6982(n). Within six months of completing the required study, the Act requires that the Agency, after public hearings and opportunity for public comment, make a determination that the Agency will either promulgate regulations governing the applicable waste or that regulation is unwarranted. RCRA § 3001(b)(3)(C); 42 U.S.C. § 6921(b)(3)(C).

Leed operates a grey iron foundry located in Schuylkill County, Pennsylvania, where it melts scrap iron to produce metal castings, primarily manhole covers and manhole collars. The scrap iron is melted in a furnace referred to as a cupola. To generate the heat needed to melt the scrap iron, Leed burns petroleum coke and a small amount of kerosene (both fossil fuels). The process generates fly ash that is captured in a baghouse air pollution control device. The fly ash waste from the baghouse was stored in piles at Leed's facility. It is undisputed that samples of this material were tested by the Region and found to contain lead and cadmium levels exceeding the applicable toxicity threshold for materials considered characteristic hazardous waste.

On September 30, 2004, following a compliance inspection, the Region filed an administrative complaint alleging, among other things, violations of RCRA disposal requirements (Counts 1-13). On August 4, 2005, Leed filed a motion for partial accelerated decision as to all RCRA counts, asserting that its wastes were exempt from regulation. In particular, Leed argued that because its fly ash waste is generated primarily from the combustion of fossil fuel, the waste is within the scope of the Bevill Amendment. The ALJ agreed and dismissed the RCRA counts in the Region's Complaint. The Region's appeal followed.

Held: The Initial Decision is reversed and this matter is remanded for further proceedings consistent with this Remand Order.

In a series of opinions, the U.S. Court of Appeals for the District of Columbia ("D.C.") Circuit has concluded that, in passing the Bevill Amendment, Congress intended to single out for regulatory suspension under the Bevill Amendment only certain high volume, low toxicity "special wastes". *See Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994); *Solite Corp. v. EPA*, 952 F.2d 473 (D.C. Cir. 1991); *Envtl. Def. Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988) ("*EDF*"). In each case, the court concluded that the language of the Amendment is ambiguous, and, thus, the court's review of EPA's criteria in implementing the Amendment was limited to the question of whether the Agency's interpretation was a permissible construction of the Bevill Amendment.

As to the class of wastes involved in the present case, the Agency has made a technical determination that fly ash waste from grey iron foundries does not meet the high volume, low toxicity threshold and is therefore outside the scope of the Bevill Amendment. The Agency's position in this regard has been consistent in EPA determinations and policy statements dating back to shortly after the Bevill Amendment was enacted. The Agency's position is also consistent with the Agency's 1999 Report to Congress and its 2000 Determination, both of which omit grey iron foundry wastes from the universe of non-utility wastes considered for regulation under the study provisions of the Bevill Amendment. The Board defers to the Agency's technical expertise in concluding that fly ash waste such as the Leed Foundry wastes do not meet the high volume, low toxicity criteria and are not within the scope of the Bevill Amendment. Accordingly, the dismissal of counts 1 through 13 on the grounds that those wastes were covered by the Bevill amendment must be reversed.

Thus, the Board reverses the ALJ's dismissal of Counts 1 through 13 of the complaint and remands this matter to the ALJ to determine whether Leed Foundry violated RCRA and EPA's implementing regulations, and, if so, what penalty (if any) is appropriate.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

The United States Environmental Protection Agency ("Agency" or "EPA") Region 3 (the "Region") appeals an Initial Decision issued on April 24, 2007, in

which Administrative Law Judge William B. Moran (the "ALJ") dismissed thirteen counts of an administrative complaint filed by the Region. In its complaint, the Region alleged, among other things, that Respondent, Leed Foundry, Inc. ("Leed"), violated the Resource Conservation and Recovery Act ("RCRA" or "Act"), 42 U.S.C. §§ 6901-6992k, by failing to dispose of hazardous waste in a manner consistent with RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e ("Subtitle C").[1] In his Initial Decision, the ALJ concluded that Leed's waste was exempt from regulation under Subtitle C under the plain meaning of the so-called "Bevill Amendment,"[2] which suspended certain categories of waste from Subtitle C's hazardous waste management regime until the EPA completed several studies and submitted the results to Congress. *See* 42 U.S.C. § 6921(b)(3)(A). The ALJ therefore dismissed Counts one through thirteen of the Region's complaint.[3] On appeal, the Region asserts that the ALJ's conclusion is wrong as a matter of law and urges this Board to reverse the Initial Decision and reinstate the RCRA counts alleged in the Region's complaint. *See* Complainant's Brief in Support of its Notice of Appeal (July 2, 2007) ("Region's Appeal").[4] Leed filed a response to the Region's Appeal on August 20, 2007. *See* Respondent's Brief in Opposition to USEPA's Notice of Appeal (Aug. 20, 2007) ("Leed's Reply"). The Board heard the parties' views during an oral argument held in this matter on December 6, 2007. For the reasons stated below, the Initial Decision is reversed, and this matter is remanded to the ALJ for further proceedings consistent with this Final Decision.

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[1] RCRA Subtitle C established a comprehensive "cradle to grave" regulatory scheme governing the treatment, storage, and disposal of hazardous waste. *See* 42 U.S.C. §§ 6921-6939e.

[2] The Amendment is named after its sponsor, Congressman Thomas Bevill of Alabama.

[3] The Region's complaint also included two counts (Counts 14 and 15) alleging that Leed violated the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, by discharging pollutants from a point source into navigable waters of the United States without the requisite National Pollutant Discharge Elimination System ("NPDES") permit and that Leed did not have a permit for industrial activity as required by CWA § 402(p), 42 U.S.C. § 1342(p). Leed conceded liability on one count (the failure to obtain an NPDES permit) and contested liability on the other. In his Initial Decision, the ALJ found against Leed on the contested count and assessed a total penalty of $19,687.50 for the CWA violations. Initial Decision at 45 (April 24, 2007). Neither Leed nor the Region has appealed from this portion of the Initial Decision.

[4] The Region actually filed its appeal on June 29, 2007. On July 2, 2007, the Region filed a motion seeking leave to file a corrected brief to address certain typographical errors in its original brief. The Region submitted the corrected brief along with its motion. By order dated July 3, 2007, the Board granted the Region's motion to file a corrected brief. Order Granting Leave to File Corrected Brief (July 3, 2007). All citations are to the corrected brief.

II. *BACKGROUND*

a. *Statutory and Regulatory Background*

In 1976, Congress enacted RCRA in an effort to better regulate the large and ever-increasing volume of solid and hazardous waste generated by individuals, municipalities, and businesses in the United States. The purposes of RCRA include the promotion and protection "of health and the environment and to [conservation of] valuable material and energy resources by," among other things, regulating the treatment and disposal of hazardous wastes that would otherwise adversely affect the environment. RCRA § 1003, 42 U.S.C. § 6902. The Act directs the Agency to promulgate standards for identifying and listing hazardous waste that would be subject to regulation under Subtitle C, taking into account criteria such as "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other factors such as flammability, corrosiveness, and other hazardous characteristics." RCRA § 3001(a); 42 U.S.C. § 6921(a).

Congress enacted the Bevill Amendment as part of the Solid Waste Disposal Act Amendments of 1980. Pub. L No. 96-482, 94 Stat. 2334 (1980) (codified at 42 U.S.C. § 6921(b)(3)(A)(i). As stated above, the Bevill Amendment suspended regulation of certain classes of solid waste as hazardous wastes until EPA completed studies concerning these wastes and submitted the results of these studies to Congress. The class of waste relevant to the present proceeding consists of fly ash residue generated primarily from the combustion of coal or other fossil fuel. In this regard, the Bevill Amendment states:

> Notwithstanding the provisions of paragraph (1) of this subsection, each waste listed below shall * * * be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter until at least six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p) of section 6982 of this title and after promulgation of regulations in accordance with subparagraph (C) of this paragraph:
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> (i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i). Under the "applicable study" provision, EPA was required to "conduct a detailed and comprehensive study and submit a report [to Congress] on the adverse affects on human health and the environment, if any, of the disposal and utilization of fly ash waste * * * generated primarily from the combustion of coal or other fossil fuels." *Id.* at

§ 8002(n), § 6982(n). Within six months of completing the required study, the Act requires that the Agency, after public hearings and opportunity for public comment, make a determination that the Agency will either promulgate regulations governing the applicable waste or that regulation is unwarranted. *Id*. at § 3001(b)(3)(C), § 6921(b)(3)(C).

In 1988, the Agency published a report to Congress addressing wastes from utility power plants burning coal. Report to Congress on Wastes from the Combustion of Coal by Electric Utility Power Plants, 53 Fed. Reg. 9976 (Mar. 28, 1988). This report did not address wastes from utilities burning fossil fuels other than coal, or wastes from non-utilities burning any type of fossil fuel. The Agency did not publish a regulatory determination within six months of this report, as required by statute. RCRA § 3001(b)(3)(C), 42 U.S.C. § 6921(b)(3)(C). In 1991, an Oregon citizens' group filed suit against the Agency for failing to complete a regulatory determination on the wastes studied in the 1988 report to Congress as well as other wastes generated primarily from the combustion of coal or other fossil fuels. *See Gearhart v. Reilly*, C.A. No. 91-2435 (D.D.C. June 30, 1992) ("Consent Decree"). On June 30, 1992, the Agency entered into a Consent Decree establishing a schedule for completion of regulatory determinations for all fossil fuel combustion ("FFC") wastes. *Id*. Under the Consent Decree, FFC wastes were divided into two categories: 1) fly ash, bottom ash, boiler slag, and flue gas emission control waste from the combustion of coal by electric utilities, and 2) all remaining wastes subject to the Bevill exclusion. The Consent Decree established time lines for EPA's determination as to whether to regulate the first category of wastes and also for the completion of any study and regulatory determination regarding remaining wastes subject to the Bevill Amendment. *Id*. On August 9, 1993, EPA published a regulatory determination for the first category of wastes, which corresponded to the wastes addressed by the 1988 report, concluding that regulation under Subtitle C was not warranted.[5] Subsequently, in order to make a determination on whether to regulate the remaining wastes, the Agency initiated an additional study.

EPA issued a Report to Congress in March 1999, addressing all remaining FFC wastes subject to the Bevill Amendment. *See* Office of Solid Waste and Emergency Response, U.S. EPA, *Report to Congress, Wastes from the Combustion of Fossil Fuels*, Volume 2 – Methods, Findings, and Recommendations (March 1999) ("1999 Report to Congress"); 64 Fed. Reg. 22,820 (Apr. 28, 1999). This included: 1) co-managed utility coal combustion wastes; 2) wastes from the combustion of mixtures of coal and other fuels ("coburning") by utilities; 3) wastes from the combustion of coal from non-utilities; 4) wastes from fluidized bed combustion of fossil fuels (by utilities and non-utilities); 5) wastes from the

[5] Final Regulatory Determination on Four Large-Volume Wastes from Combustion of Coal by Electric Utility Power Plants, 58 Fed. Reg. 42,466 (Aug. 9, 1993).

combustion of oil (by utilities and non-utilities); and 6) wastes from the combustion of natural gas (by utilities and non-utilities). *See* 1999 Report to Congress at 1-2. The 1999 Report to Congress defines the universe of non-utility combustors as "commercial, industrial, and institutional facilities that use fossil fuels *in boilers to generate steam*." 1999 Report to Congress at 4-1 (emphasis added). In May of 2000, EPA published its final regulatory determination on all remaining FFC wastes (other than the utility wastes addressed by the 1993 determination). *See* Notice of Regulatory Determination on Wastes From the Combustion of Fossil Fuels, 65 Fed. Reg. 32,214 (May 22, 2000) ("2000 Regulatory Determination"). The 2000 Regulatory Determination concludes that the studied wastes "do not warrant regulations under subtitle C of RCRA and [EPA] is retaining the hazardous waste exemption." *Id*.

B. *Factual and Procedural Background*

Leed operates a grey iron foundry located in Schuylkill County, Pennsylvania, where it melts scrap iron to produce metal castings, primarily manhole covers and manhole collars. Leed's Reply at 3. The scrap iron is melted in a furnace referred to as a cupola. *Id*. To generate the heat needed to melt the scrap iron, Leed burns petroleum coke and a small amount of kerosene (both fossil fuels). *See* Initial Decision ("Init. Dec.") at 48. The process generates fly ash that is captured in a baghouse air pollution control device.[6] *Id*. The fly ash waste from the baghouse was stored in piles at Leed's facility. *Id*. at 22. It is undisputed that samples of this material were tested by the Region and found to contain lead and cadmium levels exceeding the Toxic Characteristic Leaching Procedure ("TCLP") threshold. Accordingly, but for the potential applicability of the Bevill Amendment, the materials are considered hazardous waste because they exhibit the hazardous waste characteristic of toxicity.[7] *Id*. at 48; *see also* Memorandum in Sup-

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[6] The term "fly ash" is not defined by the statute. The ALJ states that the term encompasses particulate matter generated from the burning of petroleum coke that rises through the stack along with flue gas. *See* Init. Dec. at 7-8. The ALJ concluded that the waste at issue in this proceeding constitutes fly ash. *Id*. While the Region does not disagree with the ALJ's general characterization of what constitutes fly ash, it asserts that Leed's waste is not the type of fly ash that Congress intended to include within the scope of the Bevill Amendment. EAB Oral Arg. Tr. at 8-9 ("EAB Tr."). For simplicity, this decision refers to the Leed's wastes as "fly ash." However, as explained below, we agree with the Region that the fly ash at issue in this case is not covered by the Bevill Amendment and thus is subject to regulation under Subtitle C.

[7] Under RCRA, solid wastes can fall into the hazardous waste category and become subject to RCRA's Subtitle C regulatory program by either being individually listed as hazardous (i.e., listed hazardous wastes) or exhibiting characteristics of a hazardous waste (i.e., ignitability, corrosivity, reactivity, and toxicity). *See* 40 C.F.R. pt. 261. EPA's toxicity characteristic leaching procedure ("TCLP") is a chemical test to determine whether a solid waste is toxic (and therefore hazardous) for certain specified metals. Under the TCLP, a waste is toxic for lead if a sample contains a lead concentration in excess of 5.0 milligrams per liter (mg/l). A waste is toxic for cadmium if a sample contains a

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port of Leed's Motion for Partial Accelerated Decision at 2 (Aug. 4, 2005). Further, it is undisputed that these hazardous waste properties are due largely to the content of the scrap iron. As the ALJ notes, Leed's witness, Francis Bauer, testified that the lead content of the fly ash "came from used radiators or old sewer pipe, or painted metal" with residual lead on them, and that "[t]he cadmium source could be from plating on the waste metal." Init. Dec. at 4.

On September 30, 2004, following a compliance inspection, the Region filed an administrative complaint alleging, among other things, violations of RCRA disposal requirements (Counts 1-13). *See* Init. Dec. at 1. On August 4, 2005, Leed filed a motion for partial accelerated decision as to all RCRA counts, asserting that its wastes were exempt from regulation. *Id.* at 47. In particular, Leed argued that because its fly ash waste ash is generated primarily from the combustion of fossil fuel, the waste is within the scope of the Bevill Amendment.

On October 12, 2005, the ALJ issued a Preliminary Order on Motions ("POM").[8] The POM concluded that the language of the Bevill Amendment is clear and unambiguous on its face, and that Leed's fly ash waste, if generated primarily from the combustion of fossil fuel, is exempt from regulation under RCRA subtitle C. *See* Init. Dec. (POM) at 58, 66-68. However, the ALJ found that the record was insufficient to determine whether the waste was generated "primarily from the combustion of fossil fuel" and that expert testimony was needed before a final determination could be reached. *Id.* at 67. After hearing expert testimony from witnesses for both Leed and the Region, the ALJ concluded that Leed's fly ash waste was indeed generated primarily from the combustion of fossil fuels within the meaning of RCRA § 3001(b)(3)(A)(i)[9] and that, under the plain language of the Bevill Amendment, the waste was exempt from regulation as a hazardous waste. Init. Dec. at 7. Accordingly, the ALJ dismissed all RCRA counts. The Region's appeal followed.

The Region urges this Board to reverse the ALJ's determination regarding the applicability of the Bevill Amendment and remand this matter for further proceedings. The Region argues that EPA, through the statutorily-mandated process,

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(continued)
concentration in excess of 1.0 mg/l. *See* 40 C.F.R. § 261.24. Leed does not dispute that samples of wastes from its facility exceeded these thresholds.

[8] The Initial Decision incorporates the POM as Appendix I and the page numbers of the Initial Decision continue to run consecutively through the Appendix. The POM begins on page 46 and continues through page 68 of the Initial Decision. Citations to the POM will include the pagination as it appears in the Initial Decision and will be cited as follows: "Init. Dec. (POM)" followed by the page number of the Initial Decision.

[9] The Region has not challenged in this appeal the finding that Leed's fly ash waste is generated primarily from the burning of fossil fuels, although it disputes the significance of this finding. *See supra* note 6, *infra* note 12 and accompanying text.

has definitively determined that Leed's waste is outside the scope of the Bevill Amendment and that the ALJ erred in allowing a collateral attack on this determination in the context of an enforcement case. *See* Region's Appeal at 15-28. In addition, the Region argues that the ALJ erred in concluding that the Bevill Amendment unambiguously covers Leed's fly ash waste. *See id.* at 28-39. The Region cites to several cases issued by the U.S. Court of Appeals for the District of Columbia ("D.C.") Circuit holding that the Bevill Amendment is indeed ambiguous and that the Agency has discretion to interpret the scope of the exemption. *Id*. at 30-34. Finally, the Region argues that the ALJ disregarded EPA's longstanding interpretation of the Bevill Amendment that finds that exemption inapplicable to waste from grey iron foundries. *Id.* at 39-44.

III. *DISCUSSION*

We start by observing that neither the Region nor Leed argue that any of the reports or regulatory determinations issued by the Agency in implementing the Bevill Amendment cover waste from grey iron foundries. *See* Region's Appeal at 15; EAB Oral Arg. Tr. at 41 ("EAB Tr."). Thus, if we find the Bevill Amendment to be applicable to Leed's fly ash waste, it is clear that the Agency has not fulfilled the statutory prerequisites to regulating such wastes. Accordingly, we focus on the scope of the statutory exemption.

As stated above, the ALJ concluded that the Bevill Amendment unambiguously includes Leed's fly ash waste within the scope of its exclusion. The Initial Decision states that the Bevill Amendment is clear on its face and rejects the "EPA's attempts to create doubt in the face of this plain language." Init. Dec. (POM) at 58. According to the ALJ, the words of the Amendment "identif[y] specific exempted waste, including fly ash waste generated primarily from the combustion of coal or other fossil fuels. For such identified wastes, the Amendment provides they are not subject to Subtitle C regulation until *after* EPA reports to Congress and then only *after* it promulgates regulations concerning them." *Id*. Because EPA has never promulgated regulations governing Leed's fly ash waste, the ALJ held that, under plain language of the statute, Leed's waste may not be regulated under Subtitle C.

On appeal, the Region disagrees with the ALJ's conclusion that the language of the Bevill Amendment unambiguously exempts all fly ash waste from regulation as a hazardous waste. The Region, citing to the legislative history, asserts that Congress only intended to include certain high volume, low toxicity "special wastes" within the scope of the Bevill Amendment. *See* Region's Appeal at 29. More specifically, the Region points to proposed regulations EPA published on December 18, 1978, governing the management and control of hazardous waste under Subtitle C. *See* 43 Fed. Reg. 58,946 (Dec. 18, 1978). These proposed regulations, among other things, would have subjected certain "special wastes"

generated in high volumes but thought to pose a relatively low hazard to fewer regulatory requirements, at least until further information could be obtained to assess how such wastes could "best be handled." *Id*. at 58,948, 58,991-92. Among the wastes classified as high volume, low toxicity "special wastes" were utility wastes such as bottom ash waste and fly ash waste. *Id*. at 58,991. Although EPA did not include this "special waste" concept in its final regulations,[10] the Region contends that Congress intended to incorporate this concept into the Bevill Amendment.[11] According to the Region, Leed's highly toxic fly ash waste is not the type of low toxicity special waste Congress intended to include within the scope of the Bevill Amendment. As the Region stated at oral argument, the term "fly ash" is a term of art and, although Leed's waste may meet the technical definition of fly ash, it is not the type of fly ash that Congress intended to exempt from Subtitle C regulation.[12] *See* EAB Tr. at 7-9. We agree.

We start our analysis by interpreting the Bevill Amendment. Our task in this regard is greatly simplified by a series of opinions issued by the U.S. Court of Appeals for the D.C. Circuit examining the text and legislative history of the Bevill Amendment. *See Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994); *Solite Corp. v. EPA*, 952 F.2d 473 (D.C. Cir. 1991); *Envtl. Def. Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988) ("*EDF*"). In each case, the court concluded that the language of the Amendment is ambiguous and, thus, under the second prong of the principles of deference established in *Chevron*,[13] the court's review of EPA's criteria in implementing the Amendment was limited to the question of whether the Agency's interpretation was a permissible construction of the Bevill Amendment. *See Solite*, 952 F.2d at 482-83; *EDF*, 852 F.2d at 1329.

In reviewing these criteria, the court held that Congress' intent was to single out only those high volume, low toxicity "special wastes" for regulatory suspension under the Bevill Amendment. *Horsehead*, 16 F.3d at 1257; *Solite*, 952 F.2d at 483-84; *EDF*, 852 F.2d at 1329. Indeed, the court has held that the Agency has

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[10] *See* 45 Fed. Reg. 33,084 (May 19, 1980).

[11] We note that Congress expanded the reach of the Bevill Amendment's exclusion beyond utility wastes to include certain non-utility wastes generated primarily from the combustion of coal or other fossil fuels. *See* RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A).

[12] Similarly, the Region argues that the term "generated primarily from the combustion" of fossil fuel is a term of art, and that the wastes produced from Leed's facility are outside the scope of the Bevill Amendment even if the wastes result from the burning of fuel containing 51% or more of fossil fuel. EAB Tr. at 7-8.

[13] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the two-part framework of *Chevron*, a reviewing court first asks whether Congress "has directly spoken to the precise question at issue," and, if so, the intent of Congress is controlling. *Id*. at 842. If, however, the meaning of the statute is ambiguous, then a reviewing court will uphold an agency's interpretation so long as it is "based on a permissible construction of the statute." *Id*.

an obligation to limit Bevill wastes excluded from subtitle C solely to those wastes that are high volume, low toxicity. *See Horsehead*, 16 F.3d at 1257*; EDF*, 852 F.2d at 1329.

In *EDF*, the court was asked to review the Agency's withdrawal of a proposed reinterpretation of the Bevill Amendment's mining waste exclusion under section 3001(b)(3)(A)(ii), 42 U.S.C. § 6921(b)(3)(A)(ii).[14] *EDF*, 852 F.2d at 1318. The Agency's proposed reinterpretation had the effect of allowing certain high hazard smelting and refining wastes to remain within the scope of the Bevill Amendment and therefore excluded from regulation under Subtitle C. The Agency's stated rationale for the reinterpretation was that it had yet to quantify the full contours of the "high volume, low hazard" standard and thus was "unable to determine the status of additional wastes nominated by commenters as 'special wastes.'" *Id*. at 1323. On review, the D.C. Circuit concluded that the Agency's action was arbitrary and capricious because it adopted an over-broad interpretation of the Bevill Amendment and left six hazardous wastes unregulated. *Id*. at 1326. The court stated that EPA's rationale was not a rational justification for failing to regulate the hazardous wastes at issue, none of which would have qualified as "special wastes" under any definition. *Id.* at 1329-30. In its discussion of the Bevill Amendment's legislative history, the court concluded that Congress intended to suspend regulation only for certain high volume, low hazard "special wastes." As the court stated:

> The Bevill Amendment was a distinct, self contained amendment to the RCRA statute. It was proposed on the House floor by Congressmen Bevill and was adopted after a detailed explanation of its purpose and scope by Congressman Bevill and other supporters. The Conference Committee Report accompanying the 1980 amendments to RCRA adopted the Bevill Amendment with only a minor modification pertaining to uranium overburden. The Conference Report states clearly that the Bevill Amendment suspends regulation under Subtitle C of utility wastes as well as "all other wastes * * * in a category designated as 'special wastes' in regulations proposed by the agency under Subtitle C on December 18, 1978."

Id. at 1328 (citing H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 32 (1980), U.S. Code Cong. & Admin. News 1980, 5019, 5031-32). In light of this history, the court concluded that Congress did not intend the mining waste exclusion to

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[14] This section excludes from regulation under Subtitle C "[s]olid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore." RCRA § 3001(b)(3)(A)(ii), 42 U.S.C. § 6921(b)(3)(A)(ii).

encompass all wastes from primary smelting and refining. *Id*. at 1328-29. Rather, "Congress intended the term 'processing' in the Bevill Amendment to include only those wastes from processing ores or minerals that meet the 'special waste' criteria, that is, 'high volume, low hazard' wastes." *Id*. at 1329.[15] Since the wastes at issue were found to be high hazard, the court concluded that they were not properly within the scope of the Bevill exclusion. *Id*. at 1330.[16]

In response to *EDF*, the Agency developed criteria to screen out high hazard wastes that did not meet the "special waste" criteria and should therefore be excluded from Bevill Amendment coverage. In *Solite*, the D.C. Circuit rejected a challenge to the Agency's actions in this regard, finding that the Agency's actions in screening high hazard wastes considered outside the scope of the Bevill Amendment and in developing the criteria for this screening process were consistent with *EDF* and reflected a permissible interpretation of the Amendment. *Solite*, 952 F.2d at 482, 488; *see also, id*. at 489 (stating it is not unreasonable for the Agency to interpret the Bevill Amendment to require a "'context-specific' determination of hazard as one of several factors to be considered in regulating wastes definitively placed within the [Bevill Amendment's] scope" and may exclude from coverage wastes that do not qualify as low hazard). Relying on its previous decision in *EDF*, the court reaffirmed that Congress intended to cover within the Bevill Amendment "only those [wastes] that satisfied threshold high volume, low toxicity hazard criteria to be determined by EPA." *Id*. at 484.

In *Horsehead*, the court made clear that the "special waste" framework articulated by the court in *EDF* and *Solite* also applies when determining whether wastes generated from the combustion of fossil fuels under RCRA § 3001(b)(3)(A)(i), 42 U.S.C. § 6921(b)(3)(A)(i), are within the scope of the Bevill Amendment. *Horsehead*, 16 F.3d at 1258. Most significantly, the court stated that "[a]lthough the *Solite* and *EDF* * * * decisions involved only mining wastes under the Bevill Amendment, the analyses in those opinions are wholly

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[15] The *EDF* decision is replete with statements along these lines, such as: "the structure of the Bevill Amendment suggests that Congress intended to single out high-volume 'special wastes' for regulatory suspension[,]" *EDF*, 852 F.2d at 1327; "[t]he legislative history of the Bevill Amendment establishes that the key to understanding Congress's intent is the concept of 'special waste' articulated in the regulations proposed by EPA[,]" *id*.; and "it is clear that Congress intended the Bevill exclusion to encapsulate the 'special waste' concept articulated by the EPA in 1978. Congress's clear intention 'is the law and must be given effect.'" *Id*. at 1329 (citing *Chevron*, 467 U.S. at 843 n.9) (footnote omitted).

[16] The court ordered the Agency to propose and, after notice and comment, determine which wastes remain within the scope of the Bevill Amendment as high volume, low hazard "special wastes." *EDF*, 852 F.2d at 1331. The court further directed the Agency to complete the study required by the Bevill Amendment, report to Congress, and make a regulatory determination with respect to the wastes at issue within six months of submission of the report to Congress. *Id*.

applicable to the instant case as well."[17] *Id*.

With the scope of the Bevill Amendment thus clearly defined, we now turn to a review of the Agency's interpretation of the Amendment as it relates to grey iron foundries. In the case at hand, the Agency has made a technical determination that the fly ash from grey iron foundries does not meet the above-mentioned high volume, low toxicity criteria and is thus outside the scope of what Congress intended to cover under the Bevill Amendment. This determination is reflected not only in the Region's position in the present case, but, as discussed below, in determinations and policy statements dating back to shortly after the Bevill Amendment was enacted.

The Agency's position regarding the regulatory status of combustion waste from grey iron foundries has been consistent since 1980. In particular, we note the following three instances where the Agency has articulated its position in this regard. First, in 1980, EPA proposed to list grey iron foundry waste as hazardous waste. 45 Fed. Reg. 47,835 (July 16, 1980). The Agency stated that "[t]his waste has been shown to release high concentrations of the heavy metals cadmium and lead when subjected to EPA's extraction procedure [(the precursor to the TCLP)] * * * . If this waste is improperly managed, therefore, large scale contamination of surface water or ground water may result." *Id*. In its final rule, the Agency decided not to list these wastes pending further study. 46 Fed. Reg. 4614, 4617 (Jan. 16, 1981). However, the Agency made clear that such wastes "are hazardous,

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[17] We note that in October of 1993, Administrative Law Judge J. F. Greene issued an Initial Decision holding that fly ash waste generated from grey iron foundry operations was excluded from regulation under the Bevill Amendment. *In re Wheland Foundry*, Docket No. RCRA-IV-89-25-R (Oct. 22, 1993). That decision, however, was vacated by this Board upon joint motion of the parties as part of a consent decree. *In re Wheland Foundry*, RCRA (3008) Appeal No. 93-2 (Order Setting Aside and Vacating Initial Decision) (Dec. 22, 1993). In any case, in light of the above-cited decisions of the D.C. Circuit, the most recent of which, *Horsehead*, was decided after the initial decision in *Wheland*, we conclude that the *Wheland* decision was wrongly decided. In response to questioning at oral argument, counsel for Leed acknowledged that the Administrative Law Judge in *Wheland*, did not have the benefit of the D.C. Circuit's thinking in *Horsehead*. In particular, we note the following exchange:

Q The *Wheland Foundry* decision came before *Horsehead*, didn't it?

A Yes, it did.

Q So the ALJ in that case did not have the benefit of the D.C. Circuit's thinking in that case at the time the decision was issued.

A That clearly would be the case.

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

A Right.

EAB Tr. at 38-39.

of course, if they exhibit any of the characteristics of hazardous waste, and generators of these wastes are obligated to make this determination." *Id*. The Bevill Amendment provides an exclusion for characteristic as well as listed wastes. *See* RCRA §§ 3001(b)(1), (b)(3)(A), 42 U.S.C. §§ 6921(b)(1), (b)(3)(A). Therefore, the Agency's post-Bevill Amendment determination that grey iron foundry wastes are hazardous wastes if they exhibit a characteristic of hazardous waste is significant. The ALJ's finding that grey iron foundry wastes are covered by the Bevill Amendment improperly ignores the Agency's determination that grey iron foundry wastes that test as characteristic waste must be handled in accordance with Subtitle C regulations.

Second, on December 28, 1984, U.S. EPA Region 4, in response to an inquiry from the State of Tennessee as to whether iron foundry wastes were excluded from regulation under the Bevill Amendment, stated that such wastes, if found to be "toxic or hazardous due to any other of the characteristics, * * * would be subject to full regulation as a characteristic hazardous waste[.]" Letter from James H. Scarborough, Chief, Residuals Management Branch, U.S. EPA Region 4, to Tom Tiesler, Director, Division of Solid Waste Management, Tenn. Dept. of Health and Environment (Dec. 28, 1984). Finally, in 1997, the Agency issued a publication entitled "Profile of the Metal Casting Industry" as part of an effort to compile compliance information for various industries. Office of Compliance, Office of Enforcement and Compliance Assurance, EPA/310-R-97-004, *EPA Office of Compliance Sector Notebook Project: Profile of the Metal Casting Industry* (Sept. 1997).[18] Page 107 of this publication states that "the metal casting industry generates waste during molding and core making, melting operations, casting operations, and finishing and cleaning operations. The wastes that are produced during these processes which meet the RCRA hazardous waste criteria must be handled accordingly." Thus, since 1980, the Agency has consistently concluded that grey iron foundry waste, if found to be a characteristic hazardous waste, is subject to regulation under Subtitle C.

Further, as the 1999 Report to Congress makes clear, the Agency did not consider the waste at issue in this proceeding as one of the "remaining wastes" within the scope of the Bevill Amendment. The section of the 1999 Report to Congress addressing non-utility, coal combustion wastes states that "[n]on-utility combustors are commercial, industrial, and institutional facilities that use fossil fuels *in boilers to generate steam*." 1999 Report to Congress, at 4-1 (emphasis added). Further, the Report defines "fly ash" as "suspended, uncombusted ash particles *carried out of the boiler* along with flue gases." *Id*. at G-4 (emphasis ad-

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[18] This document is publically available on EPA's website at http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/ casting.html.

ded).[19] Boilers are defined as closed vessels "in which heat from an external combustion source (such as a fossil fuel) is transferred to produce hot water or generate steam." *Id*. at G-2. It is undisputed that Leed's cupola is not covered by this definition. Thus, as both parties agree, neither the 1999 Report to Congress nor the 2000 Regulatory Determination address grey iron foundry waste.[20] *See* Region's Appeal at 15; EAB Tr. at 41. Significantly, the Agency was very clear that the 1999 Report to Congress and the 2000 Regulatory Determination covered all the wastes it believed were subject to the Bevill Amendment not previously addressed by the 1993 Regulatory Determination.[21]

Upon review, we defer to the Region's technical expertise in concluding that the fly ash waste at issue in this matter is sufficiently hazardous to remove it from the scope of the Bevill Amendment. As stated above, the Agency has consistently determined that grey iron foundry waste is not high volume, low toxicity, and is therefore outside the scope of the Bevill Amendment. As to the wastes at issue here, the Region explained the basis of its determination that Leed's grey iron foundry wastes were hazardous. As stated in its Appeal, the Region found that contaminant levels "exceeded regulatory standards by 10 times for cadmium and by 185 times for lead" and that such levels presented "very substantial environmental danger." Region's Appeal at 35. The Region concluded that the grey iron foundry wastes at issue were highly toxic and "much more like the type of Subtitle C hazardous waste which EPA and Congress have long since determined requires regulation for the protection of human health and the environment." *Id*. at 36 (footnote omitted).

When considering challenges to such technical determinations, the Board generally gives substantial deference to the Agency's technical expertise. *See In re Dominion Energy*, 13 E.A.D. 407, 425 (EAB 2007) (reiterating that the Board will typically defer to the Agency on issues that are fundamentally technical in nature and stating that such deference "serves an important function within the

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[19] The Agency stated that the type of low toxicity, non-utility-generated fly ash considered to be within the scope of the Bevill Amendment results from combustion technology similar to that used by utilities – boilers used to produce steam. *See* 1999 Report to Congress at 3-10. In contrast, Leed's waste results from combustion of fossil fuel in a cupola furnace and produces high toxicity waste.

[20] Following EPA's completion of the 1999 Report to Congress, interested parties had the opportunity to submit comments prior to issuance of a final regulatory determination. *See* 1999 Report to Congress at 7-2. Nothing in the record before us indicates that Leed or any other party submitted comments on the Report relating to this issue. Similarly, Leed did not comment on or otherwise object to the 2000 Regulatory Determination, which adopted the conclusions and analyses of the 1999 Report.

[21] *See* 2000 Regulatory Determination, 65 Fed. Reg. at 32,214 ("Today's action applies to all remaining fossil fuel combustion wastes other than high volume coal combustion wastes generated at electric utilities and independent power producing facilities and managed separately, which were addressed by a 1993 regulatory determination.").

framework of the Agency's administrative process; it ensures that the locus of responsibility for important technical decisionmaking rests primarily" with those entities having the relevant specialized expertise and experience.) (citation omitted). Nothing in the record before us convinces us the Agency's determination regarding the regulatory status of wastes from grey iron foundries was clearly erroneous.[22] Indeed, Leed does not appear to challenge the Agency's technical determination in this regard. Rather, Leed's argument focuses on the allegedly unambiguous language of the Bevill Amendment itself. As stated above, however, Leed's arguments are, in essence, identical to arguments considered and rejected by the D.C. Circuit.[23]

IV. *CONCLUSION*

For the reasons stated above, we agree with the Region that Leed's fly ash waste is not the type of waste Congress included within the scope of the Bevill Amendment. Thus, we reverse the ALJ's dismissal of Counts 1 through 13 of the complaint since we hold that the Bevill Amendment does not apply to the wastes at issue, and remand this matter to the ALJ to determine whether Leed Foundry violated RCRA and EPA's implementing regulations, and, if so, what penalty (if any) is appropriate.[24]

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[22] Moreover, where the Agency's position has been consistent over a long period of time, this Board has, in the past, given greater deference to such a position. *See In re Howmet Corp*., 13 E.A.D. 272, 298 (EAB 2007) ("It is appropriate to give greater deference to an agency's position on a regulation when its rulings, legal interpretations and opinions are consistent over long periods of time.").

[23] We decline to accept in the context of this case the Region's argument that the omission of grey iron foundry waste from the 2000 Regulatory Determination constituted a final Agency interpretation entitled to the same force and effect by this Board that we typically give to a final regulation. *See* Region's Appeal at 22-28. That is, the Region contends that the Agency, by omission, has definitively concluded that grey iron foundry wastes are subject to regulation under Subtitle C, and the Region urges this Board to treat Leed's arguments to the contrary as an impermissible collateral attack on the validity of this "definitive interpretation." *Id*. at 22.

While regulatory determinations issued under the Bevill Amendment contain many important procedural elements of a regulation, such as public hearings and the opportunity for comment, *see* RCRA § 3001(b)(3)(C), 42 U.S.C. § 6921(b)(3)(C), the D.C. Circuit has held that such determinations are not final agency actions and, therefore, not the equivalent of regulations. *See Am. Portland Cement Alliance v. EPA*, 101 F.3d 772 (D.C. Cir. 1996). Indeed, the 2000 Regulatory Determination states that "today's action is not a regulation." 65 Fed. Reg. at 32,235. While the formal public process established by the statute can be viewed as enhancing the deference that should be afforded to technical determinations within the scope of the proceeding, the 2000 Regulatory Determination does not address the status of grey iron foundries, except at most by omission. Under these circumstances, we reject the Region's argument in this regard.

[24] In its reply, Leed argues that it lacked fair notice of its regulatory obligations and, thus, "even if the Board were to reverse the holding below, it should still find that no penalty is appropriate

Continued

Accordingly, the Initial Decision is **REVERSED** and this matter is **REMANDED** for further proceedings consistent with this Remand Order.

So ordered.

(continued)
under the general requirements of due process." Leed's Reply at 14-15 n.14. Because we are remanding this matter for further proceedings, we need not reach this issue. However, given the Agency's public and longstanding position regarding the regulatory status of the type of waste at issue here, we have serious doubts about Leed's assertion.