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

In re:	
Leed Foundry, Inc.	RCRA (3008) Appeal No. 07- (02)
	MOTION FOR LEAVE TO FILE CORRECTED BRIEF IN SUPPORT OF APPEAL
Respondent.	
Docket No. RCRA-03-2004-0061	

MOTION FOR LEAVE TO FILE CORRECTED BRIEF

Complainant in this Matter, the Region 3 Office of the U.S. Environmental Protection Agency, filed a Notice of Appeal and Brief in Support of the Appeal on June 29, 2007. Region 3 is now seeking leave from the Board to file a corrected version of the Notice of Appeal and Supporting Brief, curing minor clerical errors occurring in the June 29, 2007, Brief.

Region 3 asserts that such errors consist of insignificant changes and in no way change the substance of the matters raised and argued in the Brief and in no way prejudice Respondent. These minor clerical corrections are laid out below.

Counsel for Respondent does not object to this Motion for Leave. Furthermore, the Region does not object to the running of Respondent's Response filing deadline from service of today's motion and asks that the Board, in its decision on this Motion, clearly set out Respondent's deadline to ensure the filing of this Motion has not inadvertently made such deadline unclear.

Corrected Clerical Errors

1. Text: Correction of Heading on page 28 – substitute "CONCLUSION" for "CONCLUSIONS"

2. Text: Correction of last line, page 41 – substitute "did not finalize its proposed listing" for "did not until finalized its proposed listing"

3. Table of Contents, page i: Correction of Heading of Argument II. to conform to correction noted directly above.

4. Table of Contents, page i: Correction of Heading of Argument II.B. in Table of Contents to conform to Text Heading on page 31.

5. Footnote 14: Correction of cross-reference to correct Note number and deleting internal notation.

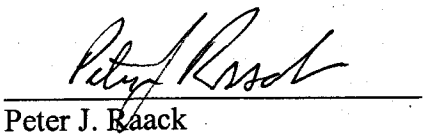
6. Footnotes 111, 116, 117, 120, 122, and 123: deletion of the underline marking; no text was changed.

7. Table, page 35: Addition of vertical line on right-hand margin of Table to denote end of table.

8. Page 45, Signature page: Insertion of signature block with counsel address and phone number and "Of Counsel" designations.

The Region respectfully requests that the attached Notice of Appeal and corrected Brief in Support of Appeal, date July 2, 2007, simply be substituted for the version filed on Friday, June 29, 2007.

RESPECTFULLY SUBMITTED this 2nd day of July, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that I caused the original and two copies of the foregoing Motion for Leave to File Corrected Brief in Support of Appeal in *In Re Leed Foundry, Inc.*, RCRA (3008) Appeal No. 07 - (02), to be hand delivered to the Clerk of the Environmental Appeals Board and caused copies to be sent by Federal Express overnight delivery service to the Region 3 Hearing Clerk, the Honorable William B. Moran and to Mr. Timothy J. Bergere, Esq., at the addresses listed below.

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In re:	
Leed Foundry, Inc.	RCRA (3008) Appeal No. 07- (02)
Respondent.	COMPLAINANT'S NOTICE OF APPEAL AND SUPPORTING BRIEF
Docket No. RCRA-03-2004-0061	

BEFORE THE ENVIRONMENTAL APPEALS BOARD
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In re:	
Leed Foundry, Inc.	RCRA (3008) Appeal No. 07- (02)
	COMPLAINANT'S NOTICE OF APPEAL
Respondent.	
Docket No. RCRA-03-2004-0061	

Pursuant to 40 C.F.R. § 22.30 and this Board's Order of May 23, 2007, the U.S. Environmental Protection Agency Region 3 Office ("Complainant" or "Region 3") hereby submits this Notice of Appeal of the April 24, 2007 Initial Decision issued by the Honorable William B. Moran in the above-styled matter.

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

In re:	
Leed Foundry, Inc.	RCRA (3008) Appeal No. 07- (02)
Respondent.	COMPLAINANT'S BRIEF IN SUPPORT OF ITS NOTICE OF APPEAL
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INTRODUCTION

Pursuant to 40 C.F.R. § 22.30 and the Environmental Appeals Board's ("EAB" or "the Board") Order dated May 23, 2007, the Region 3 Regional Office (hereinafter "Region 3" or "the Region") of the U.S. Environmental Protection Agency (hereinafter "the Agency" or "EPA") submits the following Brief in Support of the Notice of Appeal. Before the Presiding Officer, this matter involved claims under both the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). This appeal involves only the RCRA counts. For the reasons set out below, Region 3 respectfully requests that the Presiding Officer's April 24, 2007 Initial Decision be reversed regarding those conclusions of law relating to the applicability of RCRA's hazardous waste program. [1]

ISSUE PRESENTED

Whether the Presiding Officer erred in overturning EPA's settled resolution of the scope of the statutory exclusion found at 42 U.S.C. § 6921(b)(3)(A)(i) and the companion regulatory exemption found at 40 C.F.R. § 261.4(b)(4) contrary to long-standing Agency interpretations, RCRA's legislative history, and established caselaw from the Board and the D.C. Circuit Court of Appeals.

SUMMARY OF ARGUMENT

[1] Portions of the Initial Decision contained confidential business information. The Region has concluded that those portions are not relevant to the issues raised in this appeal and this brief does not discuss those portions containing the confidential information.

The Initial Decision holds that emission control dust containing highly toxic contaminants generated at Respondent's grey iron cupola foundry is covered by a statutory contained in RCRA's Bevill Amendment. As this brief will demonstrate, the Presiding Officers conclusions are wrong as a matter of law. The statute does not exclude Respondent's emission control dust from Subtitle C. Rather, EPA has clearly defined the scope of the statutory and regulatory exemptions at issue here.

As a defense to the Region's Complaint, Respondent claimed that its waste was exempt, pursuant to RCRA's Bevill Exclusion, 42 U.S.C. § 6921(b)(3)(A). The Presiding Officer agreed. This decision is flawed on a number of grounds. First, EPA has clearly defined the scope of the statute and its companion regulation through the statutorily-mandated process. Accordingly, consistent with Board decisions, the Presiding Officer should not have allowed Respondent to revisit in an enforcement proceeding the scope of the Bevill exemption, which EPA has already definitively settled. Second, the Presiding Officer's conclusions are inconsistent with RCRA and its legislative history. Finally, the Presiding Officer's conclusions disregard long-standing, consistent Agency interpretation and are contrary to federal D.C. Circuit Court of Appeals caselaw.

Accordingly, the Region respectfully requests that the Board reverse the conclusions of law in the Initial Decision regarding the applicability of the Bevill Exclusion and the regulatory exemption, hold that as a matter of law the Bevill Exclusion and the regulatory exemption do not apply to Respondent's emission control dust and remand the matter to the Presiding Officer for further proceedings on liability and penalty consistent with the Board's reversal.

STANDARD OF REVIEW

The Consolidated Rules of Practice at 40 C.F.R. § 22.30(f) state that the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion" contained in an appealed initial decision. The Board reviews a Presiding Officer's determination *de novo*.[2]

BACKGROUND

I. Procedural Background

On September 30, 2004, EPA Region 3's Director of the Office of Compliance, Enforcement and Environmental Justice filed an administrative complaint alleging violations of the Resource Conservation and Recovery Act and the Clean Water Act after conducting compliance inspections of the facility in September and October, 2002. In its Answer to the Complaint, filed October 29, 2004, Respondent raised the affirmative defense that the highly toxic emission control dust was subject to the temporary statutory exemption known as the Bevill Amendment (hereinafter "Bevill Amendment" or "Bevill Exclusion"). On August 4, 2005, Respondent filed an accelerated decision motion on all RCRA counts, renewing its argument that its waste was exempt from the RCRA statute . On August 5, 2005, Region 3 filed a Motion to Strike Defenses to dispose of Respondent's statutory exclusion affirmative defense. On October 12, 2005, the Presiding Officer issued a Preliminary Order on Motions ruling that emission control dust

[2] *In re Vico Constr. Corp,* 12 E.A.D. ___, CWA Appeal No. 05-01, slip op. at 21 (EAB September 29, 2005); *In re Donald Cutler*, 11 E.A.D. 622, 630 (EAB 2004).

from grey iron foundries could be covered by the exclusion found at 42 U.S.C. § 6921(b)(3)(A)(i) and 40 C.F.R. § 261.4(b)(4) for fly ash generated by the combustion of coal or other fossil fuel. However, the Presiding Officer requested expert testimony regarding the nature of the process and inputs used by Respondent that resulted in the generation of the emission control dust to determine if in fact the waste stockpiled at the facility was generated primarily from the combustion of the fossil fuel component in the Leed's furnace.

On November 1, 2005, after hearing a little more than one day of testimony from expert witnesses for both parties, the Presiding Officer, ruling from the bench, concluded that in fact the emission control dust was primarily from the fossil fuel component of the materials mixed in the furnace.[3] The balance of the hearing, which concluded on November 4, 2005, dealt with the outstanding CWA counts.

On April 24, 2007, the Presiding Officer issued his Initial Decision, in which he dismissed the RCRA counts in the Complaint on the grounds that the waste in question is exempt from RCRA's hazardous waste program. The Presiding Officer concluded the Bevill Amendment unambiguously includes Respondent's type of waste and that 1) EPA has failed to complete the necessary studies, reports to Congress and Regulatory Determinations for this type of waste and, thus, the statutory exclusion continues to apply to its waste, or, alternatively, 2) this waste was included within the work EPA conducted in implementing the Amendment and is therefore exempt pursuant to the regulatory exemption found at 40 C.F.R. § 261.4(b)(4). The Presiding Officer incorporated into the

[3] Tr. 160-169.

Initial Decision the entirety of the Preliminary Order on Motions and the November 1 ruling from the bench.[4]

II. Legislative and Regulatory Background

This appeal concerns EPA"s regulatory implementation of RCRA's Bevill Amendment. The Bevill Amendment, enacted in 1980, established a temporary exemption from RCRA's hazardous waste program for certain specified wastes and mandated that EPA conduct studies of such wastes, report to Congress on the results of those studies, and then make a Regulatory Determination as to whether the studied wastes warranted regulation as hazardous wastes.[5] Congress established the categories of wastes and the requirement to conduct a Regulatory Determination in Section 3001(b), 42 U.S.C. § 6921(b), and set out the requirement to study the wastes in Section 8002(n), 42 U.S.C. § 6982(n). RCRA Section 3001(b)(3) states, in relevant part:

> (A). . . 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 . . . section 6982 of this title and after promulgation of regulations in accordance with subparagraph (C) of this paragraph:
>
> (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.
>
> . . .
>
> (C) Not later than six months after the date of submission of the applicable study required to be conducted under subsection [8002(n)]of this title, the Administrator shall, after public hearings and opportunity for comment, either determine to promulgate regulations under this subchapter for each waste listed in subparagraph (A) of this paragraph or determine that such regulations are unwarranted. The Administrator shall publish his determination, which shall be

[4] Initial Decision at n.2. References in this brief to the Presiding Officer's Preliminary Order cite to pages of that Order as it was initially issued. When the Presiding Officer issued his Initial Decision, incorporating the Preliminary Order as Appendix I, the page numbers of the Decision continued to run consecutively through the Appendix (the Preliminary Order begins on page 46 of the Decision). The Region will refer to the original pagination to be consistent with references to the Order in the Initial Decision (*see, e.g.,* Initial Decision at n.16).

[5] 42 U.S.C. § 6921(b)(3)(A), (C).

based on information developed or accumulated pursuant to such study, public hearings, and comment, in the Federal Register accompanied by an explanation and justification of the reasons for it.

RCRA Section 8002(n) states

> The Administrator shall conduct a detailed and comprehensive study and submit a report on the adverse effects on human health and the environment, if any, of the disposal and utilization of fly ash waste, bottom ash waste, slag waste, flue gas emission control waste, and other byproduct materials generated primarily from the combustion of coal or other fossil fuels. Such study shall include an analysis of -
>
> (1) the source and volumes of such material generated per year;
> (2) present disposal and utilization practices;
> (3) potential danger, if any, to human health and the environment from the disposal and reuse of such materials;
> (4) documented cases in which danger to human health or the environment from surface runoff or leachate has been proved;
> (5) alternatives to current disposal methods;
> (6) the costs of such alternatives;
> (7) the impact of those alternatives on the use of coal and other natural resources; and
> (8) the current and potential utilization of such materials.
>
> In furtherance of this study, the Administrator shall, as he deems appropriate, review studies and other actions of other Federal and State agencies concerning such material and invite participation by other concerned parties, including industry and other Federal and State agencies, with a view toward avoiding duplication of effort. The Administrator shall publish a report on such study, which shall include appropriate findings, not later than twenty-four months after October 21, 1980. Such study and findings shall be submitted to the Committee on Environment and Public Works of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives.

These provisions were added to the statute as part of the amendments taking effect on October 12, 1980.[6]

The amendments were based on EPA's "special waste" concept, proposed in 1978,[7] which was intended as a reduced set of regulatory requirements on certain

[6] Pub. L. No. 96-482, 94 Stat. 2334.

categories of wastes that were generated in high volumes and were of low toxicity.[8] One of the "special wastes" involved a category of residues generated by power producing facilities.

> **§ 250.46-2 Utility Waste**
>
> (a) The treatment, storage and disposal of flue-gas desulfurization waste, bottom ash waste and fly ash waste, which is generated by a steam power plant solely from the use of fossil fuels, and which is determined to be a hazardous waste under § 250.13 of Subpart A, are subject to the requirements of the following Sections of this Subpart:
>
> 250.43(f)(h) (General Facility Standards-waste analysis);
> 250.43-1 (General Site Selection-for new sources only);
> 250.43-2 (Security);
> 250.43-5(a), (b)(1). (b)(2)(1). (b)(6-7). and (c) (Manifest System. Recordkeeping, and Reporting);
> 250.43-6 (Visual Inspections);
> 250.43-7(k). (1) and (m) (Closure and Post Closure);
> 250.43-8(a) and applicable requirements of (c) and (d) which relate to groundwater monitoring, (Groundwater and Leachate Monitoring-for groundwater monitoring only).[9]

Before EPA finalized its hazardous waste regulations, Congress became concerned that EPA would be regulating wastes that EPA admitted warranted further study before it could conclude that such waste were in fact "hazardous" pursuant to RCRA's criteria.[10] Congress adopted the Agency's "special waste" concept but prohibited the Agency from regulating the wastes pending completion of additional studies.[11]

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[7] 43 Fed. Reg. 58946 (December. 18, 1978).
[8] *See* S.Rep. No. 96-1010 at 32 (June 12, 1980). ("The House amendment, suspends regulation under subtitle C of [fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste], 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"). *See also Horsehead Res.Dev. Co. v. Browner*, 16 F. 3d 1246, 1255 (D.C. Cir. 1994).
[9] 43 Fed. Reg. at 59015/1. For convenience, references in the brief to specific passages from Federal Register notices will be accompanied by "/number" where the number is the column on the page in which the relevant language appears.
[10] *See* 43 Fed. Reg. at 58992/1.
[11] *See* Argument Section II.B. *infra*.

In anticipation of the Bevill Amendment, in 1980 EPA promulgated a regulatory exemption for this same category of wastes, which provides, in relevant part:

> The following solid wastes are not hazardous wastes:
>
> (4) 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.[12]

In the preamble to the rule, EPA described this exemption as pertaining to utility wastes.[13] This regulation, which is at issue in this case, remains unchanged today except for the addition of a cross-reference to a subsequently enacted rule which did not change the scope of the exemption.[14] In addition to fossil fuel combustion wastes (hereinafter "FFC wastes"), the Bevill Amendment covered mining and mineral processing waste, and cement kiln dust waste.[15]

In February 1988, EPA submitted its initial *Report to Congress: Wastes from the Combustion of Coal by Electric Utility Power Plants*.[16] The *Report* did not address waste from utilities burning other fossil fuels or wastes from non-utility boilers burning any type of fossil fuels because the Agency deferred study of these wastes until a later date.[17]

In 1991, an Oregon citizens group, the Bull Run Coalition, filed suit against EPA for failing to publish a Regulatory Determination on the wastes studied in the 1988 *Report to Congress* and on other large-volume wastes generated primarily from the combustion of coal or other fossil fuels. As a result, the Agency entered into a Consent

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[12] 45 Fed. Reg. 33120 (May 19, 1980), codified at 40 C.F.R. § 261.4(b)(4).
[13] 45 Fed. Reg. at 33089.
[14] The current version of the regulation cross-references 40 CFR § 266.112, the so-called "BIF Rule" as it deals with the combustion of hazardous waste in boilers and industrial furnaces. See note 111 and accompanying text *infra*.
[15] RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A).
[16] 53 Fed. Reg. 9976/3 (March 28, 1988). Given the length of this document and its relevance only for background context, the Region is not providing it at this time. If the Board would like a copy of the 1988 Report, the Region will certainly provide one.
[17] 58 Fed. Reg. 42466, 42467/1 (August 9, 1993).

Decree that established a schedule for EPA to complete the Regulatory Determinations for all FFC wastes.[18] In 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 independent commercial power producers, and (2) all remaining wastes subject to RCRA Sections 3001(b) and 8002(n).

In August 1993, EPA published its Regulatory Determination for the first category of waste.[19] Subsequently, EPA began its work on the second and final category of waste which, pursuant to the court's order, addressed all of the remaining wastes subject to the Bevill Exclusion. This consisted of: 1) co-managed utility coal combustion wastes; 2) wastes from the combustion of mixtures of coal and other fuels by utilities; 3) wastes from the combustion of coal by non-utilities; 4) wastes from fluidized bed combustion of fossil fuels (by utilities and non-utilities); 5) wastes from the combustion of oil (by utilities and non-utilities); and 6) wastes from the combustion of natural gas (by utilities and non-utilities).[20] The *Report to Congress* for Part 2 was issued in March 1999[21] and the companion Regulatory Determination was published on May 22, 2000.[22]

As described in the 1993 Regulatory Determination, the second phase of EPA's work on the FFC wastes exemption would focus on "wastes generated by utilities burning other fossil fuels or wastes from boilers burning any type of fossil fuel."[23] The 2000 Regulatory Determination identified the categories of remaining wastes EPA had

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[18] *Frank Gearhart v Reilly*, C.A.No. 91-2435, (D.D.C. June 30, 1992). Exhibit B to Complainant's Motion to Strike Bevill Affirmative Defense.
[19] 58 Fed. Reg. 42466 (August 9, 1993).
[20] U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-S-99-010, Vol. 1 (1999), at 1-2.
[21] 64 Fed. Reg. 22820 (April 28, 1999). The Part 2 *Report to Congress* can be found at http://www.epa.gov/epaoswer/other/fossil/index.htm.
[22] 65 Fed. Reg. 32214, 32218/2 (May 22, 2000)
[23] 58 Fed. Reg. at 42467/3.

determined were eligible for exclusion as those that the Agency studied in its 1999 *Report to Congress*.[24] The Regulatory Determination summarized the information set forth in detail in the *Report to Congress* and formally announced EPA's decision that the wastes studied in the *Report to Congress* did not warrant regulation under RCRA's hazardous waste program.[25] In the *Report to Congress*, the Agency was clear in its descriptions of facilities capable of generating excluded wastes, in its definitions of the type of combustion technologies able to render such wastes, and in the description of the wastes EPA studied to determine their eligibility.

The category of waste relevant to this litigation, "non-utility coal combustion wastes," which is the subject of the discussion in Chapter 4 of the *Report*. That section states:

> Non-utility fossil fuel combustors do not produce and sell electricity as their primary industrial activity. Non-utility combustors are commercial, industrial, and institutional facilities that use fossil fuel in boilers to generate steam. Steam thus produced is used to generate electricity for captive use, to provide heat, or as a production input.[26]

The *Report* also discusses the types of technology EPA determined could be used to generate an exempt waste. The *Report* focuses on boiler technology as a generic classification of the units in which fossil fuel is combusted. In Chapter 4 of Volume 2, which deals with petroleum coke combustion at non-utilities, describes the applicable technology, and defines precisely which units are capable of rendering an exempt FFC waste.[27]

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[24] 65 Fed. Reg. at 32218/2.
[25] *Id.* at 32215/2.
[26] U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-R-99-010, Vol. 2 (1999) at 4-1 (emphasis added).
[27] *See* U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-S-99-010, Vol. 1 (1999), at G-2, G-3, G-4, G-8; U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-R-99-010, Vol. 2 (1999) at 4-3,

The Regulatory Determination also relied upon documents that were published to support the *Report to Congress*. First, EPA compiled a background document of Industry Statistics and Waste Management Practices.[28] This document begins with a discussion of the facilities EPA determined to be within the exemption. EPA presented the relevant information as follows:

2.0 FOSSIL FUEL COMBUSTION UNIVERSE[29]

2.2 INDUSTRY UNIVERSE

. . . Table 2-1 characterizes the universe by industry sector and fuel...

Table 2-1. Fossil Fuel Combustion Industry in the United States

Industry Category and Fuel	Number of Boilers	Capacity (Mwe)	Percent of Capacity*
Utilities	**2,319**	**469,242**	**75%**
Coal-fired	1,251	320,834	52%
Oil-fired	280	43,447	7%
Natural gas-fired	788	104,961	17%
Non-utilities	**15,618**	**148,021**	**24%**
Coal-fired	2,288	32,895	5%
Oil-fired	5,245	43,363	9%
Natural gas-fired	6,907	46,663	8%
Other fossil fuels	1,178	14,100	2%
Fluidized Bed Combustion	**123**	**4,591**	**1%**
Total	**18,060**	**621,854**	**100%**

*Capacity percentages shown are calculated based on the sum of the total capacities presented in the various sources. Because these capacity data are from different sources and different points in time, the percentages should be treated as estimates only.
Sources: EEI, 1994; EPA, 1990; CIBO, 1997

4-4; *see also Id.* at 3-10 ("All the fossil fuel combustion technologies described in this report are used to heat water and generate steam").

[28] U.S. Environmental Protection Agency. *Technical Background Document for the Report to Congress on Remaining Wastes from Fossil Fuel Combustion: Industry Statistics and Waste Management Practices.* (March 15, 1999)

[29] *Id.* at 2-2.

EPA also published another background document to support the 1999 *Report to Congress* regarding the characteristics of the waste that the Agency studied to determine whether such waste warranted inclusion in the hazardous waste program: "This document presents the data used to characterize fossil fuel combustion (FFC) wastes for the [1999 Report to Congress]."[30] In that document, EPA presented the results of its analyses of wastes from utility fossil fuel combustion sources and determined that the fly ash waste, when tested with RCRA's leachate procedure, exhibited very low levels of heavy metal contaminants such as lead and chromium.[31] EPA concluded that utility FFC waste and non-utility FFC wastes have similar characteristics and developed a risk assessment for non-utility wastes relying on the utility waste characteristics.[32]

Both Part 1 and Part 2 *Reports to Congress* were subject to extensive public notice and comment.[33] In fact, the Part 2 *Report to Congress* comment period was extended for over three additional months and was the subject of three separate Federal Register notices.[34] EPA also conducted public hearings on the *Reports* to solicit further comment.[35] In addition, the 1999 *Report to Congress* notice, published in the "Proposed Rules" section of the Federal Register, briefly summarized the Agency's tentative conclusions regarding the need for future regulatory controls.[36] Per the process

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[30] U.S. Environmental Protection Agency. *Technical Background Document for the Report to Congress on Remaining Wastes from Fossil Fuel Combustion: Waste Characterization.* (March 15, 1999), at 1-1.
[31] *Id.* at p. 3-2.
[32] U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-R-99-010, Vol. 2 (1999), at 4-9.
[33] 53 Fed. Reg. 9976 (March 28, 1988); 64 Fed. Reg. 22820.
[34] 64 Fed. Reg. 31170 (June 10, 1999); 64 Fed. Reg. 50788 (September 20, 1999).
[35] 53 Fed. Reg. at 9977 (March 28, 1988); 64 Fed. Reg. at 22820.
[36] 64 Fed. Reg. at 22821/3.

established by Congress, the final step consisted of publication in the Federal Register, and solicitation of comments on the 2000 Regulatory Determination.[37]

III. Factual Background

The material facts are undisputed. Respondent operates a grey iron foundry in St. Clair, Pennsylvania, where it melts scrap iron to manufacture cast iron manhole covers.[38] To melt the scrap iron, Respondent utilizes a cupola furnace in which the scrap iron is placed, along with fuel and other inputs.[39] The cupola furnace is a cylindrical-shaped unit used for re-melting metals.[40] The foundry and the cupola furnace have been in operation since at least 1964.[41] During normal operation, the cupola furnace generates a particulate matter which rises out of the unit with the waste gases and is subsequently captured in a baghouse air pollution control device.[42] This emission control dust is periodically removed from the air pollution control device and, at the time of EPA's inspections in September and October 2002, was being stored in piles around Respondent's facility.[43] Prior to EPA's inspections, Respondent never attempted to handle the waste in accordance with either EPA's or Pennsylvania's hazardous waste programs. Respondent had conducted RCRA toxicity tests, prior to EPA's inspections, that demonstrated the waste could leach high levels of lead and cadmium, which significantly exceeded the regulatory toxicity standard.[44] As part of EPA's inspections,

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[37] 65 Fed. Reg. 32214.
[38] Respondent's Motion for Partial Accelerated Decision at 1 (8/4/05).
[39] *See* Respondent's Hearing Exhibit 1 (drawing of cupola furnace by Respondent Witness Bauer); *see also*, Respondent's Answer at 4.
[40] Initial Decision at 2.
[41] Tr. 1063.
[42] Initial Decision at 4.
[43] *Id.* at 22.
[44] *Id.* at 23; Tr. 1088-1089.

this material was also tested using EPA's toxicity characteristic leachate procedure[45] and found to exceed EPA's toxic characteristic standard for both lead and cadmium contaminants.[46] These results show that the emission control dust contained up to 926 ppm of lead and up to 10.2 ppm of cadmium. The regulatory threshold for lead is 5 ppm and the threshold for cadmium is 1 ppm.[47]

ARGUMENT

I. THE PRESIDING OFFICER ERRED IN OVERTURNING EPA'S DEFINITIVE INTERPRETATION OF THE BEVILL EXCLUSION

Respondent claims that its cadmium and lead-laden emission control dust is not subject to RCRA's hazardous waste program as it falls within the universe of wastes that Congress excluded under RCRA § 3001(b)(3)(A)(i).[48] The Presiding Officer agreed, reaching alternative conclusions either that EPA's regulatory work pursuant to the Bevill Amendment was substantially deficient as it failed to address certain wastes or that the regulatory exemption includes the type of waste Respondent generates. Although Respondent may argue that its defense is merely a challenge to the application of the regulation, given the clarity with which EPA has determined that Respondent's wastes do not fall within the Bevill Exclusion, Respondent is effectively seeking to amend EPA's formally adopted, definitive interpretation of the scope of the statutory exclusion and the regulatory exemption at 40 C.F.R. § 261.4(b)(4). The Presiding Officer clearly erred in

[45] 40 C.F.R. § 261.24.
[46] *See* Cox Affidavit, Exhibit A to Complainant's Motion to Strike Bevill Affirmative Defense
[47] 40 C.F.R. § 261.24.
[48] 42 U.S.C. § 6921(b)(3)(A)(i).

allowing such a challenge under the Board's general rule against reopening settled matters that are no longer subject to judicial challenge.[49]

A. Grey Iron Foundry Wastes Have Always Been Outside of the Scope of the Bevill Exclusion

Since its inception, the FFC waste exemption has encompassed only those wastes generated from utilities or other comparable operations involved in the generation of power or steam. At no point did the exemption ever extend to operations or wastes like those at Respondent's facility. Beginning with EPA's original 1978 proposal, which was adopted in the Bevill Amendment, and again in its *Reports to Congress* and Regulatory Determinations, EPA consistently limited the scope of the exemption to wastes from utilities and other power generating facilities.

In 1978, EPA first proposed to establish reduced regulatory requirements on certain categories of "special wastes" of low toxicity and high volumes.[50] Included among those were "utility wastes," which EPA defined as "generated by a steam power plant solely from the use of fossil fuels."[51] Subsequently, in 1980, EPA promulgated a final rule in anticipation of the legislation encompassing the Bevill Amendment. As the preamble to the rule states, the rule was based on bills that had recently passed both the House and Senate, each of which contained amendments to "repeal or temporarily suspend EPA's authority to regulate certain **utility** and energy development wastes as hazardous wastes under Subtitle C."[52] Thus, although the regulatory text refers only to

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[49] *See, e.g., In re B.J. Carney Industries*, 7 E.A.D. 171, 194 (EAB 1997).
[50] 43 Fed. Reg. at 59015.
[51] *Id.*
[52] 45 Fed. Reg. 33084, 33089/1 (May 19, 1980)(emphasis added).

"fly ash," the preamble makes clear that EPA intended to exempt only fly ash from utilities or other power generating facilities. EPA committed to revise the rule, as necessary, to conform to the legislation that was ultimately enacted.[53] The regulation promulgated in that rulemaking is the regulation that currently remains in effect. The sole change to that regulation was simply a cross-reference added in a 1991 rule, which in no way expanded the scope of the regulation.[54]

Congress adopted EPA's "special waste" construct in the Bevill Amendment in RCRA Section 3001(b)(3)(A)(i).[55] This language finally adopted by the conference committee is the same language EPA promulgated in its 1980 regulation. In adopting EPA's language, Congress also adopted the limited scope of the exclusion that EPA identified in the preamble to the 1980 regulation – the wastes were generated by utilities or those engaged in essentially the same operations. There is no indication anywhere in the legislative history of any intent to substantially expand the scope of this exemption to include facilities whose operations were fundamentally distinct from electric utilities and non-utility power and steam generation. To the contrary, Congress clearly indicated its intent to adopt EPA's "special waste" concept.[56]

As set forth above in the Legislative and Regulatory Background Section, EPA spent many years carrying out Congress' mandate to determine the scope of the wastes within the exemption, study and report to Congress on them, and then issue a Regulatory Determination on the need for regulatory controls under RCRA's hazardous waste program. EPA completed this process in 2000 and, in doing so, very clearly resolved the

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[53] *Id.*
[54] *See infra* at Argument Section II.
[55] S. Rep. No. 96-1010 at 32 (June 12, 1980).
[56] *Id.; see* Argument Section II.B.

scope of the statutory exclusion, as well as the corresponding regulatory exemption found at 40 C.F.R. § 261.4(b)(4).

EPA's fossil fuel combustion Regulatory Determinations are unlike other EPA actions due to the unique, multi-stage process Congress established in the statute to set out the scope of the exclusion. These determinations involve technical decisions as well as regulatory interpretations and are analogous to regulations, in terms of finality and the process by which they were developed.[57] The Administrator was initially required to "conduct a detailed and comprehensive study on the adverse effects on human health and the environment, if any, of the disposal" of the exempt wastes.[58] EPA was then required to publish the study, and report to Congress by a specified date.[59] After submission of the report to Congress, EPA was required to determine whether the studied wastes warrant regulation as hazardous wastes. In making that determination, the Administrator was required to hold public hearings, and provide an opportunity for the public to comment.[60] That final determination was to be published in the Federal Register, along with an "explanation and justification of the reasons for it."[61] The culmination of this process was a formal and definitive interpretation on the scope of the Bevill Exclusion.

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[57]EPA would ordinarily consider the Regulatory Determination to be a regulation, given the Agency's intent that the decision to not regulate the FFC wastes under Subtitle C bind the Agency and affected parties, and conclude the Bevill process. However, questions remain whether the Determination may properly be considered a regulation in light of the DC Circuit Court of Appeals decision in *American Portland Cement v Browner*, 101 F.3d 772 (D.C. Cir. 1996). The court found that it lacked jurisdiction based on a number of grounds, including RCRA's "plain language" distinction between "regulations," which the court has jurisdiction to review, and "determinations," which it does not. The court also reasoned EPA's Regulatory Determination for cement kiln dust was not a regulation on the grounds that the Agency had not indicated any intent to bind itself or affected parties and because its decision to promulgate tailored regulations was merely an "intermediate rather than ultimate stage in the rulemaking process." EPA's FFC waste Regulatory Determination stands in a somewhat different posture, however, and so may properly be considered a regulation.

[58] 42 U.S.C. § 6982(n); *see also* 42 U.S.C. § 6921(b)(3)(A).

[59] 42 U.S.C. § 6982(n).

[60] 42 U.S.C. § 6921(b)(3)(C).

[61] *Id.*

A review of the 1999 *Report to Congress* plainly shows that Respondent's waste was not included in the scope of the exemption.[62] As noted above, it is not disputed in this litigation that Respondent's facility neither is a utility nor utilizes fluidized bed combustion technology.[63] Further, there is no dispute that Respondent's facility primarily utilizes petroleum coke as the fuel source.[64] Accordingly, the only discussion in the *Report to Congress* that would arguably be relevant to Respondent's emission control dust is the discussion addressing "wastes from the combustion of ... petroleum coke ... generated by non-utilities."[65] As the Presiding Officer recognized "one will not find a single word in either of EPA's *Reports to Congress* regarding iron foundries."[66] The language used throughout the Report makes it very clear that EPA did not consider grey iron foundry waste nor cupola furnace waste to be within scope of the Bevill Amendment.[67]

In the only Chapter that could arguably be relevant to Respondent's waste, Chapter 4, Non-Utility Coal Combustion Wastes, the *Report* states:

> Non-utility fossil fuel combustors do not produce and sell electricity as their primary industrial activity. Non-utility combustors are commercial, industrial, and institutional facilities that use fossil fuel in boilers to generate steam. Steam

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[62] *See* Legislative and Regulatory Background Section *supra*.
[63] *See* Initial Decision at 2.
[64] EPA determined that petroleum coke is a fossil fuel within the meaning of that term in the Bevill Amendment. *See, e.g.*, U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-S-99-010, Vol. 1 (1999), at 1-2. However, in various places in the Report to Congress, EPA used the term "coal" to generically refer to all materials EPA has included as fossil fuels.
[65] U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-S-99-010, Vol. 1 (1999), at 1-2.
[66] Initial Decision at 8-9 (footnote omitted). The Presiding Officer, however, ignores the natural conclusion of this omission that iron foundry waste was therefore not included, curiously choosing to read this lack of reference as support for the conclusion that the waste was somehow included in the exemption.
[67] The Agency's determination of the scope of the eligible universe is consistent with the description of the exempt waste the Agency published in 1980 when it promulgated the initial regulatory exemption which states that it covered only "certain utility and energy development wastes." 45 Fed. Reg. at 33089/1.

> thus produced is used to generate electricity for captive use, to provide heat, or as a production input.[68]

In other words, EPA only included those facilities that were conducting essentially the same activities as utilities—combusting fossil fuel in boilers to generate steam. There is no dispute in this case that Respondent does not use fossil fuel in a boiler to generate steam nor is there any dispute that Respondent does not generate steam in any unit for any purpose. In using the above quoted language, EPA definitely set forth the universe of facilities capable of generating a Bevill-exempt waste and Respondent's type of facility was not among them.

The *Report* also discusses the types of technology EPA determined could be used to generate an exempt waste. The *Report* focuses on boiler technology as a generic classification of the units in which in the fossil fuel is combusted. In Chapter 4 of Volume 2, again the only chapter that is arguably relevant to Respondent's affirmative defense as it deals with petroleum coke combustion at non-utilities, the *Report* describes the applicable technology:

> **4.1.1 Boiler Technology**
>
> Coal-fired non-utilities use the same conventional combustion technologies as coal-fired utilities: pulverized coal (PC) boilers, stokers and cyclones. All three conventional technologies involve combustion of coal in a boiler to heat water and produce steam. The steam may then be used to provide process heat or generate electricity.[69]

EPA also expressly noted that "[a]ll the fossil fuel combustion technologies described in this report are used to heat water and generate steam."[70] The *Report* proceeds to define

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[68]U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-R-99-010, Vol. 2 (1999), at 4-1.
[69] *Id.* at 4-4.
[70] *Id.* at 3-10.

"boiler" as "a closed vessel in which heat from an external combustion source (such as fossil fuel) is transferred to produce hot water or generate steam."[71] The *Report* defines "stokers" as "a combustion technology using a mechanically operated fuel feeding mechanism to distribute solid fuel over a grate for combustion."[72] The *Report* defines "cyclone furnace" as "a combustion technology that creates a cyclone-like air circulation pattern causing smaller particles to burn in suspension, while larger particles adhere to a molten layer of slag that forms on the barrel walls."[73] As the description of the cupola furnace indicates, it is not designed to heat any water chambers or circulate air to enhance combustion.[74] The units at Respondent's facility, specifically its cupola furnace, do not meet any of these definitions.[75] Thus, Respondent's facility does not utilize the technology that EPA determined could be used to generate an exempt waste.

The *Report's* definitions of the exempted waste further support EPA's conclusion that Respondent's wastes do not qualify for the exemption. The *Report*, in several different chapters as well as in the Glossaries to Volumes 1 and 2, defines "fly ash" as "suspended, uncombusted ash particles carried out of the boiler along with the flue gases".[76] Again, there is no dispute between the parties as to this critical fact: Respondent's cupola furnace is not a boiler. Further, this is the only definition of "fly ash" relevant in this matter; this Bevill Amendment 'term of art' clearly does not encompass Respondent's waste.

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[71] U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-S-99-010, Vol. 1 (1999), at G-2.
[72] *Id.* at G-8.
[73] *Id.* at G-3.
[74] Initial Decision at 3.
[75] *See* Tr. 25-34.
[76] U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-S-99-010, Vol. 1 (1999), at G-4; U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-R-99-010 (1999), at 4-3 (emphasis added).

Finally, documents published in support of the *Report to Congress* also clearly state that Respondent's wastes are not eligible for the exemption. For example, EPA issued a background document of Industry Statistics and Waste Management Practices for wastes eligible for the exclusion.[77] This document begins with a discussion of the facilities EPA determined to be capable of generating waste within the exemption. EPA summarized and quantified the universe of units eligible to generate FFC waste(Table 2.0, shown above in the Legislative and Regulatory Background Section) and limited that universe to boiler combustion units.[78] EPA also published a background document to support the *Report to Congress* that characterized the waste that the Agency studied.[79] EPA analyzed waste from utility fossil fuel combustion sources and determined that the fly ash waste, when tested with RCRA's leachate procedure, exhibited very low levels of heavy metal contaminants such as lead and cadmium.[80] EPA concluded that utility FFC waste and non-utility FFC waste have similar characteristics and developed a risk assessment for non-utility wastes by relying on utility waste characteristics.[81] EPA's leachate sampling of the emission control dust indicated Respondent's waste exhibits very high levels of lead and cadmium.[82] Indeed, as these results are much higher than the levels found in the studied wastes, Respondent's waste is quite different than the energy and steam production waste described in the *Report to Congress*.

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[77] U.S. Environmental Protection Agency. *Technical Background Document for the Report to Congress on Remaining Wastes from Fossil Fuel Combustion: Industry Statistics and Waste Management Practices* (March 15, 1999).
[78] *Id.* at p. 2-2
[79] U.S. Environmental Protection Agency. *Technical Background Document for the Report to Congress on Remaining Wastes from Fossil Fuel Combustion: Waste Characterization* (March 15, 1999), at 1-1.
[80] *Id.* at.. 3-2.
[81] U.S. Environmental Protection Agency. *Report to Congress: Wastes from the Combustion of Fossil Fuels,* EPA 530-R-99-010, Vol. 2 (1999), at 4-9.
[82] *See* Cox Affidavit, Exhibit A to Complainant's Motion to Strike to Bevill Affirmative Defense.

In sum, this review of the *Report to Congress* clearly indicates that grey iron foundry emission control dust has never been included in EPA's expressed and consistent interpretation of wastes eligible for exclusion pursuant to the Bevill Amendment.

B. The Presiding Officer Erred in Allowing Respondent to Collaterally Attack EPA's Definitive Interpretation of the Scope of the Bevill Exemption in an Enforcement Proceeding.

Respondent's argument that its wastes are exempt from RCRA Subtitle C regulation by the Bevill Amendment is an attempt to revisit, in an enforcement action, EPA's definitive interpretation of the scope of the statutory Bevill Exclusion and the regulatory exemption in 40 C.F.R. § 261.4(b)(4) developed after years of regulatory activity, including a lengthy process mandated by Congress involving two *Reports to Congress*, public notice and comment and formal Regulatory Determinations. At several stages throughout this process, Respondent could have challenged EPA's decision regarding the scope of the Bevill Exclusion in court, but failed to do so. Consistent with Board decisions rejecting challenges to the validity of regulations, the Presiding Officer should have refused to entertain Respondent's challenge to the validity of EPA's Regulatory Determination regarding the scope of the Bevill Exclusion. At this point, the Agency is entitled to close the book on the scope of the Bevill Exclusion and the regulatory exemption in 40 C.F.R. § 261.4(b)(4), and the Presiding Officer erred in second-guessing that determination in this enforcement proceeding.

The Board has rejected similar attempts to revisit the Agency's settled decisions in analogous situations where parties have attacked the validity of regulations in enforcement proceedings. In those cases, the Board has held as a "general rule" that the

presiding officer should refuse to entertain a challenge to a regulation's validity in the context of an enforcement proceeding.[83]

In *In re Echevarria*, the Board explained the underlying rationale for this general rule as a "rule of practicality" and "administrative efficiency."[84] The Respondent in *Echevarria* challenged the validity of a Clean Air Act (CAA) regulation in an administrative enforcement proceeding. The Board noted the CAA specifically precludes judicial review of the regulation in civil enforcement proceedings and requires the regulations be challenged in circuit court within a fixed time period. Because the time period for judicial review had passed in *Echevarria* and no one had succeeded in having a court invalidate the regulation, the Board concluded:

> . . . the rule is no longer subject to judicial challenge and the Agency, for reasons of administrative efficiency, is obviously not interested in reexamining such a rule in an administrative proceeding. Once the rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency is entitled to close the book on the rule insofar as its validity is concerned. . . . The Agency retains the power, however, to repeal or amend the rule if the rule no longer serves its intended purposes. Similarly, citizens may petition the Agency to repeal or amend a rule if it is not to their liking. In both instances, however, the means of repealing or amending the rule are carried out in the context of a rulemaking forum, not an enforcement proceeding.[85]

In a subsequent decision, the Board reiterated that the general rule of nonreviewability in administrative enforcement cases "is based, to some degree, on considerations of

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[83] *In re Echevarria*, 5 E.A.D. 626, 634-35 (EAB 1994)(citations omitted); *In re Woodkiln, Inc.*, 7 E.A.D. 254 (EAB 1997)(refusing to review final Agency regulations promulgated under the Clean Air Act in administrative enforcement action); *In re B.J. Carney Indust.*, 7 E.A.D. 171, 194 (EAB 1997) (affirming strong presumption against entertaining challenges to validity of a regulation in administrative enforcement proceeding). *See also In re USGen New England, Inc., Brayton Point Station*, 11 E.A.D. 525, 556 (EAB 2004) (citing *Echevarria* and concluding that generally the Board does not entertain challenges to final Agency regulations in the context of permit appeals); *In re City of Irving Texas Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 123 (EAB 2001) (generally a permit appeal cannot be used as a "vehicle for collateral challenge of regulatory provisions when the time for such a challenge has long passed"); *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001) (Board will not review "validity of prior predicate regulatory decisions that are reviewable in other fora.").

[84] 5 E.A.D. at 634, 635.

[85] *Id.* (citations omitted).

'practicality' and 'administrative efficiency'" and was not compelled by the existence of the CAA provision precluding judicial review.[86]

The rationale underlying the Board's general rule against entertaining challenges to regulations applies with equal force to the Agency's resolution of the scope of the Bevill Exclusion and the regulatory exemption in 40 C.F.R. § 261.4(b)(4). In the Bevill Amendment, Congress created a special process for the Agency to determine which wastes, if any, should retain the temporary statutory exclusion from RCRA Subtitle C. This process is similar to the rulemaking process, although it entails additional steps. In 1980, Congress required EPA to study certain wastes, including fly ash waste, conduct a detailed and comprehensive study and submit it to Congress, conduct public hearings and accept public comments, and finalize its decision in a *Report to Congress*.[87] Throughout this process, EPA consistently interpreted the scope of the Bevill Exclusion as not including the type of emission control dust generated by Respondent, continuing in 2000 when EPA clearly affirmed that Respondent's waste was not exempt.

Respondent's situation in this case is very similar to that of the respondents in *Echevarria* and related cases. Respondent could have challenged EPA's definitive determination on the scope of the Bevill Exclusion in a judicial proceeding pursuant to the Administrative Procedures Act (APA) as a final agency action, just as the respondents in the previously cited EAB cases could have challenged the regulations pursuant to the

[86] *In re Woodkiln, Inc.*, 7 E.A.D. at 270 n.16 (*quoting In re Echevarria*, 5 E.A.D. at 634-35)
[87] 42 U.S.C. § 6921(b)(3); 42 U.S.C. § 6982(n).

judicial review provisions in the underlying statute.[88] It is clear from the Agency's *Reports to Congress* and Regulatory Determinations that EPA concluded that Respondent's waste did not fall within the scope of the Bevill Exclusion. Given that EPA was required under court order[89] to complete its work on all other wastes within the universe of the exclusion, to the extent it disagreed with EPA's conclusions, Respondent should have been aware that action was necessary to protect its rights. As final agency action, EPA's determination would be subject to review in the appropriate district court.[90] However, under the applicable statute of limitations provision, such challenges must be brought within six years of the date when the right of action first accrues, which in this case, was upon EPA's publication of the Regulatory Determination in the Federal Register.[91] Accordingly, Respondent's challenge to the interpretations embodied in the Regulatory Determination is now time-barred. As the *Echevarria* line of decisions establishes, once EPA's decision is "no longer subject to judicial challenge" the Agency should be "entitled to close the book" on that issue insofar as its validity is concerned"[92] and not face repeated challenges in successive administrative enforcement proceedings.[93]

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[88] As discussed, supra, at note ____, the Regulatory Determinations might be deemed regulations. As such, they are potentially challengeable under RCRA Section 7006(a), potentially presenting yet another, more appropriate forum for Respondent to raise the objections it is raising here.

[89] *See* Gearhart v. Reilly Consent Decree supra at n. 18.

[90] 5 U.S.C. §§ 702, 704, and 706.

[91] 28 U.S.C. § 2401(a). Numerous courts have held that for purposes of the statute of limitations in 5 U.S.C. § 2401(a), a party's right of action to challenge a final agency action under the APA accrues upon promulgation, or publication in the Federal Register. *See Center for Biological Diversity v. Hamilton,* No. 05-15851 (11th Cir. 2006); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999); *Southwest Williamson County Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999); *Wind River Mining Corp. v. U.S.,* 946 F.2d 710, 715 (9th Cir. 1991).

[92] *In re Echevarria*, 5 E.A.D. 626, 635 (EAB 1994).

[93] Respondent had an even earlier opportunity to challenge the scope of regulatory coverage in 1980 when EPA promulgated 40 C.F.R. § 261.4(b)(4), but again failed to do so within the time frame allowed for judicial review. As explained earlier, EPA was clear that its regulation did not extend to foundries. Respondent was obligated to bring any challenge to this regulation within ninety days of the promulgation as provided in RCRA Section 7006(a). As the EAB noted in *In re USGen*, when "Congress . . . has set precise limits on the availability of a judicial forum for challenging particular kinds of regulations, the

In addition, Respondent could have submitted a petition to the Administrator to amend or repeal the regulatory exemption in 40 C.F.R. § 261.4(b)(4). At least by the time of the 2000 Regulatory Determination, if not much earlier in 1980, the Agency had definitively interpreted the scope of that regulation. Like the respondents in *Echevarria*, Respondent Leed could have "petition[ed] the Agency to repeal or amend a rule if it is not to [its] liking."[94] Section 7004 of RCRA establishes procedures for citizens to seek the promulgation, amendment or repeal of regulations.[95] This section provides an administrative process for revising a rule, which is initiated by a filing in the office of the Administrator, not before a Presiding Officer in an enforcement proceeding.[96] If the Agency denies such petition, that denial is judicially reviewable pursuant to RCRA Section 7006(a)(1).[97] Indeed, Respondent still has this right. But having failed to submit a petition, Respondent may not bypass the petition process, and raise the issue for the first time in an enforcement proceeding; RCRA Section 7006 expressly provides that "action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement."[98] Moreover, the fact that Respondent effectively requests modification of a regulation at issue in an enforcement proceeding that does not establish any framework for rulemaking, does not confer upon the Presiding Officer the authority

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presumption of nonreviewability in an administrative enforcement context is "especially appropriate." *USGen* at 525. *See also In re City of Irving Texas Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 123 (EAB 2001) (generally a permit appeal cannot be used as a "vehicle for collateral challenge of regulatory provisions when the time for such a challenge has long passed"); *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001) (Board will not review "validity of prior predicate regulatory decisions that are reviewable in other fora.") As the time to challenge this regulation has run, Respondent should not be able to obtain review in this administrative enforcement action.

[94] *In re Echevarria*, 5 E.A.D. at 635.

[95] 42 U.S.C. § 6974. *See also* 40 C.F.R. Part 260 Subpart C, Rulemaking Petitions.

[96] Other courts have recognized the important role Section 7004 serves in the regulatory context. *See, e.g., Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988).

[97] 42 U.S.C. § 6976(a)(1).

[98] *Id.*

to augment the rulemaking record by conducting an "improvised rulemaking process within adjudication."[99] Neither 40 C.F.R Part 22 nor RCRA establish a framework for reconsidering the validity of regulations in an administrative enforcement proceeding. [100]

Although the Board has adopted a general rule against reviewing the validity of regulations in enforcement proceedings, it also recognizes a very narrow exception to that rule. Because the rule is one of practicality,

> . . . if an extremely compelling argument were made as to a rule's invalidity (for example, where it has been held invalid in an intervening court decision) the Board could rely on it to dismiss the complaint.[101]

That narrow exception does not apply here, however, because Respondent cannot point to any such compelling arguments to justify review in an enforcement proceeding of the Agency's definitive interpretation of the scope of the Bevill Exclusion or the regulatory exemption in 40 C.F.R. § 261.4(b)(4).

In sum, Respondent has not cited any compelling circumstances and has not identified any considerations that suggest that Agency resources would be better spent on

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[99] *See In re Woodkiln,* 7 E.A.D. 254 at 268 n.15 (EAB 1997).

[100] It is also worth noting that Respondent had numerous opportunities throughout EPA's regulatory process to clarify the scope of the exemption and has chosen never to do so. When EPA originally promulgated the regulatory exclusion in 1980, limiting it to "certain utility and energy development wastes," Respondent could have submitted comments noting its disagreement with EPA's position. EPA is not aware of any such comments and certainly Respondent has not claimed to have submitted any such comments. Additionally, both of EPA's Reports to Congress were announced in the Federal Register and were subject to extensive notice and comment periods. 53 Fed. Reg. 9976; 64 Fed. Reg. 22820. In fact, the Part 2 Report to Congress comment period was extended for over 3 additional months and was the subject of three separate Federal Register notices. *Id.*; 64 Fed. Reg. 31170; 64 Fed. Reg. 50788. EPA also conducted public hearings on the Reports to solicit further comment. 53 Fed. Reg. at 9977; 64 Fed. Reg. at 22820. Likewise, both the 1993 and 2000 Regulatory Determinations were published with notice and comment periods. 58 Fed. Reg. 42465; 65 Fed. Reg. 32214. During over twelve years of regulatory work, resulting in two Reports to Congress and two Regulatory Determinations and involving at least eight Federal Register notices, Respondent apparently failed to submit even a single comment alleging that EPA failed to include a statutorily-mandated waste from a very visible industry sector, grey iron foundries (or for that matter, any industry sector beyond utilities, energy development and steam production); *See also In re Howmet Corp.*, 13 E.A.D. ____, RCRA (3008) 05-04, slip op. at 47 (EAB May 24, 2007) (When a regulation is ambiguous, the Board will consider "whether a regulated party inquires about the meaning of the regulation at issue.").

[101] *Echevarria* at 635 n.13; *USGen* at 557.

reconsidering the scope of the regulation in this administrative enforcement action rather than using RCRA's administrative rulemaking processes. Nor has Respondent availed itself of any of the administrative or judicial fora that exist for raising the very claims it raises here. It would be unreasonable and manifestly inefficient if a regulated facility could sit idly by during over twelve years of regulatory work without so much as submitting a comment and then be able to raise claims and challenge rules in the context of enforcement proceedings involving the very subject of the regulatory work.[102] Respondent knew or should have known its conduct of keeping toxic material onsite in an uncontrolled manner may be subject to a regulatory requirement.[103] Accordingly, the EAB should reject Respondent's request to reconsider 40 C.F.R. § 261.4(b)(4) and the attendant regulatory interpretation.

II. THE PRESIDING OFFICER'S CONCLUSION THAT THE STATUTE UNAMBIGUOUSLY ADDRESSES RESPONDENT'S WASTE IS INCONSISTENT WITH RCRA, RCRA'S LEGISLATIVE HISTORY AND FEDERAL CASELAW

The Presiding Officer's decision is initially premised on a single flawed conclusion: Congress unambiguously included combustion residues resulting from mixtures of highly contaminated scrap iron and fossil fuel within the scope of the Bevill Exclusion. This conclusion is inconsistent with the statute, the legislative history and with relevant caselaw from D.C. Circuit.

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[102] *RSR Corp. v. Donovan*, 747 F.2d 294, 301 (5th Cir. 1984). *Howmet*, 13 E.A.D. ____, slip op. at 47-48 (Board will consider whether facility made any attempt to clarify status of questionable conduct in determining whether it can later claim it had no notice of regulatory application).

[103] *See* Initial Decision at 23 (the Facility president called his failure to properly dispose of waste "stupid" as he admits he knew that it was contaminated with lead and cadmium).

A. The Presiding Officer Incorrectly Concluded that the Bevill Amendment is Unambiguous

The Presiding Officer's conclusion that the statute unambiguously exempts the waste residue from Respondent's mixture of contaminated scrap metal and fossil fuel[104] is untenable given RCRA's language. A cursory examination of the statute demonstrates that Congress has not directly addressed whether Respondent's highly toxic waste is exempt. Rather, RCRA Section 3001(b)(2)(A)(i) exempts fly ash "primarily from the combustion of coal or other fossil fuels, " but leaves unresolved the meaning of the ambiguous phrase "waste generated primarily from."

It is clear from the language and structure of the Amendment that Congress intended EPA to resolve which wastes were included within the exclusion. First, Congress premised the Bevill Amendment on EPA's proposal relating to "special wastes." [105] Second, the language Congress ultimately adopted was the same as EPA had adopted in its 1980 rule, which EPA had characterized as "utility waste": specifically, fly ash waste and bottom ash waste.[106] Third, Congress used general terms that are subject to more than one meaning, rather than specific terms that establish clear boundaries as to what wastes are included and excluded.[107] In fact, Respondent, by relying on EPA's interpretation that at least 51% of the fuel input to the boiler must be fossil fuel to be eligible for the exemption in its Answer, essentially concedes the point that Congress left

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[104] Initial Decision at 1, 9.
[105] Compare EPA's 1978 proposal to promulgate reduced requirements on broad categories while further studies were conducted and a determination would be made on the necessity for further regulatory controls, 43 Fed. Reg. at 58991-92, with the process established in RCRA Sections 3001 and 8002.
[106] *See* Legislative and Regulatory Background Section .
[107] *In re U.S. Army, Fort Wainwright Central Heating & Power Plant*, 11 E.A.D. 126, 141 (EAB 2003) ("A statute is ambiguous if it is 'capable of being understood in two or more possible senses or ways'" citing Chicksaw Nation v. U.S., 534 U.S. 84, 90 (2001).

to EPA the responsibility to define the terms used in the statute.[108] If the statute were as unambiguous as Respondent claims, EPA would have no need to, and certainly no grounds to, define statutory terms; any Agency interpretations of these statutory terms would be superfluous and without authority. As the DC Circuit has held,

> It is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron. See Chevron, 467 U.S. at 843-44.* "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." [109]

The structure of the Amendment further supports the conclusion that EPA was delegated authority to identify the wastes subject to the exclusion. Rather than exempt wastes outright, Congress enacted a temporary exclusion, ordered EPA to study the wastes, report to Congress, and determine whether such wastes warranted regulation under Subtitle C of RCRA.

Unlike many issues that come before the Board without having been the subject of any prior adjudications, relevant aspects of the issues here have been fully analyzed by the U.S. Court of Appeals for the D.C. Circuit. That court has repeatedly held that the scope of the Bevill Exclusion is ambiguous, and that EPA was therefore granted discretion to determine the scope of that exclusion.[110] In *Horsehead v. Browner*, which involved challenges to EPA's Boiler and Industrial Furnace Rule, ("BIF rule"), the court found that Bevill's fossil fuel combustion exemption, which is at issue in this litigation, was ambiguous. At issue in that case was whether the combustion residues from

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[108] *See* Respondent's Answer at 2-3.
[109] *Horsehead Inc. v. Browner,* 16 F.3d 1246, 1253 (DC Cir. 1994), (quoting *Chevron* v. *Natural Resources Defense Council,* 467 U.S. at 843-844 ().
[110] *Horsehead,* 16 F.3d at 1246 (DC Cir. 1994); *Solite Corporation v EPA* , 952 F.2d 473, 479 (D.C. Circuit 1991); *Environmental Defense Fund v EPA*, 852 F.2d 1316, 1327-1329 (D.C.Cir. 1988); *Environmental Defense Fund* v EPA, 852 F.2d 1309, 1310-12 (D.C. Cir. 1988).

mixtures of hazardous wastes with fossil fuel necessarily fell within the statutory exemption.[111] The Court held that "EPA contends, and we agree, that the language of the Bevill Amendment does not unambiguously address the issue of hazardous waste fuels burned in Bevill devices."[112] Similarly, the statute does not unambiguously address the issue of the highly toxic wastes resulting from Respondent's combustion of fossil fuels mixed with highly contaminated scrap metal in a non-Bevill device. The court reached similar conclusions with respect to the inherent ambiguity of the Bevill exemption for mining wastes.[113]

B. The Presiding Officer's Conclusions Are Contrary to Both D.C. Circuit Court Caselaw and RCRA's Legislative History Regarding the Scope of the Bevill Amendment

The Respondent and the Presiding Officer failed to recognize the significance of the inherent toxicity of Respondent's wastes in determining whether these wastes fall within the intended scope of the Bevill Amendment.[114] The Presiding Officer attempted to support his conclusions by relying on several isolated or irrelevant references from RCRA's legislative history.[115] But a review of the entire Congressional record, as the

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[111] In the BIF rule, which established standards for boilers and industrial furnaces that burn hazardous wastes, EPA recognized that some of these units were capable of generating wastes that might qualify for Bevill's fossil fuel combustion exclusion. Boilers burn both fuel and hazardous waste primarily to generate energy for use at the facility or for sale to the electric utility grid. See 40 C.F.R. § 260.10, definition of "boiler;" 56 Fed. Reg. 7134, 7196/3 (February 21, 1991). However, EPA also recognized that some of the fuel inputs into these units would include mixtures of hazardous waste and fossil fuel that generated a toxic residue waste which would fall outside of the Bevill Exclusion as envisioned by Congress. Consequently, EPA established a provision under which wastes from boilers that met certain conditions would continue to qualify for the Bevill exemption. Consistent with its long-standing interpretation of the Bevill exclusion, EPA limited this provision to boilers, which by definition, generate energy and steam. 40 C.F.R. §266.112.

[112] *Horsehead* at 1254.

[113] *Solite*, 952 F.2d at 491 (holding that Congress has not directly addressed a number of issues in the Bevill exemption, including the "appropriate delineation of the special waste concept, and the attendant "high volume low hazard criteria" and the Bevill status of future waste streams); *EDF*, 852 F.2d at 1327 ("the statutory term 'processing' does not on its face admit of a standard definition, and ...the precise meaning of the term is not fully apparent from the structure of the statute.").

[114] Prelim. Order at note 24: "the exemption does not turn on the chemical characteristics of the fly ash."

[115] Initial Decision at 9.

D.C. Circuit has repeatedly held, clearly indicates that Congress intended to establish a temporary exemption based on EPA's 1978 proposed "special waste" requirements for certain high volume, low hazard wastes that warranted further study.[116] Accordingly, the conclusion that RCRA clearly exempts Respondent's highly toxic emission control dust is untenable, given the clear legislative history and subsequent D. C. Circuit cases that only those low toxicity, high volume wastes that would have fallen within EPA's "special wastes" were intended to be exempted by the Bevill amendments.

The Presiding Officer's conclusion that the Bevill Amendment was not based on EPA's "special waste" concept proposed in 1978 is inconsistent with the very same language he quoted.[117] The Conference Report characterizes the relationship between the statutory amendments and EPA's proposed rule as follows:

> "Section 7 - Suspension of Regulation of Certain Wastes... 1. Other Wastes *Senate Bill* - The Senate bill suspends regulation under subtitle C of fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste, pending a determination of whether such regulation is necessary to protect human health and the environment. . . *House amendment* - The House amendment, suspends regulation under subtitle C of such 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. . . *Conference substitute* - The conference substitute adopts the House amendment with a minor modification [not relevant here]."[118]

This language expressly states that Congress intended to adopt the categories of "special wastes" originally covered by the 1978 proposal. Moreover, while not as authoritative as the Conference Report, statements of individual Congressmen also clearly tie the legislation back to EPA's 1978 proposal.[119] In fact, the D.C. Circuit has repeatedly held

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[116] *Horsehead,* 16 F.3d at 1255; *Solite Corporation* , 952 F.2d at 479; *EDF v EPA*, 852 F.2d at 1327-1329.
[117] Prelim. Order at 15 n.28.
[118] S. Rep. No. 96-1010, Joint Explanatory Statement of the Committee of Conference at 32 (June 12, 1980)
[119] Cong. Rec. 3348 (February 20, 1980) (statement of Rep. Santini) ("I understand Mr. Bevill will offer an amendment which will defer regulation of 'special waste' until after EPA studies the need to do so"),

that the "special waste" concept was integral to understanding the scope of the Bevill exclusion.[120] These court decisions stand in direct contrast to the Presiding Officer's conclusion that the statute clearly and unambiguously exempts Respondent's highly toxic wastes.[121]

In *EDF v EPA*, the DC Circuit relied heavily on the finding that Congress intended the Bevill exclusion to encapsulate EPA's 1978 special waste concept, in invalidating EPA's broad exemption for all mining wastes.[122] The court held that EPA could not simply exempt all mining wastes potentially within the scope of the Bevill Amendment, but was required to comply with Congress' clearly expressed intent that the Agency exempt only those mining wastes that would have fallen within EPA's "special waste" category. Consequently, the court required EPA to develop criteria to determine whether potentially exempt mining wastes were in fact high volume and of low toxicity. For the same reason, the court also held that six types of smelter wastes that EPA had concluded were low volume and high hazard fell outside of the Bevill exemption.[123] Three years later, in *Solite Corporation v Reilly*, the Court again relied on the high volume, low hazard criteria to uphold EPA's decision to exclude lead process wastewaters from Bevill's mineral processing.[124]

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reprinted in A LEGISLATIVE HISTORY OF THE SOLID WASTE DISPOSAL ACT, AS AMENDED, at 1065 (Vol. 1, 1991); Cong. Rec. 3345-78 (February 20, 1980) (statement of Rep. Staggers) (amendment is necessary to prevent overregulation of "coal mining and coal combustion wastes within the scope of EPA's hazardous waste program in a 'special waste' category"), *reprinted in* A LEGISLATIVE HISTORY OF THE SOLID WASTE DISPOSAL ACT, AS AMENDED, at 1093 (Vol. 1, 1991). *See also EDF II*, 16 F.3d at 1328 ("The discussion of the Bevill Amendment on the House floor indicates that the amendment was viewed as a direct response to EPA's 1978 proposed regulations and was designed to suspend the Agency's regulation of 'special wastes' pending further study").

[120] *Horsehead,* 16 F.3d at 1255; *Solite Corporation* , 952 F.2d at 479; *EDF v EPA*, 852 F.2d at 1327-1329.

[121] Prelim. Order at 13.

[122] *EDF,* 852 F.2d at 1329.

[123] *Id* at 329-330.

[124] *Id.* at 329-330

Similarly, the court in *Horsehead* rejected claims that the Bevill Exclusion extended to wastes from the combustion of fossil fuel that were mixed with other material, without regard to the toxicity of the resulting residue, reasoning that

> [i]ndustry petitioners would have us hold that Congress intended that cement kilns and other Bevill devices may burn *anything*--even spent nuclear fuel, infectious medical waste, or discarded chemical weapons--without the resulting residues being subject to the hazardous waste regulation regime Congress created by enacting Subtitle C. This we are unwilling to do.[125]

The *Horsehead* court held that EPA's interpretation that wastes resulting from the combustion of mixtures of Bevill-exempt and non-exempt wastes could only retain Bevill-exempt status so long as the combustion waste remained of low toxicity was reasonable. In large measure, the court based its conclusions on the fact that "EPA was required to limit Bevill wastes excluded from Subtitle C to those wastes that are high volume/low hazard."[126]

Just as the court in *Horsehead* concluded with respect to the hazardous waste mixtures burned in units subject to the BIF rule, it would be unreasonable to think that Congress intended the FFC waste exclusion to allow scrap metal melting furnaces to serve as a dumping ground for highly contaminated materials. Yet the effect of the Presiding Officer's decision is that any contaminated waste could be added to Respondent's cupola furnace, and so long as the majority of the fuel input was fossil fuel, all of the waste would be exempt, no matter how much the hazardous character of the residue is affected by the waste component.

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[125] *Horsehead*, 16 F.3d, at 1258.
[126] *Id.*, at 1257

In this case, it is undisputed that the emission control dust essentially gained its hazardous properties from the contaminated scrap iron and not from the fossil fuel.[127] The results of the leachate sampling as compared to other leachate benchmarks are as follows:

COMPARISON OF CONTAMINANT LEVELS: EPA STUDIES, REGULATORY LEVELS AND LEED FOUNDRY EMISSION CONTROL DUST (all in mg/l)

Contaminant	1999 *Report to Congress* minimum detection[128]	1999 *Report to Congress* maximum detection[129]	LEED Foundry Waste[130]	BIF Rule Health-Based Limits[131]	Toxic Characteristic Regulatory Limit[132]
Cadmium	0.0025	0.564	6.28 4.12 5.23 10.2 3.02 3.9	1.0	1.0
Lead	0.005	2.94	276 407 515 356 882 926	5.0	5.0

The Region asserts that contaminant levels that exceed regulatory standards by 10 times for cadmium and by 185 times for lead are capable of presenting very "substantial environmental danger." It is an undisputed fact that Respondent's emission control dust exhibits toxic properties because of the contaminated scrap metal rather than the fossil

[127] Tr.42-43.
[128] U.S. Environmental Protection Agency. *Technical Background Document for the Report to Congress on Remaining Wastes from Fossil Fuel Combustion: Waste Characterization.* (March 15, 1999), at Table 3.1
[129] *Id.*
[130] *See* Cox Affidavit, Exhibit A to Complainant's Motion to Strike Bevill Affirmative Defense.
[131] 40 C.F.R. Part 266, Appendix VII (Health-Based Limits for Exclusion of Waste-Derived Residues).
[132] 40 C.F.R. § 261.24. This is the regulatory level that establishes the threshold for a material exhibiting a toxicity characteristic and, therefore, regulated as a hazardous waste.

fuel components.[133] This is not the type of poorly-characterized waste for which study was needed to determine if regulation was appropriate. In fact, EPA, in 1979 and 1980, had publicly announced that grey iron foundries were capable of generating highly toxic wastes.[134] It is, rather, 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.[135] Interpreting the exclusion to cover these highly toxic wastes would be an absurd result and, most certainly, results that the DC Circuit has already held to be contrary to legislative intent. The EAB should not construe the statutory language in such a manner.[136]

C. The Presiding Officer Misconstrued the Selective Portions of the Legislative History He Cited.

In addition to these errors, the Presiding Officer misinterpreted the selective portions of the congressional record he cited. For example, he cites to statements from Rep. Traxler for support that the Bevill Amendment would address gray iron foundry waste.[137] This is not accurate. Rep. Traxler was responding to a proposed listing EPA had published in the Federal Register for "lead-bearing wastewater treatment sludges from gray iron foundries," expressing concern about the impact of EPA's developing

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[133] Initial Decision. at 4; Tr. 42-43 (10-31-05).

[134] At the time of the Bevill Amendment, EPA had already determined that grey iron foundry waste could present substantial environmental danger. "This waste has been shown to release high concentrations of the heavy metals cadmium and lead when subjected to EPA's extraction procedure...If this waste is improperly managed, therefore, large scale contamination of surface water or ground water may result." 45 Fed. Reg. 47835 (July 16, 1980). Ultimately, the Bevill Amendment is about making categorical, industry-wide decisions on whether specific types of wastes exhibited such minimal toxicity as to not warrant burdensome and expensive regulatory controls. EPA unequivocally knew at the time of the Bevill Amendment enactment that at least some grey iron foundries had the capability to generate highly contaminated wastes.

[135] 56 Fed. Reg. at 7196/3.

[136] *See, e.g., Hernstadt v. FCC*, 677 F.2d 893, 894 (DC Cir. 1981).

[137] Prelim. Order at 13.

hazardous waste program on these foundries.[138] In fact, Rep.Traxler's statement essentially acknowledged that Bevill's amendment would not exempt this waste, noting that he considered submitting his own amendment (which would have been unnecessary if Bevill's legislation addressed it). He ultimately did not submit an amendment but merely admonished EPA to reconsider the proposed listing until the Agency gathered more information regarding the waste.[139] While it is true this shows that a member of Congress was concerned about the impact of EPA's developing hazardous waste program on grey iron foundries, it most certainly does not demonstrate any support for the notion that this specific concern was behind the Bevill Amendment, nor that grey iron foundry wastes were intended to be included within the Amendment.

Similarly, comments made by Rep. Albosta, cited by the Presiding Officer[140] were generic in nature, did not refer to Bevill's legislation and seem to have been submitted to support legislation by Rep. Florio that called for a state-by-state hazardous waste site inventory among other things. [141] While he was also responding to EPA's proposed listing of lead-bearing wastewater treatment sludge, in context, Rep. Albosta's comments seem to support the need for Rep. Florio's legislation.[142] Again, while this shows that this congressman was concerned with the impact of EPA's 1979 proposed listing on grey iron foundries, it does not show that grey iron foundries were actually encompassed within the Bevill Amendment.

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[138] 126 Cong. Rec. 3345-47 (February 20, 1980) (statement of Rep. Traxler)(citing 44 Fed. Reg. 67445 (November 26, 1979)), *reprinted in* A LEGISLATIVE HISTORY OF THE SOLID WASTE DISPOSAL ACT, AS AMENDED, at 1062 (Vol. 1, 1991).

[139] *Id.*

[140] Prelim. Order at 13

[141] 126 Cong. Rec. 3351 (February 20, 1980) (statement of Rep. Albosta), *reprinted in* A LEGISLATIVE HISTORY OF THE SOLID WASTE DISPOSAL ACT, AS AMENDED, at 1068 (Vol. 1, 1991).

[142] *Id.*

The Presiding Officer also gave substantial weight to comments in the legislative record regarding the mixture of fossil fuel and other materials, however his reliance on them is misplaced as they in fact support the conclusion EPA reached in defining the scope of exempt wastes to not include grey iron foundry emission control dusts.[143] Specific congressmen voiced their concern that the statutory exemption could be read too narrowly and that the Agency would not extend the exemption if the waste residue was the result of something other than 100% fossil fuel combustion. Specifically, the amendment's supporters were concerned that development and use of alternative fuels, including refuse-derived fuels, would be stifled if the exemption was technically limited solely to fossil fuel.[144] To ensure that alternative fuels could be mixed with fossil fuels for energy development purposes without the loss of the Bevill exemption, the legislation's supporters spoke directly to EPA:

> We do not believe that these terms should be narrowly read and thus impose regulatory burdens upon those who seek to assist the Nation by burning coal. EPA should recognize that these 'waste streams' often include not only the byproducts of the combustion of coal and other fossil fuels, but also relatively small proportions of other materials produced in conjunction with the combustion, even if not derived directly from these fuels. EPA should not regulate these waste streams because of the presence of these materials, if there is no evidence of any substantial environmental danger from these mixtures.[145]

Here, the legislation's sponsor presents a clear statement of the exemption's applicability and limit when "small proportions" of non-fossil fuel materials are added to the combustion unit: the residue from the mixture should be exempt if the waste is not

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[143] See Prelim. Order at 13-14 n.28.

[144] The legislative history also clearly indicates that Congress' concern at the time was on energy development and production given the crisis that the country was facing in the late 1970s and early 1980s.

[145] 126 Cong. Rec. 3360 (February 20, 1980) (statement of Rep. Bevill), *reprinted in* A LEGISLATIVE HISTORY OF THE SOLID WASTE DISPOSAL ACT, AS AMENDED, at 1088 (Vol. 1, 1991). On its face, the plain meaning of the statement to not read the Amendment too "narrowly" suggests that Rep. Bevill was intending EPA to define the terms in the statute. Any other reading would be nonsensical.

deemed harmful. As demonstrated above, given the high toxic levels in Respondent's waste that come from the contaminated scrap metal, this waste is potentially very harmful to the environment.

In sum, the Region asserts that a review of the entire legislative history plainly indicates that Congress relied on EPA's special waste concept, including the low toxicity criterion, and, therefore, left it to EPA to make the technical determinations of which wastes should be subject to the exclusion.

III. THE PRESIDING OFFICER ERRED IN DISREGARDING EPA'S LONG-STANDING INTERPRETATIONS REGARDING THE SCOPE OF THE BEVILL EXEMPTION AND REGULATION OF GREY IRON FOUNDRY EMISSION CONTROL DUST

Assuming, *arguendo*, that it was appropriate for the Presiding Officer to entertain Respondent's Bevill Amendment applicability argument, the Presiding Officer should not have ignored the Agency's long-standing positions on the Bevill Amendment and the regulatory status of Respondent's type of wastes. While the Board has noted that the doctrine of administrative deference is not ordinarily appropriate in matters before it,[146] the Board recently noted in *In re: Howmet Corporation* that "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."[147] In this case, the Presiding Officer's decision is inconsistent with long-standing Agency interpretations on both the scope of the Bevill regulatory exemption and on the regulatory status of grey iron foundry emission control dust.

As set forth in detail above, the Agency has consistently stated its interpretation that the scope of the exemption excludes Respondent's waste. This includes the

[146] *In re Lazarus*, 7 EAD 318, 351 n.55 (EAB 1997)
[147] *Howmet*, 13 E.A.D._____, slip op. at 35.

Agency's statement in the 1980 preamble to the promulgation of 40 C.F.R. § 261.4(b)(4) that the exemption covers certain utility wastes[148] and extended through the 2000 Regulatory Determination up to this enforcement action. As laid out previously, and amply, elsewhere in this brief, the Agency interpretation has been thoroughly considered, well-reasoned and consistent for over two decades.

The Agency also has a consistently-held position that grey iron foundry emission control dust, if characteristically hazardous, is subject to RCRA's hazardous waste program. Under the RCRA regulatory program, material that meets the definition of solid waste can be classified as hazardous waste either because it exhibits a hazardous characteristic,[149] or because it has been individually listed by the Agency through the rulemaking process.[150] Generators of potentially characteristic hazardous waste are required to use process knowledge or test the waste to determine whether it exhibits a hazardous characteristic.[151] Generators also must determine whether their waste has been listed in Subpart D of 40 C.F.R. Part 261.[152]

In 1980, EPA proposed to list the exact type of waste at issue here.[153] The proposed listing stated:

> (5) *Emission control dust from gray and ductile iron foundry cupola furnaces.* This waste has been shown to release high concentrations of the heavy metals cadmium and lead when subjected to EPA's extraction procedure, and also are [sic] generated in large quantities. If this waste is improperly managed, therefore, large scale contamination of surface water or ground water may result.

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[148] 45 Fed. Reg. at 33089/1 (May 19, 1980)
[149] 40 C.F.R. Part 261 Subpart C (§§ 261.20-.24).
[150] 40 C.F.R. Part 261 Subpart D (§§ 261.30-.35).
[151] 40 C.F.R. § 262.11(c).
[152] 40 C.F.R. § 262.11(b).
[153] 45 Fed. Reg. 47835 (July 16, 1980). See also Prelim. Order at 16.

Id. at 47835/3. The Agency sought comment on this proposed listing until September 15, 1980. On January 16, 1981, EPA announced that it was still evaluating this waste and was postponing final decision.[154] In this notice, the Administrator clearly stated the Agency's position on the existing regulatory status of this waste:

> . . . The Agency has proposed for listing . . . emission control dust from gray and ductile iron foundry cupola furnaces . . . as a result of industry comment, the Agency undertook further study of these wastes. After evaluating this data and the public comments received, the Agency will consider the hazards posed by various wastes from foundry operations. We are, accordingly, deferring final action on these wastes. (All of these wastes are hazardous, of course, if they exhibit any of the characteristics of hazardous waste, and generators of these wastes are obligated to make this determination.)[155]

The Administrator stated here unequivocally that these wastes were subject to the hazardous waste program, provided they met at least one of the hazard tests. In addition, as this statement occurred shortly after enactment of the Bevill Amendment, the Administrator's statements make it absolutely clear that the Agency's interpretation that these wastes were not within the scope of that exemption.[156]

After announcing the availability of the report on EPA's evaluation of the wastes and offering an extended opportunity to comment on the report,[157] the Agency ultimately did not finalize its proposed listing.[158] Consequently, the material remains a solid

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[154] 46 Fed. Reg. 4616/3-4617/1 (January 16, 1981).
[155] *Id.* at 4617/1 (emphasis added).
[156] The Agency was well aware of the impact of the Bevill Amendment at that time for in the same rulemaking notice, the Administrator announced that another waste proposed for listing was excluded from RCRA Subtitle C pursuant to the Bevill mining waste exclusion. 46 Fed. Reg. 4616/3.
[157] 46 Fed. Reg. 27363. 46 Fed. Reg. 40058/3.
[158] The Presiding Officer seemed very concerned that EPA's proposed listing of grey iron foundry emission control dust in 1980 was never finalized. See Initial Decision at 9. His alarm is unjustified. It is not uncommon that proposed rules are not finalized when the public raises concerns about a proposal that the Agency cannot resolve. More to the point, in this case, it merely indicates that the grey iron foundry emission control dust must be handled as a hazardous waste when it exhibits a hazardous characteristic.

waste that must be managed as hazardous waste if it exhibits a hazardous characteristic, in accord with the Administrator's statement.

In addressing the 1980 and 1981 proposals, the Presiding Officer noted that the Administrator's determination was vague as to its effect and the authority for making such a determination and "does not square with the Bevill Amendment[ ]."[159] Regrettably, he misses the import of the Administrator's statement: EPA had determined that grey iron foundry cupola furnace emission control dust was not within the Bevill Amendment and was, if characteristically hazardous, regulated by RCRA Subtitle C.[160]

In 1984, the State of Tennessee sought a determination from EPA as to whether scrap metal operations in a foundry cupola furnace that generated emission control dust was exempt under the fossil fuel combustion exemption. On December 28, 1984, EPA's Region 4 office replied with the Agency's position.

> The question at United States Pipe and Foundry and at Wheland Foundry is whether the flue gas emission control dust waste generated at a foundry operation using a coke/coal-fired cupola furnace to melt scrap metal is exempt from regulation by virtue of [40 C.F.R. §261.4(b)(4)]. Our conclusion is that the waste is not exempt.
>
> If the emission control waste from these foundries is EP toxic [the precursor to the current toxicity characteristic test], or is hazardous due to any other of the characteristics, the waste would be subject to full regulation as a characteristic waste. . .[161]

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[159] Prelim. Order at n.33.

[160] During the time the listing was pending, the Agency responded by letter to an inquiry from a grey iron foundry regarding the regulatory status of waste in the cupola furnace. The Agency stated the cupola residue should be evaluated separately from the sand at the bottom of the cupola for RCRA applicability. Nowhere in the letter did the Agency mention the potential application of the Bevill Amendment. Letter from D. Friedman, Manager, Waste Analysis Program, to C. Perket (June 18, 1981). Exhibit D to Complainant's Motion to Strike Bevill Defense.

[161] *Letter from J. Scarbrough, EPA Region 4, to T. Tiesler, Tennessee Department of Health and the Environment, December 28, 1984, at 2.* Exhibit F to Region 3's Motion to Strike Respondent's Bevill Exclusion Affirmative Defense.

Included with this letter was a memorandum from J. Skinner, Director, EPA Office of Solid Waste, to Region 4, indicating his Office's agreement with the position that the foundry waste was not excluded by the Bevill Amendment. The memorandum also stated that an earlier letter from the Office of Solid Waste (August 16, 1984, letter from J. Lehman) should not be relied upon as it was not premised on the facts surrounding the foundries in question. As this letter indicates, EPA has consistently stated that this material, if hazardous, is subject to the hazardous waste program.[162]

In 1997, EPA published a Metal Casting Industry Notebook as part of an effort to compile compliance information for numerous major industries.[163] In the RCRA requirements section, the Notebook states: "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."[164] This document has been publicly available since its publication in 1997.[165] Noticeably absent from this document, which is a guide both for regulators and the regulated community, is any reference to the application of the exemption Respondent and Presiding Officer conclude so clearly applies in this case.

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[162] In fact, EPA Regional offices engaged in an announced enforcement initiative to address grey iron foundries that were not in compliance with RCRA. *See* 53 Fed. Reg. 33177 (August 30, 1988); *see also* 54 Fed. Reg. 48151 (November 21, 1989).

[163] EPA Office of Compliance Sector Notebook Project: Profile of Metal Casting Industry (September 1997). As the Administrator stated for the entire project, "[t]hese notebooks will help business managers to understand better their regulatory requirements." Cover Memorandum from Administrator Browner, November 18, 1997.

[164] EPA Office of Compliance Sector Notebook Project: Profile of Metal Casting Industry (September 1997) at 107 (emphasis added).

[165] The relevant portion of this document is attached to this brief as Exhibit 1. The entire document can be found at http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/casting.html. While not in the record in this matter, the Board can take official notice of this document. See 40 C.F.R. § 22.22(f); *In re Howmet Corporation*, 13 E.A.D. ____ (RCRA (3008) Appeal No. 05-04 slip op. at 21 nn. 32, 36 (EAB May 24, 2007).

Both Respondent and the Presiding Officer have pointed to the 1993 Wheland Foundry Initial Decision which also involved the application of RCRA's hazardous waste program to grey iron foundry emission control dust.[166] While Initial Decisions generally have no precedential effect,[167] that decision and its rationale should be summarily disregarded because, as the Presiding Officer correctly noted the Initial Decision was subsequently set aside and vacated by this Board, upon joint motion of the parties in the case.[168] The Region asserts that for the reasons set forth in this brief, the Presiding Officer in Wheland premised her decision on erroneous conclusions of law.

CONCLUSION

The Presiding Officer erred first when he allowed Respondent to challenge EPA's Regulatory Determinations in the context of this enforcement case, and second in substantively finding that the RCRA statute unambiguously mandates the inclusion of Respondent's waste within the Bevill Amendment. To agree with the Presiding Officer, one has to believe that EPA's interpretation regarding the scope of the Bevill Amendment universe has been incorrect for 26 years, the Agency's interpretation of the regulatory status of gray iron foundry dust has been incorrect for 26 years, the DC Circuit consistently decided the cases before it incorrectly and the parties to the Gearhart litigation erred in establishing the terms of the consent decree. For the reasons set forth above, the Region respectfully asserts that the Presiding Officer erred and his decision should be set reversed regarding the applicability of the Bevill Amendment.

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[166] *In re Wheland Foundry*, 1993 WL 569096 (E.P.A.) (October 22, 1993).
[167] *In re Rhee Brothers., Inc.*, 13 E.A.D. ____, FIFRA Appeal No. 06-02, slip op. at 12-13 (EAB May 17, 2007).
[168] *In the Matter of Wheland Foundry*, 1993 WL 569097 (EAB 1993).

RESPECTFULLY SUBMITTED this 2nd day of July, 2007.

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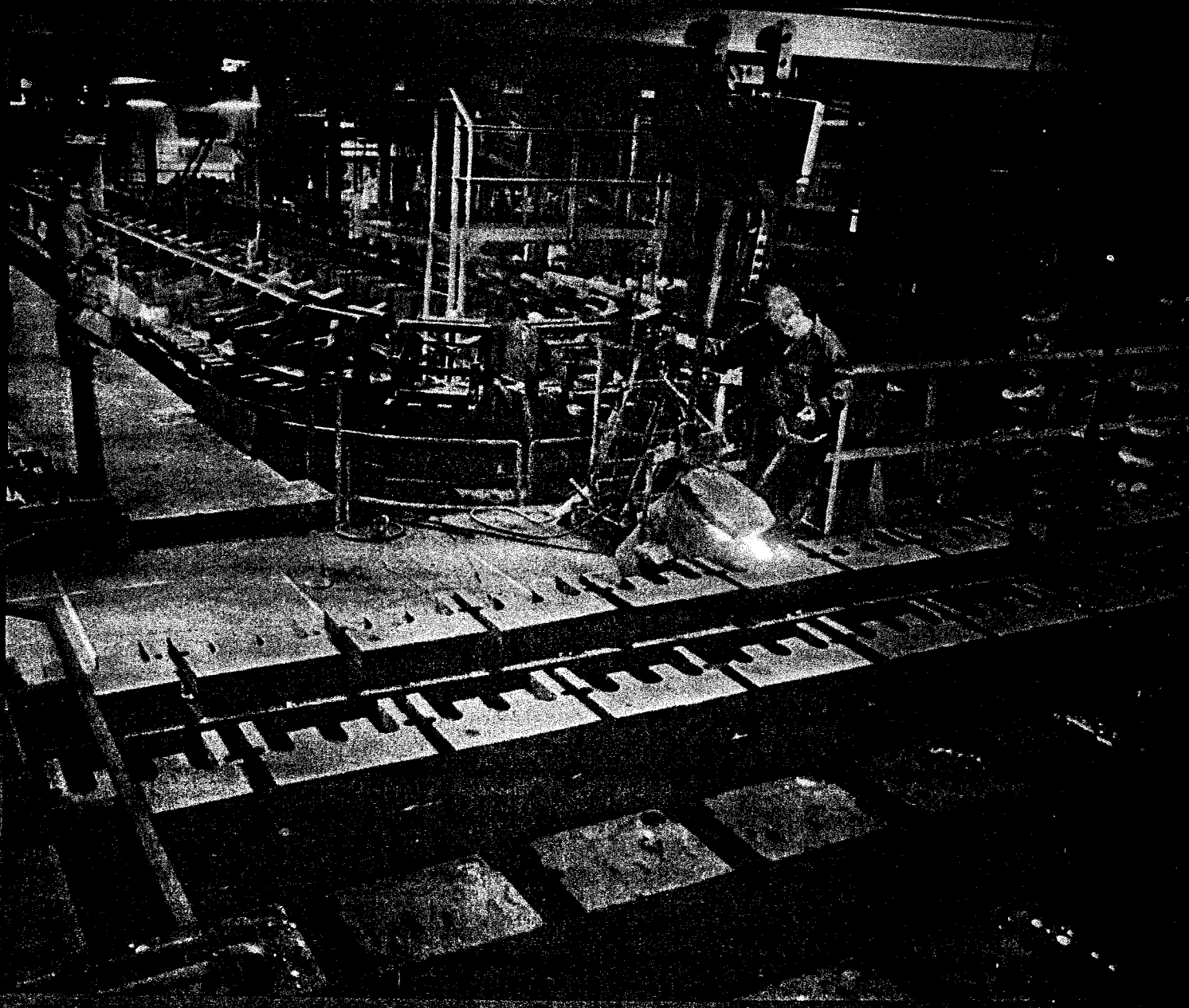
Profile Of The Metal Casting Industry



SECTOR EPA 22 NOTEBOOKS

EPA Office Of Compliance Sector Notebook Project

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 18 1997

THE ADMINISTRATOR

Message from the Administrator

Since EPA's founding over 25 years ago, our nation has made tremendous progress in protecting public health and our environment while promoting economic prosperity. Businesses as large as iron and steel plants and those as small as the dry cleaner on the corner have worked with EPA to find ways to operate cleaner, cheaper and smarter. As a result, we no longer have rivers catching fire. Our skies are clearer. American environmental technology and expertise are in demand around the world.

The Clinton Administration recognizes that to continue this progress, we must move beyond the pollutant-by-pollutant approaches of the past to comprehensive, facility-wide approaches for the future. Industry by industry and community by community, we must build a new generation of environmental protection.

The Environmental Protection Agency has undertaken its Sector Notebook Project to compile, for major industries, information about environmental problems and solutions, case studies and tips about complying with regulations. We called on industry leaders, state regulators, and EPA staff with many years of experience in these industries and with their unique environmental issues. Together with an extensive series covering other industries, the notebook you hold in your hand is the result.

These notebooks will help business managers to understand better their regulatory requirements, and learn more about how others in their industry have achieved regulatory compliance and the innovative methods some have found to prevent pollution in the first instance. These notebooks will give useful information to state regulatory agencies moving toward industry-based programs. Across EPA we will use this manual to better integrate our programs and improve our compliance assistance efforts.

I encourage you to use this notebook to evaluate and improve the way that we together achieve our important environmental protection goals. I am confident that these notebooks will help us to move forward in ensuring that -- in industry after industry, community after community -- environmental protection and economic prosperity go hand in hand.

Carol M. Browner

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EPA Office of Compliance Sector Notebook Project:

Profile of the Metal Casting Industry

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VI.B. Industry Specific Requirements

Resource Conservation and Recovery Act (RCRA)

Under the authority of RCRA, EPA created a regulatory framework that addresses the management of hazardous waste. The regulations address the generation, transport, storage, treatment, and disposal of hazardous waste.

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.

Molding and core making operations produce large quantities of spent foundry sand. Although most of the spent sand is non-hazardous, sand that results from the production of brass or bronze may exhibit the toxicity characteristic for lead or cadmium. The hazardous sand may be reclaimed in a thermal treatment unit which may be subject to RCRA requirements for hazardous waste incinerators. EPA is currently taking public comment on the regulatory status of these units. Wastewaters that are produced during molding and core making may exhibit the corrosivity characteristic but are generally discharged to a POTW after being neutralized, in which case they are not subject to RCRA. Sludges resulting from mold and core making may also be corrosive hazardous wastes.

The wastes associated with metal casting melting operations include fugitive dust and slag. Lead and chromium contamination may cause the waste slag to be subject to RCRA as a hazardous waste. Additionally, calcium carbide desulfurization slag generated during metal melting could be a reactive hazardous waste. Spent solvents used in the cleaning and degreasing of scrap metal prior to melting may also be a hazardous waste. The inorganic acids and chlorinated solvents used in the cleaning operations could be subject to RCRA as well, if they are spilled or disposed of prior to use.

Casting facilities that use electric arc furnaces (EAF) for metal melting produce dust and sludge that may be characteristically hazardous. However, the emission control dust and sludge from foundry operations that use EAFs is not within the K061 hazardous waste listing. Also, this dust and sludge is not considered to be a solid waste under RCRA when reclaimed.

Finishing operations produce wastes similar to those resulting from the cleaning and degreasing of scrap metal prior to melting, including spent solvents and alkaline cleaners. Additionally, any sludge from spent pickle liquor recovery generated by metal casting facilities (SIC code 332) would be a listed hazardous waste (K062).