

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of)	
)	
Leed Foundry, Inc.)	Docket Nos. RCRA 03-2004-0061
)	CWA 03-2004-0061
)	
Respondent)	

Preliminary Order on Motions

In this proceeding, the United States Environmental Protection Agency, Region III (“Complainant,” “EPA,” or “Agency”) filed a complaint against Leed Foundry, Inc. (“Leed” or “Respondent”) alleging violations under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6921-6939e¹ and the Clean Water Act ² (“CWA”) 33 U.S.C. §§ 1311, 1318, and 1342. EPA asserts that Respondent’s generation of fly ash waste from its gray iron foundry is a hazardous waste under RCRA and must be managed as such. Respondent contends that the fly ash waste is exempt under Subtitle C of RCRA and therefore EPA’s Counts I through XIII should be dismissed, as a matter of law.

The Motions Before the Court

This Order addresses the Respondent’s Motion for Partial Accelerated Decision as to all RCRA Counts (Counts I through XIII), a Motion which raises the RCRA “Bevill Exemption,” as a defense and EPA’s Motion dealing with the same subject, asserted through its Motion to Strike Respondent’s “Bevill Exemption” Defense. The Court fully considered all responses and replies

¹ On January 30, 1986, the Commonwealth of Pennsylvania was granted final authorization to administer a state hazardous program pursuant to RCRA § 3006(b), 42 U.S.C. § 6926(b) and 40 C.F.R. Part 271, Subpart A *in lieu* of the Federal hazardous waste management program established under Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e. Complaint at ¶ 6. On November 27, 2000, the state’s hazardous waste program was re-authorized. These re-authorized requirements are enforceable by the EPA pursuant to RCRA § 3008(a) and (g), 42 U.S.C. § 6928(a) and (g). *Id.* at ¶ 7. *See* 25 Pa. Code § 261a.1 *et seq.*

²EPA also asserts in Counts XIV and XV, that Respondent is in violation of CWA for discharge of pollutants from a point source to navigable waters of the United States without a National Pollutant Discharge Elimination System (“NPDES”) permit. As to the latter alleged violations EPA contends that Respondent does not have a permit for industrial activity as required by CWA Section 402(p), 33 U.S.C. 1342(p). Respondent denies liability as to the CWA counts.

filed in connection with these motions.

Respondent's Motion for Partial Accelerated Decision

On August 4, 2005, Respondent Leed filed a Motion for Partial Accelerated Decision as to all RCRA Counts in the Complaint (Counts I through XIII). ("Leed Motion"). It was accompanied by a Memorandum of Law in Support of the Motion ("Leed Memorandum"). Respondent asserts in its Motion that the fly ash it generates from its gray iron foundry is exempt from regulation by virtue of RCRA § 3001(b)(3)(A)(i). That section is more popularly known as the "Bevill Amendment," which provides:

Notwithstanding the provisions of paragraph (1) of this subsection, each waste listed below shall, except as provided in subparagraph (B) of this paragraph, be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter until at least six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p) of section 6928 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.

- (ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from from the mining of uranium ore.

- (iii) Cement kiln dust waste.

42 U.S.C. § 6921(b)(3)(A)(i). *See also* 40 C.F.R. § 261.4(b)(4).

Leed operates a gray iron foundry located in St. Clair, Schuylkill County, Pennsylvania, where it melts scrap iron to manufacture cast iron manhole covers. Leed Motion at 1. To do this, Respondent uses a cupola, a type of furnace, to melt down the scrap metal using "the combustion of coke and a small amount of kerosene, . . . both of which [it notes] are fossil fuels."³ *Id.* at 2. The coke is burned in the cupola to generate heat to melt the iron. Once in a

³"Coke" is defined as "[t]he solid residue of impure carbon obtained from bituminous coal and other carbonaceous materials after removal of volatile material by destructive distillation. It is used as a fuel in making steel." "Kerosene" is "[a] thin oil distilled from petroleum or shale oil, used as a fuel for heating" THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (3d ed. 1992.) The Court judicially notices that coke and kerosene are

molten state, the iron is poured into the manhole castings. Leed Memorandum at 2. This process generates fly ash waste, bottom ash waste, and slag waste. The fly ash is carried up and out of the cupola by the gases generated from the combustion process where it then passes through a “baghouse air pollution control device,” which consists of bag filters to capture the waste particles. *Id.*

Respondent agrees that this fly ash waste was “being accumulated at the Leed site when it was observed and tested by EPA during an inspection in the fall of 2002.” *Id.* Leed also notes that EPA took samples during that inspection and that these evidenced lead and cadmium levels exceeding the Toxic Characteristic Leaching Procedure threshold for materials considered characteristic hazardous wastes. However, the heart of Respondent’s position is its contention that the fly ash waste generated from scrap iron melting process remains exempt from RCRA Subtitle C regulation, under the plain meaning of the Bevill Amendment.

Respondent contends that the “fine ash particulate” collected in the baghouse is fly ash and as this ash is generated primarily ⁴ from the combustion of fossil fuel, the Bevill Amendment applies to it. Such fly ash waste is exempt according to the plain meaning of the Bevill Amendment and, as such, the principles set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984), apply. Observing that “fly ash” is not defined in any RCRA rules or regulations, Leed states that “fly ash” is generally defined as a byproduct of coal combustion and it notes that EPA in its 1999 Report to Congress defined fly ash as “[u]ncombusted material carried out of the boiler along with the flue gases.”⁵ *Id.* at 6.

Citing various sources, Leed states that “fly ash” “is well understood to refer to the fine ash particulate carried out of a combustion chamber by hot exhaust gases.”⁶ Leed Memorandum at 6. It reaches this conclusion on the ground that as its fuel mix is “100 percent fossil fuel” from the coke and kerosene, it follows that its “fly ash waste unquestionably is generated ‘primarily’ from the combustion of fossil fuel.” As such, Leed maintains that its fly ash is necessarily Bevill exempt. Leed Memorandum at 8. Leed concludes that as its baghouse dust is fly ash which is generated primarily from the combustion of fossil fuel, it is Bevill waste and may not be regulated absent rulemaking. Leed notes that the amendment directed EPA to study

fossil fuels.

⁴Leed construes “primarily” as meaning that the fossil fuel “must comprise more than 50 percent of the combusted material.” As discussed *infra*, this construction is accurate for purposes of the Bevill Amendment.

⁵Respondent lists other sources of the definition from EPA, including terms defined on their website and a letter from a former Director of the Office of Emergency and Remedial Response. Leed Memorandum at 6.

⁶Leed, without retreating from its position that the waste cited by EPA is “fly ash,” notes that under the Bevill Amendment, even if the waste involved is called “flue gas emission waste,” it is still within the express terms of the Amendment, as it covers “all categories of waste generated as a byproduct of fossil fuel combustion” Leed Memorandum at 7.

the identified wastes, report to Congress and only then, if appropriate, promulgate regulations. While Leed acknowledges that EPA made a report to Congress in May 2000, it notes that the Agency never promulgated regulations, pertaining to such wastes. Regarding that May 2000 report, Leed observes that EPA concluded that non-utility fossil fuel fly ash waste⁷ would not be regulated under Subtitle C of RCRA. Leed Memorandum at 9-10. Further, Leed argues that even if, for the sake of argument, one could construe the EPA report as not exempting its fly ash, EPA would still be obligated to then engage in formal rulemaking, a step it has never taken. Leed argues that an enforcement action is not a substitute for the Agency's obligation to engage in the rulemaking that the Bevill Amendment required. Thus, Leed contends that the Agency may not regulate its fly ash through a 'backdoor' by privately deciding that "fly ash is limited to energy production facilities." Leed Memorandum at 10.

Leed observes that the Amendment did not target specific industries, such as electric utilities, foundries, or institutional boilers, but rather identified "waste types *without regard to the type of industry producing them.*" Leed Memorandum at 4 (emphasis in original). Leed also notes Congress' intent with the Bevill Amendment was to protect suppliers and users of fossil fuels. Leed also observes that Congress was very specific in dealing with these identified wastes, by providing that they were to *be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter.*" *Id.* at 5 (citing 42 U.S.C. § 6921(b)(3)(A)) (emphasis in original). It notes that EPA's own regulation addressing the Bevill Amendment, 40 C.F.R. 261.4(b)(4), does not purport to contradict the Amendment as it too identifies that solid wastes, including "fly ash waste, bottom ash waste, slag waste . . . generated primarily from the combustion of coal and other fossil fuels" are not hazardous wastes.⁸ *Id.* at 4.

Arguing that the Amendment does apply to its operation, Leed asserts that EPA cannot regulate the fly ash until it complies with the Amendment's requirements, a process which culminates with rulemaking.⁹

⁷Leed also notes that the Report made no distinction between non-utility fly ash waste and the subset of foundry-generated fly ash waste. Thus, it contends that the general term of non-utility fly ash and the decision to exempt it from Subtitle C, applies to Leed's fly ash. Leed Memorandum at 10.

⁸The regulation states that "[t]he 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... ." 40 C.F.R. § 261.4(b)(4).

⁹Associated with these arguments, Leed contends that by EPA's failure to comply with the Bevill Amendment's terms, any enforcement action violates its constitutional right to due process of law. Leed Memorandum at 4. Elaborating upon this argument, Leed asserts that EPA has never provided notice that its fly ash is not exempt. It notes that when one examines the text of the Bevill Amendment, the Agency's 1993 and 1999 Reports to Congress, neither of which refer to foundry fly ash, the various EPA correspondence included by Leed in its Motion, (Leed proposed Exhibits C through G), and the administrative law judge's decision in *Wheland Foundry*, (1993 WL 569096), none of those sources constitute notice that the Agency intended

In sum, Leed reminds that under the Bevill Amendment, fly ash waste is exempt when it is generated *primarily* from the combustion of coal or other fossil fuels. As its combustion process uses coke and a small amount of kerosene, and this comprises more than 50% of the combusted material, it meets the requirement of being generated primarily from fossil fuels. Thus Leed's fly ash is within the Bevill Amendment.

EPA's Motion¹⁰ to Strike Respondent's "Bevill Exemption" Defense

EPA contends that the Respondent's claim that its waste pile falls within the Bevill exemption is without merit and, as such, asks that the Court strike this "purported defense." EPA Motion to Strike at 2. While recognizing the "considerable discretion" vested in the Court in dealing with motions to strike, EPA urges that there are no genuine issues of disputed material fact and that the Respondent's defense is insufficient as a matter of law. *Id.* at 14.

EPA agrees that the Respondent produces gray iron castings from scrap metals by melting the metal in a cupola, which is a coke fired furnace. It notes that during this process dust rises up a flue from the cupola and is captured in the baghouse, ending up in a fabric filter bag. From the filter bag, the dust is deposited into a hopper. From there, the dust is deposited into a large pile located on Respondent's facility. EPA contends that this dust has high levels of lead and cadmium, that is levels above the allowable regulatory maximums. EPA's issue with the Respondent's process is its alleged failure to properly dispose of the baghouse dust. EPA Memorandum at 2-3.

EPA acknowledges that it is the Respondent's claim that this dust pile falls within the Bevill Amendment exemption to the Resource Conservation and Recovery Act. 42 U.S.C. § 6921(b)(3)(A)(i). It also agrees that, with the 1980 amendments to RCRA, certain categories of waste ("special wastes") were to be exempt from the Act's Subtitle C requirements and that the exemption was to continue until EPA studied the listed categories of waste, assessing factors such as the risk to health from the disposal or reuse of the materials and the costs of alternative disposal methods. After that, EPA was to report to Congress¹¹ on each category and ultimately decide whether or not Subpart C regulations should apply to them.¹² EPA's first report was not

to regulate its fly ash. Leed Memorandum at 11-12. Although it is not necessary to reach this argument because the Court agrees with Leed's contentions regarding the requirements of the Bevill Amendment, the Court also agrees that Leed's due process argument is meritorious, and provides an independent basis to affirm Leed's Motion.

¹⁰EPA filed a Memorandum in support of its motion to strike. Unless otherwise noted, references are to the supporting memorandum, as the motion itself is essentially a single page.

¹¹Regrettably, EPA failed to meet Congress' deadlines to report on these special wastes and it took a citizens suit against the Agency to get it to act.

¹²According to EPA, the genesis for the Bevill Amendment did not come from Congress but from EPA itself. This arose because EPA informed that it believed these wastes to be less hazardous and not well suited for the control techniques applicable to other wastes. Thus, in

issued until 1993 and it dealt only with Utility Coal Combustion Wastes (“UCCWs”). Specifically, the first report dealt with four types of fossil fuel combustions (“FFCs”), “fly ash, bottom ash, boiler slag and flue gas emission control waste - *from combustion of coal at electric utility power plants.*”¹³ EPA Memorandum at 7 (emphasis added). Ultimately the Agency determined that these wastes rarely exhibit hazardous waste characteristics and therefore were inappropriate for Subtitle C regulation.

In 1999 EPA completed its study of the other “special wastes.” According to the Complainant, these pertained to “Comanaged Utility Combustion Wastes,” i.e. “Utility coal combustion wastes mixed with, codisposed, cotreated, or otherwise comanaged with other wastes generated in conjunction with the combustion of coal or other fossil fuels,” and to “[a]ny other wastes subject to Section 8002(n) of RCRA, except fly ash, bottom ash, boiler slag, and flue gas emission wastes from coal combustion by electric utilities.” *Id.* at 8. The “Comanaged Utility Combustion Wastes” consisted of comanaged and coburned wastes, with comanaged wastes described as “UCCWs when mixed with other wastes that are generated ancillary to, but a necessary part of, the combustion and power generation processes,” and “coburned wastes” identified as wastes “produced when the utility burned a combination of coal and up to 50 percent other fuels.” *Id.* at 9.

EPA determined that comanaged utility combustion wastes “had very low levels of RCRA constituents” and that the non-utility coal combustion waste also would not be characterized as hazardous waste.¹⁴ Further, EPA determined that wastes from fluidized bed combustion of fossil fuels by utilities and non-utilities, as well as wastes from the combustion of oil and from natural gas, from utilities and non-utilities, did not present hazardous wastes issues. *Id.* at 10-12.¹⁵

In 2000, EPA published its Final Regulatory Determination on Wastes from the Combination of Fossil Fuels, a determination which applied to all remaining fossil fuel

1978, EPA stated that utility wastes such as fly ash, bottom ash, and scrubber sludge, and other “special wastes” were to regulated in a less rigorous manner. EPA Memorandum at 6 (citing 42 Fed. Reg. 58946, 991-92, 59015 (1978)). The Court does not adopt EPA’s recounting of this history, as the legislative history contradicts it.

¹³Restated, EPA asserts that the 1993 report dealt only with “waste from the combustion of coal that was managed separately from other wastes.” EPA Memorandum at 8.

¹⁴The 1999 Report stated that “non-utility [wastes], including wastes from petroleum coke combustion and from other fuels that are co-fired with coal, and also low-volume wastes where they are managed with the combustion wastes, generally present a low inherent toxicity, are seldom characteristically hazardous, and generally do not present a risk to human health and the environment.” EPA Memorandum at 11 (quoting EPA’s 1999 Report at 4-33).

¹⁵EPA notes that in its Federal Register notice pertaining to the 1999 Report, EPA “proposed to continue the exemption for all categories of remaining wastes.” EPA Memorandum at 12 (quoting 64 Fed. Reg. 22,821 (April 28, 1999)).

combustion wastes, as the other high volume coal combustion wastes generated at electric utilities and independent power producing facilities and managed separately had been addressed by the 1993 regulatory determination. 65 Fed. Reg. 32214 (May 22, 2000). EPA states that “[t]he Agency determined not to regulate, under Subtitle C of RCRA, *any* of these ‘remaining’ FFC wastes” EPA Memorandum at 13 (emphasis added).

EPA contends that “[n]either the Bevill Amendment nor EPA’s Regulatory Determination apply to Respondent’s toxic baghouse dust.” *Id.* at 14. While EPA agrees that fossil fuel combustion waste (“FFC”) identified by the Respondent was included among the wastes the Bevill Amendment singled out for “special treatment” and that the Amendment “directed that those wastes not be regulated under Subtitle C of RCRA until EPA studied those categories of wastes,” determined that such wastes should be treated as hazardous wastes and promulgated regulations addressing them, it contends that this process has now been completed but that the Respondent’s wastes were not included among those FFC wastes that were exempted from Subtitle C regulation. *Id.* at 15. EPA submits that Respondent misreads the Bevill Amendment and that EPA’s obligation was to determine those wastes that “fell within the scope of the Amendment.” EPA contends it was not required to study Respondent’s “particular waste” but only those wastes within the scope of the Amendment. Thus, it asserts EPA was not obligated to study “**all** ‘fly ash waste.’” *Id.* Accordingly, EPA submits that “the Bevill Amendment was never intended to exempt every waste generated by burning of fossil fuel, regardless of its source or nature.” *Id.* Yet, EPA concedes that the Bevill Amendment “singled out for special treatment three categories of . . . waste . . . **including** the ‘fossil fuel combustion’ (‘FCC’) [sic] waste category Respondent points to here.” *Id.* (emphasis added). In what seems to be a paradoxical assertion,¹⁶ EPA states that for “utilities which were powered by fossil fuels generated wastes (fly ash, bottom ash, scrubber sludge) in *very high volumes* . . . the Agency believed[] these wastes were of *low hazard and were not amenable to the standards . . . for hazardous wastes.*” EPA Memorandum at 16 (emphasis added). This might reasonably lead one to ask if this means that the Agency is asserting that *low* volume fossil fuel wastes are subject to Subtitle C, while *high* volume fossil fuel wastes are not.

EPA reiterates that it determined in 1993 that UCCWs should not be subject to Subtitle C regulation and that upon study of the second group of FFC wastes, which it describes as “the remaining wastes,” such wastes were dealt with in its 1999 report to Congress, and it was

¹⁶To the Court, it seems paradoxical for EPA to concede that the Bevill Amendment includes “the ‘fossil fuel combustion’ (‘FCC’) waste category Respondent points to here” and that utilities “powered by fossil fuel generated wastes [including] . . . fly ash, bottom ash, [and] scrubber sludge . . . in *very high volumes* . . . [and that the Agency believed] these were of a “low hazard and were not amenable to standards . . . for hazardous wastes,” while simultaneously asserting that the Respondent’s fly ash is somehow very different. EPA Memorandum at 15 -16 (emphasis added). At the least, EPA has not made it clear why it has drawn a distinction between its need to regulate the Respondent’s fly ash, while deciding that other fly ash, generated in *very high volumes* is not amenable to standards for hazardous waste.

determined that “the remaining FCC [sic]¹⁷ should *not* be subject to Subtitle C regulation.” EPA Memorandum at 16-17 (emphasis added). EPA also cites to its 1999 Report to Congress to emphasize this point. It notes that it was addressing “‘all’ FFC wastes by first looking at fly ash . . . from utilities . . . [and then, in its Final Regulatory Determination by addressing] all remaining fossil fuel combustion wastes” Thus, its second regulatory determination, by EPA’s own description “covers all other fossil fuel combustion wastes” EPA Memorandum at 17, n. 8.

EPA also asserts that the Respondent has misrepresented its position by claiming that EPA has only exempted *utility* generated fly ash under the Bevill Amendment. Rather, EPA contends that it examined wastes from “commercial, industrial, and institutional facilities combusting fossil fuels in boilers for power generation, hot water, space heating and manufacturing process steam generation” and concluded that each of those should be exempt from Subtitle C. EPA Memorandum at 17. In addition, the Agency concluded that wastes “produced from the burning of fossil fuels and up to 50% other materials including wood and biomass, petroleum coke, peat mixtures, etc.” should all be exempt from RCRA Subtitle C regulation. *Id.* at 18.

EPA also states that it specifically addressed “baghouse dust from gray iron foundries,” determining that “any such waste which exhibits a hazardous ‘characteristic’ is subject to Subtitle C regulation.” EPA Memorandum at 18-19. To support this assertion, EPA points to its proposal to include “[b]aghouse dust from cupolas at gray . . . iron foundries” in which it considered listing such dust due to “high concentrations of cadmium and lead.” EPA Memorandum at 19. Despite noting that “[h]ad such waste *been* ‘listed,’ it would have would have been deemed ‘hazardous’ regardless of whether any particular batch of baghouse dust tested toxic,” EPA admits that it decided *not* to list this waste as hazardous.¹⁸ *Id.* at 19. Finally, EPA dismisses the Respondent’s reliance upon an administrative law judge’s opinion *In re: Wheland Foundry*, as the decision was vacated by the Environmental Appeals Board. 1993 WL 569097 (EPA RCRA -IV-89-25-R, December 22, 1993). EPA construes that administrative law judge’s opinion as incorrectly concluding that EPA had applied the exemption only to utilities.¹⁹

¹⁷EPA should take care to proofread its submissions. Too often, it referred to the FFC wastes as “FCC” waste (*see* EPA Memorandum at 17, 18, 20, 21) and when citing to the critical amendment at issue, cites the Bevill Amendment as “42 U.S.C. § 6921(a), (c)” (*see* EPA Memorandum at 16) when the correct citation is 42 U.S.C. § 6921(b)(3)(A).

¹⁸EPA adds that, while it decided not to list baghouse dust from cupolas as hazardous waste, it “warned the regulated community that any such wastes which exhibited toxicity [or other hazardous characteristics] . . . would be considered ‘hazardous waste’ subject to RCRA regulation.” EPA Memorandum at 19.

¹⁹While the decision of the administrative law judge in *Wheland* was vacated, this came about as part of a Consent Decree and Consent Order entered into by the parties, not because the holding was reversed upon appeal. It would seem that the observations and underlying reasoning by the judge about the Bevill Amendment may still be noticed, even if the *Wheland*

In contrast, here EPA states that the “FCC [sic] exemption does not apply solely to utilities” and it distinguishes the facts from Leed Foundry because the state of Tennessee had told the Wheland Foundry that its waste *was* Bevill exempt and because the Wheland decision was issued in 1993, and therefore before EPA had dealt with the Bevill exemption. *Id.* at 20-21.

EPA’s Memorandum Responding to Respondent’s Motion for Partial Accelerated Decision

EPA, in its Memorandum Responding to Respondent’s Motion for Partial Accelerated Decision (“EPA Response to R’s Motion for PAD”) acknowledging that it disagrees with Leed’s view of the meaning of the Bevill Amendment, 42 U.S.C. § 6921(b)(3)(A)(i), asserts that it “followed a thorough and well reasoned approach to defining the scope of the exemption under the Bevill Amendment” and that its review covered “all wastes that could potentially qualify to have the temporary exemption extended” but that Respondent’s toxic waste was not one of those very publicly identified wastes which qualified for the exemption extension. * EPA asserts that as Congress has not spoken directly to the issue, the exemption is not susceptible to the plain meaning test for statutory construction. Operating under this belief, the Agency continues that, as the statute is “silent or ambiguous with respect to the specific issue” the Agency is due substantial deference in interpreting the statutory exemption. From EPA’s perspective, the “issue here is whether baghouse dust produced from the melting of mixed metals in a cupola at a gray iron foundry is exempt from regulation under Subtitle C of RCRA.” EPA Response to R’s Motion for PAD at 2. EPA also contends that Leed’s approach “requires a reading of words in isolation, . . . ignoring other words and . . . [the] insertion of words that are not present.” *Id.* at 3. To begin, it takes issue with Leed’s assertion that the amendment applies to *all* fly ash waste, noting that Congress did not state *all* fly ash waste. The Agency also contends that Leed has conceded that “‘fly ash’ may have more than one meaning,” that “there may be many forms of ‘fly ash’ and/or that ‘fly ash’ may apply to a variety of [] materials.” *Id.* at 4. EPA also notes that the exemption refers to ‘fly ash waste,’ not simply ‘fly ash.’ So too, EPA asserts that the statute’s use of the term *primarily* regarding waste “generated *primarily* from the combustion of coal or other fossil fuels” is not so clear and could be construed in several different ways.²⁰ The

decision itself may not be formally recognized. In any event the Court’s conclusions do not rest upon that vacated decision. It is hoped that if this case, like *Wheland*, is ultimately settled, that there is no agreement within any consent agreement to “deep six” this Preliminary Order, as the Court considers it important that its review of the Bevill Amendment not be erased so that in any future litigation others will not need to revisit this issue as if it were a matter of first impression.

²⁰Although EPA posits other potential meanings for ‘fly ash’ and other constructions for ‘primarily,’ it never offers its own, Agency -endorsed, definition of fly ash and concedes that Leed’s notion of ‘primarily’ was in fact employed by EPA, as it used a 50% value to the statute’s reference to waste generated primarily from the combustion of fossil fuel. While EPA also asserts that Congress’ grouping of the three categories of exempted waste “signals a common purpose” it then concedes that neither the statute nor the legislative history speak to the *signaled common purpose* it discerns. EPA Response to R’s Motion for PAD at 6.

term, it submits, could refer to the percentage of waste after combustion or perhaps to chief component in a mixture, where no one component is 50 percent. It maintains that these uncertain words employed by Congress all point to EPA's justifiable filling in the gaps where the statute presents ambiguous terms and silence.²¹

Continuing with its claim that the statute is unclear, EPA then looks to the principle that where a statute does not speak to a matter, an administrative agency's interpretation of the provision must be upheld if it is reasonable, (a principle about which Leed does not quarrel), and it asserts that the Agency has done exactly that for the Bevill wastes. It did so by first addressing Utility Coal Combustion Wastes ("UCCWs") and then by separately addressing "all 'remaining wastes' subject to [the Bevill Amendment]."²²

Respondent Leed's Response to EPA's Motion to Strike

Respondent asserts that EPA's Motion should be denied because its Bevill exemption claim has application not only to its assertion that the exemption operates to preclude Counts I through XIII but, even if Leed's does not prevail on its defense to liability, the claim is relevant to the determination of any penalty. Leed's Response at 1-2. It notes that the parties agree that, at this juncture, the issue can be plainly stated as whether the Bevill exemption encompasses *all* fly ash waste generated primarily from the combustion of fossil fuel or if it is limited to fly ash waste generated in a pure energy context. Leed believes that its view, adopting the former construction, is supported by the plain language of the Bevill Amendment, whereas EPA's view "requires a tortured reading of the statute and the addition of words of limitation which Congress chose not to include." *Id.* at 2-3. Leed asserts that where the plain meaning of the words employed in a statute are clear, courts are bound to apply those words. Examining those words, Leed notes that the Bevill amendment identifies specific exempted wastes, including, as pertinent here, fly ash waste generated primarily from the combustion of coal or other fossil fuels, and provides that such listed waste is not subject to Subtitle C regulation until *after* EPA reports to Congress *and* promulgates regulations. 42 U.S.C. § 6921(b)(3)(A).

Applying the plain meaning construction, Leed notes that the words of the Amendment are not limited by "the intent of the combustor, the type of furnace used, the temperature of the combustion process, or the chemical characteristics of either the fossil fuel being combusted or the waste generated." Nor do those words limit the Amendment to combustion from energy

²¹In the Court's view, each of these contentions is nothing more than an attempt to create an illusion of uncertainty where the meaning is clear. Accordingly, they are rejected.

²²Although EPA has claimed that the Bevill Amendment merely codified the Agency's pre-existing plans for such "special wastes," it admits that its 1978 plans *were limited* to "utility waste" but that the Bevill Amendment was not so limited as it encompassed "non-utility" wastes. Further demonstrating that its existing plans for special wastes were not merely echoed by Congress in the Bevill Amendment, when EPA filed its reports to Congress, as mandated by that Amendment, the reports were not limited to utility waste.

production. *Id.* at 4. Restated, Leed points out that the words employed by the statute apply to fly ash, without any limitation tied to whether the combustion process arises from utility or non-utility sources.²³ To Leed, this makes sense, as the Amendment stemmed from the need for knowledge concerning the appropriate way to address these wastes. Following EPA's study and report to Congress, the Agency concluded that "both utility and non-utility fly ash should remain exempt, with no recapture of foundry-generated fly ash." Leed's Response at 4, n.1. Leed, noting that it burns its fossil fuel for the sole purpose of generating heat to melt its scrap iron, contends that it makes no sense for EPA to assert that fossil fuel burned in the presence of scrap iron loses its exemption simply because of that, when it permits utilities to mix their fly ash waste with other solid wastes. Thus, Leed contends that if the waste is fly ash and such waste is generated primarily from the combustion of coal or other fossil fuels, it is exempt from regulation until EPA follows the steps mandated by the Bevill Amendment. *Id.*

Leed also challenges EPA's historical recounting of the Bevill Amendment's origin with the Agency's suggestion that the Amendment was merely an endorsement of EPA's proposed regulations dealing with fly ash. Leed contends that the Agency's 1978 draft regulations were "largely limited to *utility* fly ash" whereas the Amendment exempted "*all* fossil fuel ash waste, as long as the waste was 'primarily' generated from fossil fuel." *Id.* at 5-6. Further, Leed observes that if Congress in fact had endorsed EPA's proposed draft regulations, there would have been no need for it to include the Amendment. Thus, Congress was concerned with more than utility-generated fly ash and wanted to include an analysis of the entire fly ash community to determine who should be regulated under Subtitle C. Leed also contends that, nineteen years after the Amendment, EPA decided to continue the exemption from Subtitle C for all classes of fly ash.²⁴ *Id.* at 6.

²³Leed also notes that the plain language of the Amendment does not exclude foundries, whether they are grey iron or any other kind, from its coverage. Leed Response at 4.

²⁴Leed also takes issue with EPA's frequent reference to the chemical characteristics of the fly ash from its foundry, asserting that fly ash is not defined by such characteristics, and that the basis for the Bevill Amendment arises "by virtue of the manner in which it [is] generated, from the simple process of combusting an exempt fuel source." Leed's Response at 7. The exemption does not rest on whether the fly ash is a characteristic waste, but rather on whether the fly ash is created by combusting fossil fuel and although, under the Amendment, the fly ash cannot be a characteristic waste, the exemption does not turn on the chemical characteristics of the fly ash. Instead, Congress' direction was for the EPA to study all fly ash and determine if Subtitle C should apply. When EPA did so, it elected not to regulate fly ash waste within the hazardous waste program. Leed Response at 7-8. In addition, Leed points to EPA's March 1999 Technical Background Document which reflected "significant variability in fly ash chemistry and ... identif[ied] lead and cadmium as common components" Leed construes this Document as reflecting that "not all fly ash is created equally" and refuting the idea that its fly ash should be determined by its chemistry. Instead, Leed insists that the pathway for regulation was clearly established by the Bevill Amendment and consequently that the only way for EPA to regulate its fly ash is through rulemaking. The rulemaking approach, Leed notes, would also permit EPA to employ the application of the characteristic waste test which it uses to

Discussion

The analysis of whether Respondent's fly ash is exempted by virtue of the Bevill Amendment must begin with the statutory language of that Amendment. The pertinent language from RCRA § 3001(b)(3)(A), provides that:

[E]ach 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 ... 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.*

42 U.S.C. § 6921(b)(3)(A)(i) (emphasis added).

The Court agrees with Leed that where the plain meaning of the words employed in a statute are clear, courts are bound to apply those words. This principle has been applied in the regulatory context since the Supreme Court's decision in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694,(1984), and in the many subsequent cases that have echoed that holding. Courts are to start with the "language of the statute itself ... [and] follow the plain and unambiguous meaning of [that language] interpreting undefined terms according to their ordinary and natural meaning ..." *United States v. Orellana*, 405 F.3d 360, 365 (5th Cir. 2005). So too, *Rolland v. Romney*, 318 F.3d 42, 48 (1st Cir. 2003), notes that "the plain of the statutory language, as derived from the whole of the statute, including its overall policy and purpose, controls [and that] the congressional intent conveyed by unclear statutory language may be discernible from its legislative history."²⁵ 318 F.3d at 48 (citations omitted). Courts "traditionally refer[] to the legislative history and the atmosphere²⁶ in which the statute was enacted in an attempt to determine the congressional purpose." *United States v. Gregg*, 226 F.3d 253, 257 (3d Cir. 2000) Cert. denied 532 U.S. 971, 121 S. Ct. 1600, 149 L. Ed. 2d 467 (2001) (citation omitted). As Leed notes, upon examining those words, the Bevill amendment

determine the leachable constituents of a stream. Having failed to follow the Congressionally prescribed procedure, Leed contends that EPA cannot selectively borrow from the characteristic waste provisions in Subtitle C to reach statutorily exempt waste streams. *Id.* at 8-9.

²⁵It is worth emphasizing that this Court views the statutory language to be clear. While that is sufficient, it is noteworthy that the legislative history is consistent with that statutory language, echoing the plain meaning of that language.

²⁶As discussed, the 'atmosphere' in which the Bevill Amendment was passed could not have been clearer.

identifies specific exempted wastes, including fly ash waste generated primarily from the combustion of coal or other fossil fuels. For such identified wastes, the amendment provides they are not subject to Subtitle C regulation until *after* EPA reports to Congress and then only *after* it promulgates regulations concerning them. EPA's attempts to create doubt in the face of this plain language are rejected.

The Legislative History

Although the plain language of the Bevill Amendment clearly expresses Congress' intention, the Legislative History for the Resource Conservation and Recovery Act Amendments of 1979 also shows that Congress was specifically concerned with the impact of RCRA on gray iron foundries. Representative Traxler, referring to Congressman Bevill's Amendment, noted that the town that he came from, Saginaw, Michigan, "has the largest cast iron foundries in the world." He characterized the Amendment addressing "overzealous and perhaps unjustified regulatory action by the [EPA]." CONG. REC. 3,345-47 (1980). While his particular focus was EPA's plan to classify lead-bearing wastewater treatment sludges as hazardous, he was concerned that the Agency was acting without sufficient data and under the pressure of court ordered timetables. *Id.* Congressional Record -House, February 20, 1980, at 3345-47. Representative Santini also spoke positively of the Bevill Amendment, describing it as "defer[ing] regulation of 'special waste' until after EPA studies the need to do so . . . [and] requir[ing] EPA to prove a waste is harmful before regulating it." *Id.* at 3348. Similarly, Representative Albosta, referring to iron foundries and noting that such foundries produce sludge that can contain lead, was concerned that there should first be "considerable and substantial evidence of a problem" before EPA attempts to regulate those industries. *Id.* at 3351.

When the author of the amendment, Mr. Bevill, described its intended effect he stated that "it would require EPA to defer imposition of regulatory requirements on the disposal of the waste by-product of fossil fuel combustion . . . until after [it] has completed studies to determine whether, if at all, these materials present any hazard to human health or the environment." *Id.* at 3361. Congressman Bevill emphasized that "this amendment would require EPA to promptly undertake studies to fill these gaps in the agency's knowledge, and to determine whether there is any health or environmental problem from the disposal of these coal by-product wastes *and other materials listed on subparagraph A of the amendment.*"²⁷ *Id.* at 3361 (emphasis added). Further, Congressman Bevill was very specific about the intention behind the amendment, noting specifically that it "**covers fly ash waste, bottom ash waste, slag waste ... generated primarily from the combustion of coal and other fossil fuels.**" *Id.* at 3362. The Congressman stated he had "carefully chosen these phrases, in order to allow utilities *and others* who burn coal and other fossil fuels mixed with other materials ... to avoid being saddled with [the] unnecessary

²⁷Subparagraph A, to which Congressman Bevill referred, remained virtually unchanged in its final form from the language employed when his amendment was read into the record immediately before he spoke about it and the language in issue in this case was not changed at all. 26 CONG. REC. 3360 (1980).

regulatory burdens EPA has proposed²⁸

Further, Congressman Bevill stated:

It is the sponsor's intention that ***this list of waste materials in the amendment be read broadly***, to incorporate the waste products generated in the real world as a result of the combustion of fossil fuels. 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

²⁸This remark belies EPA's claim in its motion and responses in this litigation that the Bevill Amendment merely echoed the regulatory approach EPA had already embarked upon. On December 18, 1978, EPA published a proposed rulemaking, "Hazardous Waste Guidelines and Regulations," that addressed special waste standards for Subtitle C hazardous wastes. 43 Fed. Reg. 58,946, 58,991. These regulations addressed the potential for these "special wastes," which were characterized as high volume, low hazard, to include fly ash waste. *Id.* at 58,991 - 58,992. EPA then categorized these special wastes. Fly ash waste was categorized under utility wastes. *Id.* at 59,015 (citing § 250.46-2). On February 20, 1980, Congressman Bevill issued his amendments for the Solid Waste Disposal Act ("SWDA") known as the Bevill Amendment. 26 Cong. Rec. 3361-3365. After Senate and House conferences (S. REP. NO.96-1010 and H. R. REP. NO. 96-1444), the Bevill Amendments were codified in the SWDA Amendments of 1980. Pub. L. No. 96-482, 94 Stat. 2334. As Congressman Horton stated regarding the Bevill Amendment, "[t]he language of this amendment ***differs significantly from that used by EPA in its proposed hazardous waste regulations***, and the ***purpose of this difference is to extend coverage of the amendment to circumstances where fossil fuels are burned in conjunction with other materials ... [s]o long as more than 50 percent of a fuel mix consists of a fossil fuel, the waste generated from the combined fuel mix is subject to this amendment despite the fact that the volume of the waste ash resulting from each of the fuels being burned may not be directly proportional to the volume, tonnage or Btu value of the fuel inputs.***" *Id.* at 3363. (emphasis added). Congressman Bevill confirmed to Congressman Horton that the amendment also covered waste from combined combustion of refuse derived fuel and fossil fuel. *Id.* On May 19, 1980, EPA promulgated the initial regulations implementing Subtitle C. However, Congress aware of EPA's proposal, passed bills restricting EPA's authority to regulate fly ash waste. In October 21, 1980, Congress passed the Solid Waste Disposal Act Amendments of 1980, which included the Bevill Amendment. *See* Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334. As noted, fly ash waste was exempted from Subtitle C until further studies were completed by EPA and it reported to Congress and it promulgated regulations regarding such wastes. *See* H.R. 3994 and S. 1156.

*these waste streams because of the presence of these materials, if there is no evidence of any substantial environmental danger from these mixtures.”*²⁹

Id. at 3362 (emphasis added).

The Conference Report to the Solid Waste Disposal Act Amendments did not alter the House language for the Bevill Amendment.³⁰ S. REP. NO. 96-1010 (1980). The Joint Explanatory Statement of the Committee of Conference, which accompanied that Conference Report noted that the Senate Bill suspended “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 environment.” *Id.* at 32. Like the House Bill, the Senate required EPA to “conduct a detailed study of the adverse effects, if any[,] of such wastes” It also observed that the House Amendment suspended regulation of such wastes, as well as all other wastes . . . in a category designated as ‘special wastes’ . . . [and that] the conference substitute adopts the House amendment”³¹ *Id.*

While often the legislative history can leave uncertainties about the Congressional will and, because of conflicting statements, be capable of varying interpretations, it is this Court’s view that the legislative history for this amendment only serves to confirm a clear harmony between the plain language employed by the Bevill Amendment and the statements made by the members of the House at the time the amendment was adopted.

²⁹It is unnecessary to detail each Congressman’s comments in support of the Bevill Amendment. Suffice it to say that Congressmen Findley, Moffett, Rahall, Perkins, Williams and Staggers, among others, spoke with praise about the amendment. Many of these comments specifically spoke to and endorsed the exemption’s application to fly ash and the need for EPA to develop more facts before regulating the amendment’s listed wastes.

³⁰In fact the Senate Bill had essentially the same language as the House with regard to this provision.

³¹The Senate had, in an earlier record, expressed the same concerns as the House had expressed through the Bevill Amendment. That is, both bodies were concerned about EPA acting in an “overly broad” manner by regulating without sufficient information. Like the House, the Senate expressed its concern about EPA’s proposal and characterized it as an “overly broad implementation, [which] include[d] the overcontrol of materials such as **byproducts of coal and other fossil fuel combustion – fly ash, bottom ash, and flue-gas emission control waste – which have never been demonstrated to be environmentally harmful.**” Remarks of Senator Huddleston, Congressional Record, Senate, June 4, 1979 at 13245. The Senator added: “Solid waste byproducts of the combustion of coal and other fossil fuels have been present in the environment of this country since fossil fuels were first used, and our practical experience with these byproducts has revealed no instance where the ash, slag or sludge could be shown to have posed a substantial hazard to human health or the environment.” *Id.*

Thus, it is accurate, as Leed notes, that the Bevill Amendment does not target or identify certain industries for Subtitle C exemption. Rather, its coverage applies to certain waste types, one of which is ‘fly ash.’ In fact, based on the legislative history, not only was Congress exempting fly ash but it specifically expressed its concerns over the effect of RCRA hazardous waste designations being prematurely applied to the steel industry. Leed is also correct that Congress did not want suppliers and users of fossil fuels to be regulated under RCRA until there had first been studies, reports and promulgation of regulations.

Related EPA Rulemaking

On January 16, 1981 EPA published a “Final rule and temporary suspension of interim final rule” described as “Hazardous Waste Management System; Identification and Listing of Hazardous Waste.” 46 Fed. Reg. 4614. As relevant here, the document spoke to “*Wastes from Gray and Ductile Iron Foundries (proposed listings)*.” *Id.* at 4616. The Agency noted that, among other topics, it had proposed listing emission control dust from gray and ductile iron foundry cupola furnaces.³² *Id.* at 4617. Thus the rulemaking was addressing the very subject of this litigation. However industry comment caused EPA to defer such action until it completed further study to determine whether those wastes were hazardous.³³

Subsequently, on May 19, 1981, EPA published a “Notice of availability of information and request for comments” in which it noted that it had “recently conducted a waste characterization study of the emissions control dusts from gray and ductile iron foundries, *in order to determine if these wastes should be listed as hazardous under the Resource Conservation and Recovery Act of 1976.*” 46 Fed. Reg. 27363 (May 19, 1981). It noted that it had earlier, tentatively, determined, on July 16, 1980, that such dusts, including ash, from furnace fumes, were hazardous wastes under RCRA. However, the May 19, 1981 announcement noted that on January 16, 1981, in response to comments, the Agency decided to defer any final action until a study on these wastes had been completed. Thus, the May 1981 publication announced that the study had been completed and the Agency sought comments on it. Following that, in August of 1981, EPA noted that the comment period on the study had been extended by forty-five days, with the extended comment period ending on September 3, 1981. 46 Fed. Reg.

³²The proposed rule, published July 16, 1980, noted that if a final rule were to be issued, adding wastes such as emission control dust from gray and ductile iron foundry cupola furnaces would make them subject to “the management standards issued by EPA under Sections 3002 through 3006 and 3010 of RCRA [and] 40 CFR Parts 262 through 265 and 122 through 124.” 45 Fed. Reg. 47835.

³³Although deferring action to list gray iron dust as hazardous waste, EPA added in the same breath that “[a]ll 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.” 46 Fed. Reg. 4617. Of course, this assertion, vague as it is about the source of this ‘obligation’ or the effect of such a determination, does not square with the Bevill Amendment’s requirement to study, report and only then potentially regulate under Subtitle C.

40058 (August 6, 1981). After the extension, EPA did not publish a final rule and it is noteworthy that the Agency has allowed **twenty-four years** to pass in silence since it last discussed the topic in rulemaking of emissions control dusts from gray and ductile iron foundries. As noted, the 1999 Report to Congress where EPA dealt with fly ash waste from fossil fuel combustion begged the question of whether or not gray iron foundry emissions were covered under that Report.

On April 28, 1999, EPA published a Federal Register notice announcing the availability of its “Report to Congress on Fossil Fuel Combustion.” 64 Fed. Reg. 22820. The Report contained a “detailed study of fossil fuel combustion wastes not previously studied [i.e.] the (‘remaining wastes’).” The Agency explained that the purpose of the Report was “to determine whether the remaining fossil fuel combustion wastes should *retain* their exemption from hazardous waste regulations . . . [under] the Bevill Exemption.” *Id.* (emphasis added). EPA noted that the Bevill Exemption “exempts, among other things, fossil fuel combustion wastes from regulation under RCRA subtitle C, pending . . . [a] determination of whether such regulation is warranted.”³⁴ *Id.* at 22821. As it summed up its tentative conclusions³⁵, EPA informed that it intended “to retain the exemption for the disposal of: comanaged and coburning coal combustion wastes at utilities; coal combustion wastes at non-utilities; petroleum coke combustion wastes; and for fluidized bed combustion wastes ... [and] natural gas combustors . . . [and] to retain the exemption for all other beneficial uses of fossil fuel combustion wastes.” *Id.* Further, as referenced in its April 28, 1999 Federal Register announcement, EPA noted that on August 9, 1993 it made its determination for “the first category of wastes,³⁶ concluding that regulation under subtitle C was not appropriate . . . [and] not warranted.”³⁷ *Id.*

³⁴EPA’s description in the Federal Register notice of its regulatory determinations for FFC wastes is somewhat disconcerting, as it relates that 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)(3)(A)(i) and 8002(n).” 64 Fed. Reg. 22821. The problem with EPA’s description is that it can be construed as suggesting that fly ash, for example, is limited to that produced by electric utilities and independent commercial power producers. In contrast, the statute is not so limited, but rather applies, without words of limitation, to fly ash generated primarily from the combustion of coal or other fossil fuels.

³⁵EPA’s Report to Congress contained seven chapters. As relevant here, the significant chapters are in Volume 1, the Executive Summary; and, from Volume 2, Chapter 1, summary and scope, Chapter 2, overview of industry sectors using fossil fuel combustion, and Chapter 4, non-utility coal combustion wastes.

³⁶As noted in footnote 34, *supra*, the two categories EPA used to divide its determinations for FFC wastes are not consistent with the wording employed by the Bevill Amendment.

³⁷The August 9, 1993 “Final Regulatory Determination on Four Large-Volume Wastes From the Combustion of Coal by Electric Utility Power Plants” concluded that such wastes should continue to be exempted from regulation as hazardous wastes. 58 Fed. Reg. 42466. EPA

EPA's March 1999 Report continues its disconcerting description of the Bevill Amendment that RCRA Section "3001(b)(3)(A)(I)"³⁸ . . . excludes certain *large-volume* wastes generated primarily from the combustion of coal or other fossil fuels from being regulated as hazardous waste under Subtitle C of RCRA, pending completion of a Report to Congress" EPA March 1999 Report at 1.1. It recounts that its earlier report to Congress, in 1988, dealt with the combustion of coal by electric utility power plants, and that it did not address "[w]astes generated by utilities burning fossil fuels other than coal" nor with "[w]astes from non-utility boilers burning any type of fossil fuel." *Id.* Without a lengthy recounting, it is fair to state that, after the 1998 Report to Congress, further action by EPA did not occur until the Agency was sued by a citizens group. In 1992 a Consent Decree³⁹ resulted from the citizens' suit and, as EPA describes it, a schedule was created under the Decree to complete its regulatory

noted that it was required to determine "whether Subtitle C regulation of *fossil fuel combustion wastes* is warranted." *Id.* (emphasis added). The Agency also stated that it had anticipated the amendment of RCRA Section 3001 and for that reason "excluded fossil fuel combustion wastes from the[] regulations." *Id.* It noted that Congress directed it to report on whether there were adverse effects to health or the environment associated with "the disposal and utilization of fly ash waste." The same document relates that in 1981 the Agency decided that "[f]ly ash . . . resulting from: the combustion solely of coal, oil, or natural gas, the combustion of any mixture of these fossil fuels, and the combustion of any mixture of coal and other fuels where coal makes up at least 50 percent of the mixture . . ." would be exempt from RCRA Subtitle C regulation. *Id.* The Agency's 1988 Report to Congress did *not* address "wastes generated by utilities burning other fossil fuels or wastes from non-utility boilers burning *any type* of fossil fuel." *Id.* at 42467. Little more needs to be said about the 1993 Final Regulatory Determination with regard to this litigation because the scope of the Determination expressly stated that it did not include "industrial FFC wastes [as it was restricted to] wastes from coal combustion for electricity generation." *Id.*

³⁸It is also disconcerting that, right from the start of its Report to Congress, EPA provides in the Report's Introduction the wrong cite to the applicable section. Section 3001(b)(3)(A)(I) is not the Bevill Amendment provision.

³⁹The Consent Decree in *Gearhart v. Reilly*, Civil No. 91-2435, DDC. June 30, 1992 ("1992 Consent Decree") noted that pursuant to Section 3001(b)(3)(C), 42 U.S.C. § 6921(b)(3)(C), EPA was to "make a determination whether [or not] to promulgate regulations under subchapter III of RCRA for fly ash waste, bottom ash waste . . . and other byproduct materials generated primarily from the combustion of coal or other fossil fuels . . . [and] conduct a detailed and comprehensive study . . . on the adverse effects on human health and the environment" but that it had not done so. The Decree ordered that, by December 1, 1992, EPA was to decide whether or not to conduct additional "study of fly ash, bottom ash, . . . from the combustion of coal by electric utility power plants." Thus, by its express terms, the Consent Decree only dealt with fly ash and the other listed wastes produced *from the combustion of coal by electric utility power plants*. EPA's March 1999 Report to Congress - Wastes from the Combustion of Fossil Fuels - Volume 2 - Methods, Findings and Recommendations, ("EPA March 1999 Report").

determinations for FFC wastes. As pertinent here, under that schedule the FFC wastes were divided into two categories: fly ash from the combustion of coal by electric utilities and commercial power producers and “*all remaining wastes subject to RCRA Sections 3001(b) and 8002(n)*.” *Id.* (emphasis added). Although the Report states that it covers the remaining FFC wastes, it looks to the 1992 Consent Decree to define the remaining wastes, that is, the wastes which were not addressed in EPA’s 1988 Report to Congress on this subject. EPA described these “remaining wastes” as: “Fly ash, bottom ash, boiler slag, and flue gas emission control wastes from the combustion of coal by electric utility power plants, when such wastes are mixed with, codisposed, cotreated, or otherwise comanaged with other wastes generated in conjunction with the combustion of coal or other fossil fuels [,and] any other wastes subject to Section 8002(n) of RCRA, except fly ash, bottom ash, boiler slag, and flue gas emission wastes from coal combustion by electric utilities.” The latter category included, as pertinent here, “[w]astes from the combustion of *coal* by non-utilities.” EPA March 1999 Report at 1-2. Chapter 4 of the March 1999 Report speaks to non-utility coal combustion wastes, although nowhere does it specifically refer to gray iron foundries.⁴⁰

EPA’s bottom line for these non-utility coal combustion wastes was that it “*tentatively concluded that disposal of these wastes should remain exempt from RCRA Subtitle C.*” *Id.* at 4-33 (emphasis in original). It stated that such wastes “generally present a low inherent toxicity, are seldom characteristically hazardous, and generally do not present a risk to human health and the environment.” This conclusion should not be surprising, given that EPA had earlier concluded in 1988 that the combustion of coal by electric utility power plants should not be regulated under Subtitle C of RCRA and that the non-utility consumption of coal was less than 10 percent of that consumed by utilities and independent power producers. *Id.* at 4-1.⁴¹ Similarly, EPA noted that “[n]on-utility burners of coal and petroleum coke generate the same types of large-volume and low-volume wastes as utilities ... [and while] [t]he total quantities of low-volume wastes generated at these facilities is not well established, . . . the aggregate

⁴⁰Chapter 4.0 notes that “[i]n addition to non-utility coal combustion waste (CCW), this chapter covers wastes from non-utilities combusting petroleum coke and coburning coal and other fuels.” EPA March 1999 Report 4-1, EPA 0611.

⁴¹It is also noted that at several points in its Report to Congress, EPA acknowledged that “[n]o comprehensive data exist on the quantity of low-volume wastes or non-combustion process wastes generated at non-utilities . . . [nor did EPA have] data . . . available on the extent of [burning other non-coal fossil fuels, such as petroleum coke . . . or coburn[ing] with other fuels . . . [nor did it possess] data to broadly characterize non-utility combustion wastes.” EPA March 1999 Report at 4-3, 4-8, and 4-9. Thus it is noted that, at the time of this Report, EPA still did not have the facts, as expressed in the Beville Amendment, that Congress wanted it to have before deciding to regulate such wastes. In any event, having determined that non-utility CCWs “generally present a low inherent toxicity, are seldom characteristically hazardous, and generally do not present a risk to human health and the environment” Congress’ concern over the lack of data would only become important if EPA had acted to regulate these wastes under Subtitle C.

quantities are much lower than utility low-volume wastes.” *Id.* at 4-31. Accordingly, given the absence of data that Congress required as a predicate before EPA could regulate such fossil fuel combustors under RCRA Subtitle C and given that it had determined some ten years earlier that electric utility power plant coal combustors should be exempt from Subtitle C regulation, and given that it had concluded that EPA believed that the non-utility burners of fossil fuels generate the same types of wastes as the utilities, but at vastly smaller quantities than the utilities, it would have made little sense for it to have decide that the non-utilities should be subject to Subtitle C.

EPA’s May 22, 2000 “Notice of Regulatory Determination on Wastes From the Combustion of Fossil Fuels.” (“May 2000 Regulatory Determination”).

The Agency’s May 2000 Regulatory Determination concluded that “*all remaining fossil fuel combustion wastes* other than high volume coal combustion wastes generated at electric utilities and independent power producing facilities⁴² . . . **do not warrant regulation under subtitle C of RCRA** [and therefore those wastes are] retaining the[ir] hazardous waste exemption under RCRA section 3001(b)(3)(C).” 65 Fed. Reg. 32214 (emphasis added).

Thus, on the basis of the foregoing, it can be seen that a major problem with EPA’s contention is that its 1993 Report to Congress was confined to coal combustion wastes generated at electric utility power plants, while its 1999 Report to Congress, covering the “other special wastes,” pertained to non-utility [wastes], including wastes from petroleum coke combustion and from other fuels that are co-fired with coal, and also low-volume wastes where they are managed with the combustion wastes. Significantly, EPA’s Second Report to Congress, which spoke to all fossil wastes not covered in its First Report to Congress, shared a common conclusion, in that it was decided by EPA *in both reports* that neither category should be regulated under Subtitle C. It would have been logical and reasonable for any potential fossil fuel user to have been informed by the time of the Agency’s Second Report to Congress that EPA was carving out certain fossil fuel waste generators from its conclusion to *not* regulate the remaining fossil fuel combustion waste generators and thereby informed those users of fossil fuel that they *would henceforth be covered under Subtitle C*. However, as EPA noted in its Federal Register determination following its Second (and last) Report to Congress “[t]he Agency [has] determined *not* to regulate, under Subtitle C of RCRA, *any* of these ‘remaining’ FFC wastes” 65 Fed. Reg. 32214 (May 22, 2000) (emphasis added.) Even if EPA’s contention that it was not required to study Respondent’s “particular waste” but only those wastes within the scope of the Amendment, an argument which begs the question, the Agency still had a duty to state, in at least one of its Reports to Congress, that all other FFC wastes would not be exempt. It never did so. In short, EPA never notified any subgroup of fossil fuel combustors that they would be subject to RCRA Subtitle C.

⁴²As mentioned earlier, EPA noted in its May 2000 document that electric utilities and independent power producing facilities already had been addressed by a 1993 regulatory determination.

In addition to the plain meaning of the statute, and the clear expression of Congress' intent as expressed through the legislative history, the Court concurs with Leed's observation that the language in the statute does not turn on the industry involved. Rather, the focus of the language is on fly ash which is primarily generated by the combustion of fossil fuel, with no industry source connected to that subject. Even EPA's own regulation, a regurgitation of the Bevill Amendment, takes this approach as it too turns on fly ash generated by fossil fuel, *not* the type of industry generating the fly ash: "[t]he 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 and other fossil fuels" 40 C.F.R. § 261.4(b)(4). As EPA itself has noted, its First Report to Congress was limited to utility coal combustion wastes and its Second Report dealt with any other wastes.⁴³ Significantly, EPA's conclusion for each Report was the same: Subtitle C regulation was not appropriate. As the Agency expressed it: "[t]he Agency determined not to regulate, under Subtitle C of RCRA, *any* of these 'remaining' FFC wastes" EPA Memorandum at 13 (emphasis added).

To emphasize the point made earlier, although EPA now claims that its studies were completed: "this process has now been completed but that the Respondent's wastes were not included among those FFC wastes that were exempted from Subtitle C regulation,"⁴⁴ it has never stated that the Respondent's wastes, or for that matter, *any* class of such wastes, were not included among the wastes exempted from Subtitle C coverage.

As the foregoing discussion demonstrates, the waste at issue here is unquestionably fly ash. However the question of whether it is generated primarily from the combustion of fossil fuels is a factual determination for which the record does not yet provide a basis to formulate an answer. While one could assume that in the process of melting the scrap iron the fly ash would be created primarily by the burning of the fossil fuels, that is not a determination which is susceptible to judicial notice and, as the parties have not stipulated to this issue, expert testimony is needed to establish which of the materials in Leed's cupola generate fly ash and, among those that do, which are the primary source for it. The Court adds that if, for example, in this process of melting the scrap iron, expert testimony establishes that the fossil fuel is the primary generator of fly ash, even if expert testimony were to establish that fumes from the melted scrap iron attach to the fly ash and thereby produce a fly ash with lead and cadmium to the point of qualifying as characteristic waste, that would not override the Bevill Amendment. This is because the Amendment looks only to whether the fly ash is *generated* primarily from the combustion of fossil fuels. If the answer to that question is an affirmative, then the Bevill Amendment applies and the Agency must take the steps required by that Amendment in order to regulate that waste under Subtitle C. It is also clear, again, if the answer to the question is an affirmative, that the Agency has not complied with any of the Amendment's preconditions to regulating. That is, the Agency has not studied, nor reported to Congress regarding the studied waste, nor has it engaged

⁴³To be precise, as EPA described the other wastes as "comanaged utility combustion wastes" and "non-utility coal combustion waste."

⁴⁴EPA Memorandum at 15.

in rulemaking in order that it may regulate such waste under Subtitle C. Whether it would have been sufficient if the Agency had simply stated in its second Report to Congress that “all other wastes identified in its Second Report would be subject to Subtitle C” is a question that does not have to be answered because the Agency did not even do that.⁴⁵

Conclusion

Accordingly, for the foregoing reasons, but subject to the needed expert testimony before the Court can issue a Final Order on these motions, the Court preliminarily concludes that EPA has not complied with the plain terms of the Bevill Amendment as it applies to this Respondent. Alternatively, assuming *arguendo*, if it were to be concluded that the EPA’s March 1999 Report to Congress - Wastes from the Combustion of Fossil Fuels - Volume 2 - Methods, Findings and Recommendations - did encompass gray iron foundries, such as Respondent Leed’s facility, that EPA March 1999 Report determined that such fly ash and the other wastes in the Bevill Amendment should *not* be regulated under RCRA Subtitle C.

William B. Moran
United States Administrative Law Judge

Washington, D.C.
October 12, 2005

⁴⁵Thus, for example, in the face of EPA’s utter silence, the Court does not have to address whether the Agency had a duty to specifically address categories of fly ash production such as fly ash produced by the steel industry. While a determination that such specificity was required by the Bevill Amendment, given Congress’ specific legislative history remarks singling out its concerns regarding that industry, again it is not necessary to rule on that question because EPA never even made a broad statement that it was intending to include all other sources of fly ash within Subtitle C. Instead, when one reads the Agency’s First Report to Congress and then one reads its Second Report, all one learns is that both Reports concluded that the Agency would not regulate the wastes that were the subjects of those Reports.