

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

[NOTE: This version of the decision deletes Confidential Business Information, "CBI"]

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

Initial Decision

In this proceeding, the United States Environmental Protection Agency, Region III ("Complainant," "EPA," or "Agency") filed a complaint on September 30, 2004, against Leed Foundry, Inc. ("Leed" or "Respondent"). Leed operates a gray iron foundry in St. Clair, Pennsylvania. The Complaint alleges fifteen violations, thirteen, (Counts I through XIII), under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939e¹ and two counts, (Counts XIV and XV), under the Clean Water Act ("CWA") 33 U.S.C. §§ 1311, 1318, and 1342. A hearing in this matter was held in Philadelphia, Pennsylvania, commencing on October 31, 2005 and concluding on November 7, 2005.

Prior to the commencement of the hearing in this matter, the Court issued, in October 2005, its Preliminary Order on Motions.² The Preliminary Order, which was subject to hearing testimony from experts, before becoming a final order, addressed the thirteen RCRA counts and concluded that EPA had not complied with the plain terms of the Bevill Amendment as it applies to this Respondent. The Bevill Amendment is clear, as it requires that, for fly ash waste generated primarily from the combustion of coal or other fossil fuels, it shall not be subject to RCRA regulation until *after* EPA reports to Congress and then only *after* it promulgates regulations concerning them. That simply has never happened here. Further, assuming

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.*

²The Preliminary Order on Motions is incorporated into this Initial Decision and appears, in full, as Appendix I to this decision.

arguendo, that 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, the Preliminary Order noted that the 1999 Report determined that such fly ash and the other wastes in the Bevill Amendment should *not* be regulated under RCRA Subtitle C.

Regarding the Clean Water Act Counts, EPA asserted, in Counts XIV and XV, that the Respondent violated the 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 and that Respondent did not have a permit for industrial activity as required by CWA Section 402(p), 33 U.S.C. 1342(p). Respondent initially denied liability as to the CWA counts, but subsequently conceded that it was required to, and did not have, a NPDES permit. The effect of Leed's concession regarding the requirement that it have a NPDES permit, and the Court's determination that the thirteen RCRA counts must be dismissed, left only a single CWA count remaining for resolution on the issue of liability.

I. The RCRA Counts

As mentioned, Counts I through XIII are the RCRA counts. The Court's 'Preliminary Order' could not be labeled as a 'Final [Initial Decision] Order' because the record did not establish whether or not the *fly ash*,³ emanating from the Respondent's cupola, was generated primarily from the combustion of fossil fuels. This is important because the Bevill Amendment looks only to whether the fly ash is generated primarily from the combustion of fossil fuels. If the answer to that question is in the affirmative, that is, if it is found that the fly ash *is* primarily generated from the combustion of fossil fuels, then the Amendment applies and EPA must take the steps required by the Amendment. Before a factual determination could be made on that issue, the record needed expert testimony on the subject. Further, as the assertion of the applicability of the Bevill Amendment by the Respondent is an affirmative defense, the burden of establishing its applicability was on the Respondent.

EPA's position is that Leed's facility operates a "cupola," which is a cylindrical shaped furnace used for remelting metals. In Leed's cupola "metal and coke are processed . . . and . . . particulate matter rise[s] up a flue [then] through a duct and [then] into a baghouse." Tr. 17-18. It asserts that the resulting pile from the baghouse⁴ particulates "is made up largely and primarily

³Although EPA would like it to be otherwise, it is not simply a question of whether the Respondent's "waste" is generated primarily from the combustion of fossil fuel, but rather whether Leed's *fly ash waste* is generated primarily from the combustion of coal or other fossil fuels. This determination required expert testimony to establish which of the materials in Leed's furnace, or as more particularly described, its "cupola," generate fly ash, and among such materials generating fly ash, which is the primary source for such fly ash. Tr. 1045.

⁴As described by Leed's witness Bauer, a "baghouse" is an emission control device functioning essentially like a sock which collects the fly ash coming from the flue gas and which

of other things, not of ash or coke . . . and therefore . . . the waste itself is not generated primarily from the combustion of fossil fuel.” *Id.* at 18.

Respondent’s witness, Francis Bauer, who has a bachelor’s degree in engineering and physics, and fifty years of experience in the design and construction of power plants and cupolas, and her knowledge concerning fly ash, including its development, analysis and testing, and direct experience with fossil fuel combustion. Bauer was qualified as an expert in combustion engineering with regard Leed’s cupola operation and to testify as to the composition and percentage of the fly ash from it. Tr. 35. Retained by the Respondent for the purpose of this testimony, Bauer visited the site and obtained information regarding the quantities of material used in Leed’s process and available test data concerning the ash and the fuel being burned. Tr. 22. With this information, he then requested that Leed run certain tests and, following those, analyzed the results. Tr. 22. As Bauer expressed it, he took “everything that came into the furnace and everything that came out of the furnace and determined from that what percentage of that material would be from the burning of the coke and what percentages were available from foreign materials.” Tr. 23.

The cupola itself has a layer of iron. There is also a thin layer of limestone, which is also referred to as “flux” and serves to keep oxygen from the iron below. Above the limestone is a zone of coke and above that is the “charge zone” where a mixture of materials react with air. Tr. 25. Coke is the fuel for this process. The hot gases from the coke come into the charge area and melt the steel or iron. The burning process does not burn the surface of the steel or coke. Instead the melting is accomplished through radiant heat. Tr. 26. 31. Bauer’s testimony about the *process* was unclear in some respects and because of that the Court required that the demonstrative exhibit used by the Respondent to clarify his testimony be admitted into the record. *See* RX 1, Bauer’s drawing of cupola. Bauer later clarified that the cupola has a charge zone. Metals will melt in that zone and when this occurs it moves down through the coke and limestone below it. Tr. 39.

Regarding the critical issue of the ‘fly ash,’ Bauer’s testimony was clear, as he stated that “[b]asically the only source of combustible material is from the coke.” Tr. 33. Thus he emphasized that the coal generated the bulk of the fly ash and the bottom ash. Tr. 34. To be sure of this, Bauer had Leed prepare a series of tests in which the fuel, iron, and other inputs were measured, and then compared with the outputs. This established that the only source of the fly ash was the coke. Tr. 34. With these results, he concluded that at least 90 percent of the fly ash comes from combustion of the coke.⁵ Tr. 36 - 38.

Bauer, on redirect, was asked about EPA’s analytical results showing lead and cadmium in

acts like a filter for the collection of this ash. Tr. 24.

⁵Bauer’s testimony on the fly ash content was unchallenged in EPA’s cross-examination. Tr. 39-41. Further, he was confident regarding the accuracy of his figures for the composition of the gases that emanate from the cupola and these calculations were unchallenged. Tr. 45

the fly ash. Although he stated that “a little bit” of it could be from the coke, his expressed view was that chiefly this came from residual in the iron. He explained further that if for example some of the metal to be melted came from used radiators or old sewer pipe, or painted metal, these could have some residual lead on them. The cadmium source could be from plating on the waste metal. Tr. 43.

Leed also offered the testimony of Dr. Barry Scheetz, who among other educational achievements, has a masters degree in geochemistry and a Ph.D. in geochemistry and minerology. Tr. 46. His experience and expertise includes studying the chemistry and composition of fly ash materials, and he was qualified as an expert on fly ash composition and its chemistry. Tr. 46-49. Testifying with regard to the materials from Leed’s foundry, Dr. Scheetz stated that he took a sample of its fly ash and subjected it to x-ray diffraction, as well as with a scanning electron microscope. Scheetz also examined a sample of Leed’s coke. Upon examining the minerology of the fly ash from the baghouse, he found signs of lead sulfates and lead sulfides. Tr. 58. He found that these constituted about 6 ½ percent of the particulate matter that was coming off, along with zinc, in a vapor state and being deposited in the ash. The bottom line for Dr. Scheetz was that the fly ash material, that is the “vast majority”⁶ of it, was being generated from the coke.⁷ Tr. 60.

EPA presented witness Edward Wojciechowski who has a degree in mechanical engineering and significant training from EPA in courses dealing with control of particular and gaseous emissions. Tr. 84-85. His employment with EPA began in 1977 and continues there presently, where he is presently with the enforcement division, with the title of environmental engineer. His work has entailed inspections of iron and steel making facilities and it includes experience looking at blast furnaces’ cupola operations when there are air emissions. Tr. 91-92.

He was qualified as an expert in cupola operations as it relates to air pollution and air pollution control at those facilities. Tr. 93.

Wojciechowski stated that a cupola operates by charging scrap steel and iron, coke, and limestone and that the coke serves as the fuel to burn. Because the metal used in a scrap iron process is ‘scrap,’ there can be a variety of other metals along with scrap iron. Tr. 94-96. As it concerns this operation, the products of combustion go up through the top of the cupola through a duct and end up in an air pollution control device known as a baghouse.⁸ Tr. 96. The gases

⁶While Dr. Scheetz could not put a firm number as to the percentage of fly ash generated from the combustion of the coke, he stated it was “probably well over 90 percent,” a conclusion reached in part on his determination that the cadmium and lead content was “only a couple of percent out of the total bulk of the ash.” Tr. 61. “With certainty,” he could state that 75% of the fly ash was from the coke. Tr. 62.

⁷Asked to assume that the lead in the fly ash was as high as 150,000 per million, Dr. Scheetz stated that would only constitute 1 ½ % of the fly ash. Tr. 60.

⁸EPA Ex. 6 I is a picture of Leed’s baghouse. Tr. 103.

from the cupola are filtered upon going through the bags, with the gas passing through the pores in the bags and the particulate depositing itself on the inside of the bags. Eventually the inside of the bags become so filled with particulate that they must be shaken, through a mechanical process, so that the collected dust falls to the bottom of the baghouse into hoppers below. This waste is referred to as “baghouse dust.” Tr. 104- 105. When asked if the coke interacts with the metal, Wojciechowski stated, without any detail, that “[s]ome of the molten metal absorbs some of the material in the coke.” Tr. 97. The particulates that are generated in the cupola are within the gases that go up through the duct work and from there to the baghouse. Tr. 99. Wojciechowski stated that the particulates generated by the boilers are referred to as ‘fly ash,’ but the baghouse manufacturer refers to this only as a ‘dust collector.’ Tr. 106.

Wojciechowski has never been to the Leed facility and consequently has never seen its cupola in operation, nor has he ever seen the emission controls in operation, or inspected the coke used there. Tr. 137. When he was asked about the constituents of the baghouse dust pile at Leed’s Foundry, he noted that he was unaware of any analysis of its composition. Thus he knew of no analysis that set forth the constituents or their percentages. Tr. 109. Rather, only some of the constituents were analyzed. Tr. 109. Despite this, Wojciechowski did not agree with Bauer or Scheetz that 75 to 90 percent of the baghouse dust generated is ‘fly ash.’ Wojciechowski did his own analysis “of the material in the baghouse dust pile and determined how much of that dust was ash from the coke. To arrive at his conclusion, he looked at Leed invoice data to determine how much dust was hauled from its facility in 2004. Tr. 110. Using those invoices he estimated the amount of dust hauled away during the course of a year to be about 120 tons. Tr. 112. He then compared that with the amount of coke that Leed purchased, again examining its invoices.

These calculations should not distract anyone from the central issue before the Court for these RCRA counts. That issue is whether the *fly ash waste* in this instance was generated primarily from the combustion of coal or other fossil fuels. It is that determination, focusing on the *content* of the fly ash waste, *not how much dust Leed hauled away, nor how much coke Leed purchased*, which leads to the conclusion regarding determines the applicability of the Bevil Amendment.

Wojciechowski agreed with Bauer’s description of the processes of the operation. Tr. 129. Also, stating that his familiarity was with the particulate matter generated in operations such as Leeds, he agreed that such matter, generated in the cupola, travels through the flue gas of the stack and then passes through the emission control device known as a baghouse. Tr. 129-130. In preparing for his testimony, he also reviewed Leed’s plan approval application for the baghouse, which was submitted in 1996. Although the plan application, listed the range of ash content in the fly ash at 7 to 9 percent, he used a figure of 6.5 percent for his calculations. Tr. 131. Thus, he agreed that if the ash content were actually 9 percent instead of 6.5, his calculation would be off by that amount. Wojciechowski also agreed that he based his figures assuming that Leed used 529 tons of coke in a calendar year. Tr. 132. While he admitted that the invoices showed gaps, in that there were no invoices for a number of months during the year he examined, this did not cause him concern because he assumed that the gaps simply meant that the cupola did not run continuously . In making that assumption, however, he conceded that he

had no idea how many days in a year Leed actually operates its cupola and accordingly his calculation did not consider the number of days per year that Leed operates its cupola. Tr. 134.

Wojciechowski agreed that if the amount of coke used per year was in fact three times the 526 tons that he assumed to be the case, the ash produced would also increase by threefold from the 34 tons he assumed, putting the amount of ash content in the range of 80 tons per year. Tr. 136. At any rate, Wojciechowski's opinion that 62 percent of the baghouse dust was something other than fly ash. Put differently, his view was that only 28 percent of the total volume would be attributable to the coke. Tr. 137. When asked what would make up this 62 percent, if not the coke itself, Wojciechowski expressed that "[i]t could be due to the fumes given off from the metal that's melting within the furnace."⁹

Edmund Quirin, President of Leed Foundry was then called by Leed's Counsel, who testified regarding the amount of coke that is purchased each year at the facility. Quirin stated that Wojciechowski's figures were missing six or seven months and that, in fact, Leed purchased 1,397.03 tons in 2003 and 1,562.78 tons in 2004. Tr. 148. Thus, Leed contends that, factually, Wojciechowski was simply wrong in his figures for the amount of coke Leed purchased and consequently that his calculations should be disregarded. Apart from the deficient calculations, Leed contends that other aspects of Wojciechowski's affidavit actually support its position, as that affidavit concedes that fly ash will be generated from the burning of coke and that it can be a component of the bag house dust. Tr. 154.

Following the expert testimony, the Court permitted counsel to make closing arguments on the issue of whether Leed's fly ash waste is generated primarily from the combustion of fossil fuel. *Because of the Court's Preliminary Order on Motions, this was the only issue left to be resolved for the RCRA Counts.* Leed's Counsel asserted that the record established that at least 75% and likely 90% of the fly ash content is generated by the combustion of the coke.¹⁰ For EPA's part, its counsel contended that the "the pile of baghouse dust in and of itself is not 'fly ash.'"¹¹ Tr. 157. It points to Wojciechowski's assertion that this material is not fly ash, but rather that it is 'baghouse dust.' Tr. 158. However, EPA's claim avoids answering the source of the baghouse dust. While EPA conceded that "some" ash is produced by the combustion of

⁹Wojciechowski could not recall the highest lead number for the baghouse dust at Leed, nor could he recall the highest TCLP ("total characteristic leaching procedure") concentration. Tr. 138, 244. He did note that the lead from the TCLP tests from the baghouse was compared with the lead that was in the coke and the number was less than 1 %. Tr. 140. If it were assumed that there were 900 parts per million of lead in the baghouse dust, Wojciechowski calculated that this would amount to .009 percent. Tr. 141.

¹⁰In addition, Counsel for Leed asserted that the affidavit of Bauer, Quirin's affidavit, and the uncontroverted information sources cited in its motion and supportive memorandum, are sufficient to establish the content of the fly ash.

¹¹EPA asserts that even Leed's witness, Dr. Scheetz, had "never included this particular material in his definition of fly ash." Tr. 157.

Leed's coke, it relies upon Wojciechowski's calculation that only 28% *or less* of this ash comes from the coke.¹²

The following day, the Court issued its final ruling on the sole remaining issue for the RCRA Counts. Tr. 160-169. In that ruling the Court first determined that EPA witness Wojciechowski's figures, and consequently his calculations and conclusions, were incorrect. Although he testified that approximately 526 tons of coal were used at Leed's operations annually, this was only an educated guess which was based on flawed assumptions about Leed's operations. More than simply wrong, Wojciechowski's figures were a gross underestimation of the amount of coke actually used at the facility. The actual annual tonnage approached three times the amount that he assumed to be the case, a finding supported by the testimony of Leed's President Mr. Quirin. Consequently, Mr. Wojciechowski's calculations were of no value as they were based on grossly incorrect information.

Unlike Mr. Wojciechowski's views, the Court did credit the testimony of the Respondent's witness, Mr. Bauer, who had first-hand knowledge of Leed's operation. Comporting with both common sense and the results of his testing, the Court found that the only source of combustible material from this facility's cupola operation was from the coke. That testimony supports the Court's conclusion that the fly ash waste was generated primarily from the combustion of fossil fuel; to wit, the coke Leed uses in its process.

Beyond Bauer's testimony, that of Dr. Scheetz, who also had first-hand knowledge of the Leed facility, and as he noted in his testimony, he collected a sample of the fly ash from Leed's facility, analyzing it to determine its mineral content and concluding that at least 75 percent of the fly ash at Leed's facility is from the coke.¹³

At bottom, what is important is that whether one uses Dr. Scheetz's figure of 75 percent

¹²Without elaboration, EPA also noted in its argument that there was no testimony concerning "what flue gas emission control waste is . . . [and] how those materials might be treated . . . [although such materials are] an entirely separate matter from the particulate[s] . . . in this case. Tr. 158.

¹³ *The Court explicitly rejects* EPA's suggestion that Dr. Scheetz's papers, focused as they were on electric utilities and cogenerators, suggests that he did not consider Leed's operation to be within the Bevel Amendment. As it is a matter of a legal interpretation for the Court to make and does not involve a finding of fact, it is not a subject for an expert's opinion. Dr. Scheetz's paper, addressing certain fly ash producers, is not a substitute for EPA's duty to engage in rulemaking, nor is the fact that his paper did not address gray iron foundries suggestive that he or, more importantly, that EPA excluded such producers from its Subtitle C exemption. Thus, Dr. Scheetz's writings do not suggest that facilities such as Leed's are within Subtitle C coverage. To restate this for clarity, neither EPA nor Dr. Scheetz have suggested that facilities such as Leed are within Subtitle C coverage and, even if it were Dr. Scheetz's view, as explained above, his view would be irrelevant to the legal determination.

or Mr. Bauer's estimate of 90 percent, both figures far exceed the threshold to trigger the Bevel Amendment's applicability, which Amendment becomes operative where fly ash is primarily generated by fossil fuels. Since only 51% of the fly ash needs to be created from fossil fuel to trigger the Bevel Amendment, it is obvious that where, as here, 75% of the fly ash comes from fossil fuel, the Amendment clearly applies. That is to say, where more than 50 % of the fly ash created from combustion is from fossil fuel.

Given the record evidence, the Court rejected EPA's attempt to re-label the fly ash, by calling it "dust," as merely a nomenclature gambit. The key point is that the Bevel Amendment captures all of the waste generated primarily from the combustion of fossil fuel. It speaks to the waste that goes down, which is the bottom ash and the slag, and it speaks to the waste that goes up, which is the fly ash and the flue gas. What rose from the cupola here was fly ash. Dictionary sources support this determination and the fact of the matter is that the affidavit of EPA's Wojciechowski also supports this conclusion. At paragraph three, that affidavit states the burning of coke in the cupola produces ash and paragraph five states that baghouses collect particulate matter which are generated by the melting process in the cupola and that this particulate matter includes ash from the coke.

It is also worth noting that Congress itself effectively defined fly ash waste. It did so by defining it as waste which is generated primarily from the combustion of fossil fuel. That is exactly what is present in this instance – the fossil fuel known as coke. As Mr. Bauer stated, essentially the *only* combustible material here is the coke. EPA itself, implicitly admits this, as its pleadings describe the process as one of melting a scrap metal in a large *coke* fired furnace. It concedes that, in this process one waste stream consists of materials which rise up the flue where particulate matter is filtered as the gas stream passes through a filter bag. Calling this 'dust' doesn't change what it actually is – fly ash waste generated primarily from the combustion of the fossil fuel known as coke.

The Court has sympathy for the position EPA Counsel has been put in, having to defend the untenable. The Agency's history on this matter has not been exemplary. After all, it had to be sued to get moving on the required Bevel Amendment process. It then effectively was poked to proceed, by virtue of the consent decree which followed the law suit. What happened after that was no less embarrassing, as it took some thirteen (13) years after the Bevel Amendment for the Agency to act and when it did so, in 1993, the action dealt with coal combustion, but only for electric utility power plants. Then, almost six years later, it dealt with all other fossil fuel combustion waste.

Two significant facts stand out in this regard. First, in the nearly 20 years it took for EPA to address Bevel, the outcome was its conclusion *not* to regulate in either category. Neither in the subject of the 1993 or the 1999 report did EPA elect to regulate. Thus, it decided not to regulate under Subtitle C in either instance. The second significant fact is that one will not find a

single word¹⁴ in either of EPA's reports to Congress regarding iron foundries, and this absence occurred despite the fact that the plain language of the Bevel Amendment that its applicability was all inclusive.

Thus, the Amendment, dealing as it does with all fly ash waste, bottom ash waste, slag waste and flue gas emission waste, covers such waste where it is generated primarily from the combustion of fossil fuels. The Court cannot think of a clearer statement of congressional intent as expressed in the legislative history than this instance. In addition to Congress's clear expression concerning gray iron foundries, it is also noted that Congress expressly stated that the list of waste materials in the amendment was to be read broadly.¹⁵ Further, it is noted that in its 1999 report EPA never expressed that any fly ash fossil fuel generated, but not specifically named, would henceforth be covered under Subtitle C.¹⁶

Beyond these observations, it must be noted frankly that EPA's embarrassing history with regard to the Bevil amendment was extended with its January 1981 proposed rulemaking, which dealt specifically with waste from gray and ductile iron foundries. According to the federal registered comments, EPA apparently studied the subject and sought comments, and now, with all of twenty-four (24) years having passed since the time of that proposed rulemaking, the agency is, for all we know, still digesting the comments to this proposal. While there is no dispute that EPA can potentially regulate the waste in issue here under RCRA Subtitle C, Congress required that the agency *first* study, *then* report, *and then* engage in rule making before regulating such generators. Thus it is worth emphasizing that not one of EPA's reports on this subject concluded that any of these wastes should be regulated under Subtitle C. Accordingly, a conclusion to regulate did not occur in 1993, nor did it occur in 1999.¹⁷

II. The Clean Water Act Counts.

A. Overview

¹⁴At least the Court was unable to find a single word and certainly EPA did not point out a single word from any Federal Register notice addressing iron foundries.

¹⁵*See infra* the Court's preliminary order on this issue at page, quoting from the amendment's sponsor, Mr. Bevil.

¹⁶*See infra* the Court's preliminary order at pages 21-22.

¹⁷*The Court noted that while Leed could have continued to tell EPA that, as these wastes were not regulated, it would continue to deal with the wastes as it had for the past twenty-five years. But, Leed did not elect to stand on its rights and instead it decided act as a good corporate citizen by voluntarily deciding to treat this waste as if it were covered under Subtitle C. The Court expressed to EPA that, for this voluntary, and unrequired, action, Leed should have been receiving the agency's laudation, not litigation.*

The Complaint has two counts pertaining to Clean Water Act violations. The first, Count XIV, deals with an alleged permit-less discharge of pollutants into waters of the United States and the second, Count XV, with an alleged failure to have the NPDES storm water¹⁸ permit itself. The Respondent conceded liability as to the count dealing with the lack of a NPDES storm water permit, acknowledging that it didn't have such a permit and needed to have one.¹⁹ However, Respondent still contested the penalty proposed by EPA for that violation. Tr. 178. EPA is seeking the statutory maximum penalty for these two counts, an amount totaling \$157,500. Tr. 183, 186.

Thus, the only remaining *liability* issue is with Count XIV, alleging that Leed discharged pollutants to waters of the United States without a permit, in violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311. More specifically, this Count notes that Section 301 “prohibits the discharge of any pollutant from a point source to waters of the United States except in compliance with, among other things, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to § 402 of the CWA, 33 U.S.C. §1342.” Complaint at 15. For this Count, the Complaint alleges that “[f]rom at least March of 1999 water fell on Respondent’s site[,] flowed to on-site storm drains, from there to a drainage swale and then into [a] storm sewer and into Mill Creek²⁰[,] [with] [s]uch flow constitut[ing] discharge from a point source.” Further, the Count alleges that “[s]torm water which fell on the site came into contact with, among other things, dust that has been generated by the manufacturing processes, rocks and sand, which are then carried along with the storm water [and that such] dust, rocks and sand constitute “pollutants” within the meaning of 33 U.S.C. § 1362(6). *Id.* at 16. As Counsel for EPA described the violation, it deals with “precipitation driven discharge [which occurs when] [w]ater falls on a site, becomes exposed to whatever pollutants [are] exposed on the site, and then [that rain water] carries those pollutants off into other waters of the United States.” Tr. 181-182. Leed’s position as to the contested count is that “EPA has no scientific evidence to demonstrate that there were pollutant[s] or pollutional (sic) discharges [and consequently EPA

¹⁸“Storm water” is defined as “storm water runoff, snow melt runoff, and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13). EPA’s Harsh, an environmental scientist and storm water team leader, defined storm water as “any precipitation that would cause runoff . . . [and as applied to the storm water program it] would be precipitation that would hit an industrial facility and then come in contact with whatever might be there, [and] pick up pollutants and then be discharged.” Tr. 415-419. The storm water program is part of the NPDES Program. Tr. 420. Most such permits are general permits, not individual permits. Tr. 420, 422.

¹⁹EPA has “standard industrial classification” codes, more familiarly referred to as “SIC” codes, addressing the regulation of storm water discharges from industrial sites. The SIC code applicable to Respondent Leed’s facility is 3321. As conceded by Respondent, it admits that it did not have the required permit for the discharge of storm water at its site, until it belatedly applied for it, receiving the permit in March 2004.

²⁰The Complaint alleges that Mill Creek “is a ‘water of the United States’ as that term is defined at 40 C.F.R. §122.2 and ‘navigable water’ within the meaning of 33 U.S.C. §1362(7).” As explained *infra*, Leed does not challenge these allegations.

is] rely[ing] on implications to say that [the discharges] occurred.”²¹ Tr. 189. Although this will be discussed in greater detail later, essentially it is Leed’s position that there are other discharge sources, such as homes further up the hill from Leed’s location, which homes discharge raw sewage into the same sanitary sewer system that handles Leed’s discharge flows. In addition, there is an abandoned solid waste landfill, an open strip of anthracite coal, along with other, abandoned, strip mine work. Leed essentially contends that as EPA did not rule out those other sources of pollutants, and failed to otherwise show that pollutants are carried by rainwater off Leed’s property to receiving waters, it did not meet its evidentiary burden to establish the alleged violation.

B. Findings of Fact²²

1. Leed’s facility and operation.

As noted earlier, Leed’s business is a foundry. Its owner, Mr. Edmund Quirin, described it as a gray iron or green sand foundry. It makes municipal and construction castings, manhole covers and storm grating. Tr. 987. The Leed foundry sits on a relatively level portion of a hill. As EPA witness Cox described it, the facility backs up to a hill, or to a fairly vertical slope. Tr. 219. EPA witness Harsh described the facility as two thirds of the way up a hill, but sitting on a level area. Tr. 446. At any rate, it’s not disputed that the facility itself is on a fairly level area and that there is a steep slope up to it, from the highway below. Tr. 448-449. The heart of this operation is the “cupola,” which is the furnace where the castings are created. The cupola creates the fly ash, which was the subject of the RCRA Counts in the Complaint, as a byproduct of this production process, and which ash is captured by the baghouse. Respondent’s Ex.1. The operation moves about 600 tons of sand around per day and the cupola is the most active area outside. Tr. 1012-1013.

²¹In its opening, Leed added one exception to this assertion, namely that its own samples from four storm water outfalls which samples were submitted as part of its permit application. Leed’s position is that the context of those sample results, made as part of its permit application, made them authorized discharges. Tr. 190. Leed also contends that there was some irony underlying this litigation. This arose because Leed elected to pave certain parts of its operation at the suggestion of the Pennsylvania Department of Environmental Protection (“PaDEP”) but that, by doing so, it created a point source storm water discharge, where previously it had nonpoint source storm water discharge, for which there is no NPDES permit requirement.

²²At the outset it should be noted that, although much time was spent during the hearing developing testimony about Leed’s property, the baghouse, the tipping hoppers, and the pile of baghouse dust, the Court’s findings pertinent to the liability issue for the remaining CWA Count focuses on the presence of “pollutants” and whether the record establishes that precipitation carries such pollutants off Leed’s site. Leed does not contest that Mill Creek flows into the Schuylkill River and from there to the Delaware River and then to the Atlantic Ocean. CX 36, Tr. 480-481

Leed stores the ingredients needed to produce its products in piles on its property. EPA witness, Ken Cox, assigned to its Bureau of Waste Management, is an environmental engineer. Tr. 194. Cox stated that the piles were above the foundry level but that behind the piles, that land backed up to a hill, or fairly vertical slope. Thus, while the piles themselves are on a level area, there is an incline behind them. As one example, photos 4H and 4I show a pile of coke, which is uncovered. Tr. 486. Cox's first visit to Leed's operation was on September 19, 2002, and, along with EPA's Martin Matalin, they toured the facility. CX 18, Bates 0286, drawing of Leed's site. Cox stated that he observed the raw materials used in Leed's cupola process. Tr. 204. These consisted of a large pile of scrap metal, a pile of coke and two places, as he recalled, where limestone was stored. Tr. 205. Adjacent to those areas, the baghouse dust, or fly ash, was stored. Tr. 211. EPA exhibit 6A and 6B are photographs of these dust piles. Tr. 218. The piles for metal scrap, coke and limestone, were contained by 4 foot tall concrete walls. Cox did not know the nature of the surface under the material piles, although he stated that between the piles and around the facility's truck driveway there is a "paved asphalt or macadam surface."²³ This driveway runs between the piles and the baghouse. Tr. 213-214. Because of the height of the piles, with the scrap pile seven to eight feet high and baghouse dust pile about the same height, at first Cox could not tell what, if anything, confined the piles at their rear. Tr. 214. Later, however, he determined that the piles were contained on three sides. Tr. 215. Thus, all piles were open on one side, the front. Tr. 215. The limestone too was not contained. Tr. 490.

During his September 19th visit, Cox spoke with Mr. Quirin about the dust pile he observed behind the cupola, as depicted in CX 18. Cox and State Inspector Feher took bottle samples of the dust. Referring to CX 38, EPA's information request letter to Leed Foundry, Cox also stated that, in the wake of the agency's request, Mr. Quirin did provide an analysis of the baghouse dust. That dust, collected during the September 19th inspection, was analyzed and found to have significant levels of lead – 6.85 milligrams per liter by the TCLP ("toxic characteristic leaching procedure.") Tr. 243, 264. Exhibit 22, (Bates 0301). This compares with the regulatory level under RCRA of 5.0. Tr. 244. Leed took its own samples at this time and these too showed significant levels: 10.7 and 11.3 milligrams per liter TCLP. Tr. 244-245. There is no serious dispute that the baghouse dust contains levels of lead above the EPA regulatory level.²⁴

²³Cox did not know which material was there, asphalt or macadam. Tr. 224. He stated that his understanding of the distinction is that asphalt is composed of a smaller aggregate material than macadam, but that in neither arrangement is the material loose. Tr. 226. Covered as it was by coating of dust, whatever was beneath it, concrete, macadam, or asphalt, Cox was sure that it was a hard surface. Tr. 227.

²⁴Given the frequent references to RCRA in the CWA claims, it is proper at this point to step back and put this information in perspective by addressing the significance of determining that this dust had levels exceeding the level which, *had the Bevill Amendment been properly applied*, could have triggered regulatory action. It is fair to note, as Counsel for Respondent expressed, that the information regarding this was more about EPA's efforts to introduce this as a back-door-route to enter in the record information concerning the waste matter and effectively

Cox observed during his September 19, 2002 visit that large tarps covered most the waste piles. He also stated that there are two tipping hoppers under the sides of the baghouse and that material enters the tipping hopper by being dropped down from the baghouse above. Cox stated that it drops 20 feet from bottom of the baghouse to the hopper, and that it is a dusty, powdery material. Cox stated that material moves from the baghouse down into the tipping hoppers by the process of the bags being shaken, causing the accumulated dust to fall down. The dust will only fall when the bags are shaken. Tr. 277-278. At least when Cox visited the site on September 19, 2002, the top six inches of the hoppers were open, creating a gap along the 36 to 40 inch wide hopper top. Tr. 236. CX 6 J. EPA Photos, CX 4H and 4I, show loading of the cupola and a pile of coke. Neither area was covered. Tr. 486. Photo CX 4C shows scrap Leed used for its foundry process. Tr. 488. Cox revisited the site on October 24th, along with a sampling team from EPA contractor Techlaw and Pennsylvania's Department of Environmental ("PaDEP") Bill Feher, to take more samples of the baghouse dust. Tr. 257-58. On this visit Cox observed that concrete highway barriers, had been placed in front the openings to the piles, as an additional form of containment. Tr. 258, 262.

EPA witness William Feher, a waste management specialist with the Pennsylvania DEP also first visited Leed, along with Cox, was September 19, 2002. Tr. 281. During this visit he observed the scrap metal, sand and "dust" piles. Feher, realizing that the descriptive label was itself a point in contention, diplomatically noted that the 'dust,' or 'baghouse dust,' or 'fly ash,' "whatever the term that came out of this [dispute was] all over the property [along with] [s]and [] blown all over the property." Tr. 284. Except for the hopper, he saw no containment of these materials. Tr. 285. Regarding the sand, because it was exposed, he noted that it was subject to movement from rain and wind.²⁵ Tr. 286. However, he stated that the baghouse dust pile, which

to taint the record, or at least to distract the Court or any appellate review body, from the issue of whether the CWA Count had been established. This is important because the Court had already ruled that this was irrelevant to the remaining storm water issues. Counsel for EPA represented that the nature of the material was relevant to the Clean Water Act because, apart from the label of hazardous waste, it is still lead and cadmium. Tr. 251-252. Given the Court's ruling on the RCRA matter and since the two cases had separate docket numbers, the Court considered it improper to reference the "RCRA" evidence in the CWA matter. Tr. 262-263. Thus, because this waste was not capable, by virtue of the Bevill Amendment, of being regulated under RCRA, the focus in the CWA Count is whether *any* "pollutants" enter the waters of the United States, be they lead, cadmium, or simply sand. To the argument that the *type* of pollutants reaching waters of the United States matters, at least in determining the appropriate civil penalty, this will be discussed later in this initial decision. For now, it must be noted that the issue does not represent an ongoing controversy, as Leed now removes the baghouse dust and voluntarily disposes it as hazardous waste.

²⁵Feher observed different types of sand at the facility: a tan color, beach-like, sand and a black sand on the rooftop building and the ground. Tr. 288. Feher identified a photograph showing the 'black sand' located on the opposite side of the building from the baghouse. He stated that this came from the rooftop, ending up on the ground on the east side of the main

was located to the rear of the building, was covered with tarps. Tr. 286. The tarp for that pile was held down with pieces of scrap iron but the edges of the material were still exposed. Tr. 287. In contrast to the sand, the baghouse dust was gray in color, and “talcum powdery” in texture. He asserted that the baghouse dust was subject to air movement, “just by walking by it,” and he asserted it would kick up a bit by walking by, because it was so dry and “talcumy.” Tr. 288. With regard to the ‘tipping hoppers,’ Feher stated that the hoppers did not effectively contain the material because it was all over the ground. Tr. 290-291.²⁶ The Court finds on the basis of the evidentiary record that “at the time of PaDEP’s April 25, 2001 inspection, the piles of baghouse dust were uncovered and exposed to precipitation and subject to transport via storm water.” EPA Br. at 20.

In the direction from the piles down to the foundry building, there is a downward slope and there is a downward sloping road there as well. Tr. 220-221. Exhibit 6B. The facility has four subdrainage areas.²⁷ CX. ZX18. John Epps, while called as a witness by EPA, appeared

assembly plant. Tr. 356 - 358. CX 32.

²⁶EPA Exhibit 32 E, is another photo, in which Feher tried to show how the sand washed from the roof and eventually reached the drainage basin and left the property boundary. Tr. 305. Feher located on Ex 18 the location depicted in Exhibit 32 A, just below the words ‘drainage area 3.’ CX 32 B. Tr. 307-308.

²⁷ The Court adopts the characterization of the drainage areas as described in EPA’s Post-Hearing Brief: “Leed Foundry facility consists of four drainage areas or zones. Drainage area 1 is located in the southwestern portion of the facility and is outlined in yellow on CX 18 and Stip. Ex. 3, Figure 2, page EPA 175a. Tr. 449 (Harsh); Tr. 802 (Epps). Drainage area 1 includes areas where raw materials, including scrap iron, limestone, and coke were stored uncovered outdoors. CX 18; Stip. Ex. 3, page EPA 0162-0163 & Figure 2, page EPA 175a; Tr. 204-06 (Cox). Storm water falling on Drainage area 1 is directed to Outfall 1. Outfall 1 is a pipe located on the southeastern portion of the facility's property. Stip. Ex. 3; Tr.803-05 (Epps). Drainage area.2 is located in the southeastern portion of the facility and is outlined in purple on CX 18 and Stip. Ex. 3, page EPA 0163 & Figure 2, page EPA 175a; Tr. 449 (Harsh); Tr. 802 (Epps). Drainage area 2 includes a portion of the foundry building, a paved area containing a propane tank, a shed, and a foundry sand silo. Stip. Ex. 3, page EPA 0163. Storm water falling on Drainage area 2 is directed to Outfall 2. Outfall 2 is a pipe located in the southeastern portion of the facility's property. Stip. Ex. 3; Tr. 805 (Epps). Drainage area 3 is located in the southeastern portion of the facility and is outlined in blue on CX 18 and Stip. Ex. 3, Figure 2, page EPA 175a; Tr.449 (Harsh); Tr. 802 (Epps). Drainage area 3 includes a portion of the foundry building, a small area of unpaved hillside and two concrete scales. Stip. Ex. 3, page EPA 0163. Storm water falling on Drainage area 3 is directed to Outfall 3. Outfall 3 is a pipe located in the southeastern portion of the facility's property. Stip. Ex. 3; Tr. 805-06 (Epps). Drainage area 4 is located in the northern and western portions of the facility and is outlined in green on CX 18 and Stip. Ex. 3, Figure 2, page EPA 175a; Tr. 450 (Harsh); Tr. 802 (Epps). Drainage area 4 includes the area where the baghouse and associated tipping hoppers are located. CX18 (cupola baghouse located on labeled in purple on C.Ex. 18 at area where word "rack" appears); Tr. 232 (Cox), CX 6J (tipping hoppers

under EPA subpoena. Epps is an environmental consultant for Earth Data Northeast, which company was retained by Leed to assist with its efforts to obtain a storm water permit. This included conducting some sampling. Tr. 796. CX 8. Epps helped prepare the Notice of Intent and the Pollution Prevention and Contingency Plan, (“PPC Plan”) and he identified CX 3 at page 0175A as the storm water drainage map for Leed Foundry. Tr. 799-800. (EPA Exhibit 18 is the same document as 0175A except that Exhibit 18 has markings which were added during the course of the hearing.) Tr. 801. Epps agreed that Leed’s property can be viewed as having four subdrainage areas, based on its topography. Tr. 802. Four outfalls, which were color-coded and numbered, were also identified on this exhibit. The “yellow” outfall corresponds to drainage area one, “purple” with area two, “blue” with area three, and “green” for area four. Tr. 802. Epps stated that outfalls 1, 2 and 3 are on Leed’s property but that outfall 4 appeared to be on the property’s boundary line, and he marked 0175A with a red marker to depict those boundary lines. Tr. 807. Epps’ sampling was to look for RCRA metals. Tr. 815. The lead sample for outfall 1 detected 3.5 milligrams per liter. This figure compares with an “action level” for lead in drinking water if there is more than 0.015 milligrams per liter. Tr. 816. 40 C.F.R. § 141.80. Epps identified CX 3 at page 0175A as the storm water drainage map for Leed Foundry. Tr. 800. Epps stated that outfalls 1, 2 and 3 are on Leed’s property but that outfall 4 appeared to be on the property boundary. Tr. 807. Epps marked 0175A with a red marker to depict those boundary lines. Tr. 807. The “yellow” outfall corresponds to drainage area one, “purple” with area two, “blue” with area three, and “green” for area four. Tr. 802.

EPA witness Chad Harsh, an environmental scientist and storm water team leader, in an unannounced visit, inspected the facility on April 15, 2003 and he prepared an inspection report following the visit. EPA Ex 2, Tr.415 425. Harsh’s report concluded that storm water flows either through on-site inlets or through the steep slope towards the storm sewer on Route 61. These conclusions were based on his observations and talking with Mr Quirin. Tr. 432. CX ZX18 shows four subdrainage areas. The inlets for drainage area number 1 were marked in brown by Harsh. Tr. 455. Drainage area 2 was marked in purple but Harsh did not see any inlet areas²⁸ for this on the diagram.

located under the baghouse); *see* Tr. 1080-88 (Quirin) (dust from hoppers then moved to dust pile behind baghouse). This is also the area where the pile of baghouse dust waste is stored outdoors. Tr. 211-12 (Cox); CX 18 (baghouse dust pile denoted in blue). According to the report prepared by Respondent's consultant, storm water falling on Drainage area 4 is directed to Outfall 4. Stip. Ex. 3; Tr. 806-07 (Epps). Unlike Outfalls 1, 2, and 3, Outfall 4 is not a pipe. Outfall 4 is an inlet to St. Clair Borough's municipal separate storm sewer. Tr. 462-63 & 465 (Harsh). According to the report prepared by Respondent's consultant, some storm water falling on Drainage area 4 is directed through a rock-lined channel and collected in an inlet which then directs it to Outfall 4. Stip. Ex. 3. Both Outfall 4 and the inlet at the bottom of the rock-lined channel are inlets that go to the St. Clair municipal storm sewer. Tr. 462-463 (Harsh).” EPA PH Br. at 10-11.

²⁸Harsh defined an “inlet” as “an area or a spot where the storm water is directed to, and there would be an opening. It would be an entrance to the storm water conveyance system,

There really is no dispute regarding the subject of Leed's topography, nor that storm water would exit the property given a sufficient rainfall. As Leed itself expressed this issue, it "does not dispute that storm water falling on the Leed Facility, if it fell in sufficient quantities to run-off, would in certain areas have discharged through one or all of its four point sources discharges. Rather "Leed contests *only* EPA's bald assertion that any such discharges reflected the 'addition of a pollutant' to a water of the United States in violation of 33 U.S.C. § 1311(a), where EPA has not only failed to produce scientific evidence concerning its discharges, but failed to even offer a single observation concerning a discharge during the time period relevant to the complaint." Leed PH Br. at 10.²⁹ (italics added).

pipes, so forth. And, generally, there would be some type of rack on top to keep trash out. Tr. 459. They are man-made. Tr. 460.

²⁹Though not disputed by Leed, the following findings about rain discharge are set forth here: "Respondent's consultant calculated the amount and intensity of a 24-hour rainfall event that would cause storm water to be discharged from the Leed Foundry facilities through Outfalls 1, 2, 3, and 4. Stip. Ex.6. The consultant determined that any measurable amount of rainfall in excess of one one-hundredth of an inch (0.01 inches) over a 24-hour period would result in the discharge of storm water from the Leed Foundry facility. Stip. Ex. 6. According to the consultant, a 24-hour rainfall event of 0.01 inches will cause the discharge of 873.31 gallons per day from Outfall 1, 246.45 gallons per day from Outfall 2, 312.13 gallons per day from Outfall 3, and 1673.89 gallons per day from Outfall 4. Stip. Ex. 6." EPA PH Br. at 11-12. The parties stipulated to the testimony of EPA witness Dr. Hwang, which relates to rainfall events and to his calculations for rainfall or storm water velocities that flow off the site. Tr. 840- 841. The Court adopts EPA's description regarding the stipulated testimony of Dr. Hwang, which relates that "[w]ith respect to Drainage area 4, Dr. Hwang reviewed the description provided by Respondent's consultant in Stip. Ex. 3, the topographic map identified as CX 18 (prior to markings added during the hearing), Stip. Ex. 3, Figure 2, page EPA 0175a (before markings added during the hearing), information provided by Mr. Harsh, and the calculations of Respondent's consultant (Stip. Ex. 6) that any measurable rainfall of 0.01 inch of rain over a twenty-four hour period will cause storm water to discharge from Drainage Area 4 of the Leed Foundry facility to inlets to the municipal storm sewer. Dr. Hwang also based his testimony on his understanding that the soil type at and in the vicinity of the Leed Foundry facility fall within Hydrologic Soil Group B for purposes of the U.S. Department of Agriculture Soil Conservation Service, *Urban Hydrology for Small Watersheds, Technical Reference 55* (June 1986) ("*TR-55* "). See *Additional Stipulations of Complainant and Respondent* (Nov. 1, 2005) (stipulating that the soil type at and in the vicinity of the Leed Foundry facility falls within Hydrologic Soil Group B). Dr. Hwang was uncertain whether the calculations of Respondent's consultant referred to total rainfall or "effective" rainfall. Effective rainfall is the amount of rain in excess of the "initial abstraction." Initial abstraction is a value that takes into account the amount of rain that will be absorbed or intercepted by soil and other surface features. Taking a conservative approach, Dr. Hwang assumed Respondent's consultant's calculations did *not* account for the initial abstraction. Dr. Hwang, used a formula from *TR-55* to calculate an initial abstraction of 0.22, which means that a rain event equal to or greater than 0.23 inches of rain

2. The evidence concerning rainfall during the period in issue.

The Court adopts EPA's characterization of the evidence regarding rainfall at Leed's site during the time in issue and finds that "[t]he preponderance of evidence regarding rainfall events in the vicinity of the Leed Foundry shows that it rained at least one one-hundre[d]th (0.01) of an inch over a 24-hour period at least 417 times from March 1999 through January 2004. CX 34; Tr. 617-619 (Harsh)³⁰ Thus, according to the calculations of Respondent's own consultant, storm water was discharged from the Leed Foundry facility through Outfall[] 4 to the municipal storm sewer³¹ at least 417 times from March 1999 through January 2004. Taking Dr. Hwang's more conservative approach, storm water from Drainage Area 4 on the Leed facility is discharged from Outfall 4 every time there is a 24-hour rain event greater than 0.22 (twenty-two one-hundre[d]ths) of an inch. The preponderance of the evidence demonstrates that 316 rain events greater than or equal to 0.2 inches in a 24-hour period occurred between March 25, 1999 and March 25, 2004 (the date Leed received its NPDES permit, Stip.Ex. 2). Tr. 642-43 (Harsh). Dr. Hwang also calculated that storm water from Drainage Areas 1, 2, and 3 on the Leed facility

over a twenty-four hour period will cause a discharge from Drainage Area 4 of the Leed Foundry facility to the storm sewer. Thus, Dr. Hwang's testimony is that the minimum rain event over a twenty-four hour priod that will cause a dicharge from Drainage Area 4 of the Leed Foundry facility to reach the municipal storm sewer is between 0.01 inches and 0.23. With respect to the areas identified as Drainage Areas 1, 2 and 3 of the Leed Foundry facility on CX 18 and Stip. Ex. 3, Figure 2, page EPA 0175a, Dr. Hwang reviewed Respondent's Notice of Intent (Stip. Ex. 1), the description provided by Respondent's consultant in Stip. Ex. 3, the topographic map identified as CX 18 (before markings added during the hearing), Stip. Ex. 3, Figure 2, page EPA 0175a (before markings added during the hearing), photographs identified as CX 5A, 5B and 5C, information provided by Mr. Harsh, and the calculations of Respondent's consultant (Stip. Ex. b) that any measurable rainfall of 0.01 inch of rain over a twenty-four hour period will cause storm water to discharge from Drainage Areas 1, 2 and 3 through Outfalls 1, 2, and 3. Based on the information he reviewed, it is Dr. Hwang's understanding that storm water falling on Drainage Areas 1, 2 and 3 is directed to Outfalls 1, 2 and 3 on the east side of the Leed Foundry Facility. From Outfalls 1, 2 and 3, the storm water flows in concentrated form down a steep hillside toward State Route 61. Upon reaching the bottom of the slope, the storm water travels south along State Route 61 to a large swale that drains to the municipal sewer. Using standard equations from *TR-55*, Dr. Hwang calculated that a rain event of 0.6 inches over a twenty-four hour period will cause storm water flowing from Drainage Areas 1, 2 and 3 of the Leed Foundry facility to discharge out Outfalls 1, 2 and 3 and from those outfalls to the muncipal storm sewer. The parties have stipulated that Dr. Hwang's calculations are more conservative than those provided by Respondent's consultant."

³⁰It was Harsh who testified about the rainfall data from the St. Clair Sewer Authority. Tr. 558. The data he obtained covers the years 1999 to 2004.

³¹The municipal storm sewer is a conveyance, using pipes, to transport storm water. In this instance such water does not go to publicly owned treatment work. Rather, it travels directly to a water body leading to waters of the United States. Tr.. 459-460.

reach the storm sewer and from there go to Mill Creek every time there is a 24-hour rain event greater than 0.6 (six-tenths) of an inch. The preponderance of the evidence demonstrates that 148 such rain events occurred from March 25, 1999 - March 25, 2004. Tr. 644 (Harsh).” EPA PH Br. at 38-39.

EPA points to Stipulated Exhibit 3 in which the Respondent’s consultant agreed that a mere one-hundredth of an inch of rain will cause a discharge of storm water from the site. EPA also notes that the consultant agreed that for outflow 4 a discharge of that small amount is sufficient to result in a discharge directly to the storm sewer. Tr. 978. Although Harsh had some difficulty interpreting CX 56 and 71, the rainfall data from the United States Weather Service, he then stated that to acquire the data, he called the Weather Service and told them that he told needed rain stations near St. Clair Borough, PA. The weather service told him that Joliette, Tamaqua and Mahanoy City were the closest stations. Tr. 574. Further, EPA’s Epps testified that it rained on the day he was at Leed’s foundry and that there was water coming out of each outfall when the sampling took place. Tr. 814. EPA 0891, reflects the sampling results.³² Leed took its own sample of rainwater from the facility’s outfalls on November 19, 2003. Obviously, it rained sufficiently on that date to create rainwater flow to the outfalls. EPA exhibit CX 37, the rainfall measured at nearby Mahanoy City reflects .19 of an inch of rain on that day. Bates 0426. So too the St. Clair Wastewater Treatment Plant in Schuylkill, PA, reflects 1.1 inches of rainfall for the same date. EPA CX 34, Bates 0351. Similarly, CX 71 reflects measurable rainfall on that date at the Tamaqua rain gauge, Bates 0954. Thus, the Court concludes that these nearby rain stations³³ are reliable indicators of similar rainfall at Leed’s facility for the same dates. Without making a finding as to the specific number of rainfall events that occurred at Leed’s facility, the multiple rain measurement results make it clear that Leed experienced rainfall events of sufficient magnitude sufficient to cause rain water to exit its facility on *many* occasions during the time in issue in this proceeding.

3. The record establishes that pollutants traveled off Leed’s site.

There is ample evidence that the Leed Foundry site was dusty.³⁴ EPA witness Cox testified, credibly, that the Leed site was very dusty, both inside and out. It is also undeniable that sand is an integral component of Leed’s operation and for that reason it is understandably present around areas associated with its storage and use.³⁵ EPA’s Feher identified conveyors at

³²There are four columns reflecting sample results within EPA 0891. Each column corresponds to the same numbered outfall. Thus column 1 relates to outfall 1, column 2 to outfall 2, and so on. Tr. 813.

³³The Court takes judicial notice that Tamaqua is 16 miles from St. Clair, Mahanoy City, less than 14 miles, and the St. Clair wastewater facility is in the same borough as Leed’s facility.

³⁴The Court, while recognizing that a foundry is engaged in industrial activity, noted on the record that EPA Exhibits revealed dust and uncovered materials. For example, CX 4N shows sand residue in the baghouse parking lot. CX 4 photographs Tr. 485-494, 501.

³⁵Many of the skirmishes between the parties ultimately meant little. For example, whether one can discern sand or not in the photographs within CX 32 is a distraction, because

the facility that transport sand. Tr. 360. CX 32D, a photo of the roof of the foundry. When Feher was first at the site in September 2002 he observed that it was a very dirty operation. He maintained that those conditions remained poor even through February 2005, as at that time material was still blowing on the ground and escaping from the hoppers and sand was still on the ground.³⁶ Tr. 365.

It was Feher's testimony, which the Court accepts, that during later visits, in October 2002 and years later, in November 2004, the facility continued to be dusty. He still observed material on the ground around the hoppers and he asserted that the material under the hoppers was getting washed away from that area CX 32 D. Bates stamped page 0340, a photo of the building at Leed Foundry, shows the amount of sand being deposited on the roof from the conveyor systems. Tr. 304. Feher stated that rain water washes that sand from the roof to the ground below and that he observed that happening on that visit. Tr. 304 - 305. Feher testified that sand washed from the roof would eventually reach the drainage basin from which it would exit the property boundary. Tr. 305. CX 32 E. Feher also stated that he observed the sand leaving the property, coming out of an outlet he identified.³⁷ According to his credible testimony, this discharge was in an area with a steep slope, leading down to Route 61. CX 18. Tr. 309.

Based on the record evidence, the Court finds that Leed's housekeeping, if not minimal, was definitely not optimal. EPA witness Chad Harsh noted that, although street sweepers are referred to in his report, he did not personally see them operating during his visit. Tr. 432. Further he opined, credibly in the Court's view, that the sweeping was not being done often enough or properly, given the amount of dust at the facility. Tr. 433. Harsh's report also states that raw materials and waste were exposed to storm water. These included the baghouse dust, scrap iron, coke, limestone. Harsh saw no other controls, such as a settling pond, being

the fact of the matter is that sand was an integral part of the foundry's manufacturing process.

³⁶As another example, on a later visit by Feher, he noted that while the tipping hoppers had plastic bags in them, they were still not totally sealed, as material was still escaping to the ground. Tr. 311. Although Feher acknowledged that Mr. Quirin took issue with the conclusion that this was baghouse dust, maintaining the material on the ground was sand blowing around from the ground, the Court observes that the key point is that, whatever the material was, be it baghouse dust or simply sand, in either case it was a source of pollutants which would be subject to traveling, via storm water drainage, off the site.

³⁷EPA witness John Fellingner, an employee of Techlog, Inc., an environmental consulting company, testified regarding sampling it conducted for EPA at Leed's facility. Tr. 386- 392, 496. EPA Exhibits 33, 107. The exhibits involve the TCLP results, and reflect the toxicity characteristics to determine "leachability," that is, the mobility of the metals in the samples. Tr. 392. Fellingner sampling led to the conclusion that if water flows through the subject material, it will release some of its pollutants. For example, Fellingner noted that sampling Pile 1, Grab 1, reflected 13.6 percent lead in it. Tr. 392. Cadmium results for that sample were 288 milligrams per kilogram. Similarly, Fellingner noted that Pile 1, grab 2 also shows the amount of lead and cadmium in the sample. Tr. 396.

implemented. Tr. 434. The Court's finding recognizes that a foundry cannot be expected to be spotless; it is after all an inherently dusty manufacturing facility. However, the record clearly establishes that there were ample sources of loose material available to be carried off the property when sufficient rainfall occurred.

Last, even if for the sake of argument the Court were to adopt the view as Counsel for Leed put it that "the only evidence of storm water discharge is the one that accompanied Mr. Quirin's permit to the Department which was acted upon and approved as a discharge," (Tr. 977) this alone constitutes substantial evidence to establish the violation set forth in Count XIV. While this is sufficient, a measure of common sense may also be applied to the other evidence of record. As noted, the record is replete with evidence that Leed's facility had many sources of pollutants available for transport off its site via the storm water outfalls. Sand alone, as a pollutant, would have been transported readily in any rain event, of which there were many such events, producing sufficient rainfall, per Dr. Hwang's testimony.³⁸ The notion that EPA must

³⁸For a number of reasons, the testimony of EPA witness Joel Hennessy, a professional geologist, currently employed by EPA, needs only the briefest mention. Though qualified at the hearing as an expert for identification and characterization of unconsolidated materials and asked to determine if material on the ground at Leed's facility was foundry sand or baghouse dust, his testimony was wanting on that issue. Among other problems, the witness acknowledged that for the samples he examined from Leed's facility, this was the first time in his career that he ever used a microscope to identify mineralogy, as he did here. Tr. 862 863. Also, he knew in advance what he was supposed to be looking at. That is, his was not a blind examination and consequently he had knowledge what the samples were supposed to be before he examined them under a microscope. Tr. 891. Although this decision has determined that, in terms of establishing liability, it does not matter whether a pollutant was bag house dust or simply sand, Hennessy himself diminished his work, summing up his self-evaluation by stating that "the only thing that [he] fe[lt] comfortable in stating [wa]s that sample number two looked very much like a quartz sand based on looking at quartz sand before." Tr 896. Another witness whose testimony for EPA added little to the proceeding was Dr. Ruth Prince. Although the witness has a Ph.D. in toxicology, and duties which include "review[ing] and conduct[ing] human health risk assessments for the corrective action sites as well as ecological risk assessment," her testimony largely involved the adverse effects of lead on humans, a subject not in dispute. Tr. 908. Based on her review of CX 33 and CX 66 (EPA 0885), she expressed that waste material present at Leed's facility contained significant amounts of lead. Tr. 918. This too is not in contention. Leed's Counsel stipulated that lead is a toxic substance and that there is "good medical and scientific evidence to set the levels that EPA sets." Tr. 925. Working under an EPA hypothetical assumption that lead from Leed's facility could be transported by storm water through the hillside between Leed's property and Route 61, Dr. Prince expressed that birds and small mammals would face a risk from that lead. Tr. 930. In a grand assumption that lead-laden storm water would make its way to Mill Creek, Dr. Prince expressed that there would be a risk on the "aquatic community and Mill Creek." Tr. 935. The doctor acknowledged that she has never been to the site. Beyond the uncontested assertion that, for many reasons, lead is dangerous to the ecosystem, the doctor's testimony did not advance EPA's case. Regrettably,

sample each site and demonstrate that such pollutants are actually flowing from the facility is rejected as it is unduly burdensome and defies common sense.³⁹ The court can take notice that sand, dirt and dust, all common at Leed's facility, would naturally travel along with the storm water during a rain event on the order identified by Dr. Hwang. Further, the suggestion that EPA would have to negate all other potential sources of pollutants is rejected.⁴⁰ Additionally, there is no evidence, only speculation, that such other sources did in fact contribute to the samples EPA obtained and even if there was such a *contribution* from other sources, that does not suggest that Leed's own pollutants would not enter waters of the United States. Given the fact that storm water does exit Leed's property, there is no basis to assume, given the dusty, sandy conditions and consequent sources of mobile materials, that the water would exit in a pristine state.⁴¹ Such

her testimony is also an example of a witness who, knowledgeable and confident on direct examination, became flummoxed with simple and direct questions when posed during cross-examination. See transcript at 941- 947. Such distressingly contrasting presentations from the same witness did not bolster that witness's credibility.

³⁹Thus the fact that Feher, who had been at the Leed property four times, never sampled storm water discharges on any visit or that he only issued one notice of violation to Leed does not refute the sampling *that Leed itself took*, nor the witnesses' testimony about the dusty nature of the operation, nor the commonsense conclusion that pollutants would travel off-site during rainfall events of the order identified by Dr. Hwang's stipulated testimony . Tr. 348-352.

⁴⁰Working on the assumption that such assertions raised doubts about whether EPA had demonstrated that the pollutants arose from Leed's facility or from other sources, Respondent's Counsel asserted that the photograph at Bates stamp 0227 shows the property line of Reading Anthracite Company, not Leed's. So too, Leed's Counsel asserted that Route 61 has a storm water swale and that *one* purpose of that is to convey storm water coming off Route 61, not simply storm water from Leed's facility. Tr. 671. Similarly, EPA's Harsh was asked if coal trucks would travel along Route 61, and if he knew what pollutants, if any, would come off of roadways. Tr. 672- 673. In fact, Harsh agreed there could be many contributors to storm water found along the Route 61 drainage gully. Tr. 683. However, these and a number of other issues raised by Leed were essentially distractions in that they did not disprove EPA's case. As another example, questions concerning whether photos showed erosion scars that were on Leed's property, or in fact were located on adjacent owners' property, and whether there was a construction project involving the installation of a natural gas line, really do not matter. This is because the record establishes that it rained during the time in issue, that such rain water would have drained off Leed's property and the common sense conclusion that such exposed material would have been carried along with such rain water. Also, as mentioned *supra*, confirming the accuracy of this common sense conclusion, Leed's own storm water sampling showed this to be the case. Thus, while it is true that EPA did not proceed to rule out every other potential contributor to storm water pollutants, it simply does not matter. As a matter of its evidentiary burden, it would be unreasonable for EPA to be required to do more than it did here to establish that there were a host storm water runoff events from the Respondent's property and ample sources of pollutants that would be carried off the site in those events.

⁴¹Quirin, explained that "sea coal," which is a sand, is used in Leed's production process. Tr. 1099. He also admitted Quirin admits that the facility's operations produce dust and that

an assumption would run contrary to commonsense. It also would fly in the face of the substantial testimony from various witnesses, including Mr. Quirin, that the foundry is a dusty place of business.⁴² Again, confirming this are Leed's own storm water results. This is not offered in any critical sense, of the sort one might expect from someone who unrealistically expected a foundry to run its business with the tidiness of a hospital. Rather, it is accepted uncritically as a real world acknowledgment that foundries produce dust and dirt in the course of their normal operations.

The Respondent presented the owner of Leed Foundry, Mr. Edmund Quirin as a witness.⁴³ Tr. 982. A Vietnam veteran, Mr. Quirin supervises the facility's day-to-day operations. As most of Mr. Quirin's testimony has relevance for the discussion of the penalty determination portion of this initial decision, it will appear later. For now, on the issue of liability, Mr. Quirin simply could not recall with exactness, but his best recollection was that the facility's fly ash was covered in 1998 or 1999. Tr. 1071. He testified, credibly, that in 2001, when PaDEP conducted an inspection, all but one portion of the ash was covered by a tarp. Tr. 1072-1073. However, it is fair to state that there were lapses in Leed's covering the ash. This was evident when Mr. Quirin was confronted with a copy of an April 25, 2001 inspection report of Ms. Llewellyn of PaDEP, which report he recognized by virtue of his initials on it. That the report reflect that, at least on that occasion, the dust piles were uncovered. Tr. 1077. The same Report states that dust is being openly stored and that there are fugitive emissions from the piles. Tr. 1078- 1079. Faced with this report, Mr. Quirin conceded that, according to that report, the piles were not in fact then covered. Tr. 1079.

Mr. Quirin also agreed that, up until September 2004, Leed did not dispose of any bag house dust off-site. Tr. 1088. Quirin, called this failure "stupid," as he was aware that the material tested positive for lead and cadmium, but without excusing himself, he stated that they never got around to properly disposing of it. Tr. 1088. He also conceded that neither its coke or limestone has been fully contained, i.e. covered, and that the containment had been limited to concrete side walls and concrete ground floors.

when inspectors were present at the site, there were significant amounts of dust covering good portions of its manufacturing areas. Tr. 1104. Candidly he admitted that it doesn't take long, that is only a few hours, for operating conditions to create such dust and that such dust is created daily. Tr. 1105.

⁴²The Court does not accept the claim that Quirin told Cox that there is a "sea of ash" at Leed's property whenever it rains. Tr. 1011. It would be highly unlikely for any property owner to employ such a damning description of its own operation.

⁴³As this decision explains, the particulars of Leed's boundary lines are not critical to the finding of liability. Accordingly, Quirin's marking (by a blue dotted line) on Leed's property's boundary lines on Stipulated Exhibit 3, (EPA 0175A), his agreement with the boundary markings (represented by a red marker) made by Mr. Epps, his noting that on Exhibit 18, that "S 3" represents a storm water inlet which is not on his property, but rather is on Reading Anthracite's property, that the storm water culverts marked along Route 61 on the western side are also not on Leed's property, all do nothing to refute the finding that pollutants can and have flowed off Leed's property during rainstorm events of sufficient magnitude.

C. EPA established a violation for Count XIV.

Leed's central contention regarding this Count is that EPA did not meet its burden of proof in that it failed to show that there was any discharge a pollutant. Leed notes that the elements of establishing a Section 301(a) violation of the Clean Water Act, 33 U.S.C. § 1311(a) require that EPA show that the Respondent discharged a pollutant, from a point source, into a navigable water, without having an NPDES permit. Leed focuses upon the first element, that one "discharge a pollutant," noting that the phrase means "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). Although Leed acknowledges that a pollutant includes things like rock, sand, soil or dust, as well as industrial waste, its chief point is that there must be an *addition* of some pollutant to the water and that the evidentiary record must establish such an addition. Leed PH Br. at 9.

Thus, given the "addition of a pollutant" requirement, Leed asserts that EPA must show in fact that there was some *addition* of a pollutant. Consequently, it contends that it is not enough to simply show that there were discharges of rain water during the time period involved with the Count. *Id.* at 10. It bears emphasis that Leed has conceded each element of the alleged offense save one – the addition of a pollutant.⁴⁴ It asserts that it is insufficient for EPA to simply make a bald assertion to establish that element. Instead, Leed maintains that something more must be presented, such as "scientific evidence concerning [the] discharges . . . [or] a single observation concerning a discharge during the time period relevant to the complaint." *Id.* at 10. By this measure, it contends that EPA failed to present any such evidence.⁴⁵ Leed considers it fatal to EPA's burden of proof that the record does not contain a single storm water sample from any of its witnesses and it dismisses EPA's attempt to meet this evidentiary obligation through its "*theoretical estimates* of the number of *possible* storm water discharges that *might have occurred* from the Leed facility, based on sophisticated models and calculations using rainfall data from unverified sources" *Id.* at 11. It argues that, despite EPA's calculation that there could have been some 500 occasions for storm water discharge, it never used one of those opportunities to observe the site during a rain event or to collect a sample or otherwise test exiting storm water. In short, Leed contends that in the absence of such evidence, EPA cannot be found to have met its burden of proof or persuasion that a storm water discharge at Leed contained any addition of a pollutant. *Id.*

Despite Leed's assertion that the record lacks any storm water sample, as mentioned, it has acknowledged that there is one such sample in the record by virtue of the sample collected

⁴⁴In conceding each of the other elements for Count XIV, Leed agrees that "storm water falling on the Leed Facility, if it fell in sufficient quantities to run-off, would in certain areas have discharged through one or all of its four point sources discharges." Leed PH Br. at 10.

⁴⁵Leed notes that EPA's storm water inspector, Mr. Harsh, visited the Leed facility on two occasions during the five years involved in the Complaint but on neither occasion did he observe or sample a storm water discharge. Nor, Leed maintains, did any other witness for EPA provide such evidence. It notes "none of the EPA witnesses even visually observed a storm water discharge during the relevant time period from any of the four point sources, let alone sample[] one." Leed PH Br. at 11.

for Leed by Earth Data Northeast (“EDNE”) in November 2003. This sample was taken by Leed as part of its NPDES permit application. Leed contends that this sample should not be considered to establish that it added pollutants to storm water because it was required to obtain the sample as part of the NPDES permitting process and because in the face of the sample results, PaDEP thereafter issued Leed the permit and did so without imposing any numerical effluent limitations. *Id.* at 9.

Perhaps recognizing the weakness of its contention that the sample should not be considered at all, Leed argues in the alternative that if the single sample can be used to show that it added pollutants to the water, the single sample result is insufficient by itself to establish that such additions of pollutants occurred during the five year period charged. Rather, Leed submits that the lone sample is nothing more than a snapshot of that discrete discharge event and that it is insufficient to extrapolate conclusions from that about its discharges generally. Absent expert opinion on the subject, it asserts that the single sample is not sufficient by itself to establish that the result obtained is representative. Leed PH Br. at 13. As with its earlier contention regarding the sample, Leed contends that the important feature of the sample is that, upon reviewing the sample results, PaDEP granted the permit, and by that act, authorized Leed’s discharges *without requiring any numerical effluent limitations* for any of the point sources. *Id.* at 12. Thus, the permit was issued and neither EPA nor PaDEP ever made recommendations for storm water controls with that permit and it was not until the hearing that Mr. Harsh voiced any criticism of Leed’s PPC plan. Accordingly, on the grounds just described, Leed objects to using the lone sample result it provided as a basis to establish the violation of 33 U.S.C. § 1311(a).

Addressing EPA’s other evidence that storm water exiting its facility carried pollutants, Leed speaks to the testimony of inspector Feher regarding his observation of rainwater from a roof drain at the facility. It notes that this occurred some eight months *after* Leed received its NPDES permit. While Feher stated that he observed water flowing on the paved surface and that it contained a black, silty material that was not baghouse dust,⁴⁶ the more important point according to Leed is that Feher’s observations and his photos were taken after Leed had received its NPDES permit, a point in time which was also two months after the Complaint in this case had been filed. Consequently, Leed maintains that such evidence cannot be used to establish polluttional discharges for the time period involved in the Complaint. Leed PH Br. at 15.

The Court does not agree. Absent evidence that this was a new phenomena, Feher’s observations can reasonably relate back to the time period covered by the Complaint. There is nothing in the record that dispels the logical conclusion that such black, silty material would have existed as a by-product of Leed’s normal operations during that time, just as it existed when Feher observed it.

Speaking to the five samples taken at Leed’s facility by Mr. Harsh or by Ms. Gower in

⁴⁶Leed contends that the photographs associated with Feher’s testimony do not substantiate his testimony. Further, Leed contends that the photos are deficient in any event because they none of them are from the final discharge point. Leed PH Br. at 14.

August 2003, Leed asserts that four of those samples were collected of solids,⁴⁷ while one was collected from Leed's property, three were adjacent to, but nevertheless off, its property, and the last, sample 1A, was from standing water from a storm water ditch along state road 61, but it apparently had no signs of contamination. Leed PH Br. at 15. With regard to the solid samples, Leed states that the record contains no evidence that this material ever left its facility. Leed offers that its "vigorous street sweeping program . . . most likely . . . cleaned up [the material by] the end of the workday" Leed PH Br. at 15. While three solid samples did exceed EPA criteria, Leed discounts these results because the area sampled was off Leed's property and received drainage and runoff from a variety of other sources. For example, Leed contends that sample 3 did not represent debris at a storm water inlet on Leed's facility, but in fact was from the adjacent property of the Reading Anthracite Coal Company.⁴⁸

As to the samples from the drainage ditch at the culvert below State Road 61, Leed argues that as these were not taken from Leed's property, and received drainage from "numerous other areas, including SR 61, EPA's evidence is wanting as it failed to differentiate among the multiple contributing sources."⁴⁹ Leed points to EPA's failure to rule out the other sources and it notes that EPA's Dr. Prince acknowledged the importance of background studies in this regard. Such an approach, before concluding that Leed was the source of the discharges, would have taken into account the unpermitted landfill that is hydrologically and topographically upgradient of the ditch adjacent to SR 61 and the impact from the ashes and charred remains of the former Hospital Homes that was burned down by the fire department. This failure was heightened by the creek's designation as an "impaired water due to acid mine drainage/metals." Leed PH Br. at 18.

⁴⁷These were from Ex. 66, samples 1B, 1C, 2 & 3. Leed PH Br. at 15. Leed states that only the sample from material on the ground surface at its facility was within the EPA action level for lead.

⁴⁸Leed contends that Mr. Harsh was oblivious to having taken the sample from the adjacent coal company's property and consequently EPA never considered whether discharges from the coal company itself could have impacted the chemical characteristics of the sample. Leed PH Br. at 16. It notes that while EPA described Leed's fly ash as light or grayish in color, Harsh described sample 3 from Exhibit 66 as solid material which was dark in color. *Id.* at 17. As explained in this decision, none of these contentions operate to negate the finding that Leed's storm water carried pollutants from its property to the drainage points. At most, these contentions are suggestive that other sources may have contributed pollutants. However, any such possible contributions from others do not show that Leed was not a contributor in its own right.

⁴⁹As an example, Leed points to Harsh's reluctant acknowledgment that the ditch where samples 1B and 1C were taken showed erosion scars. It asserts that these scars demonstrate that there was runoff from the bank of SR 61. Further, Leed does not view Harsh's description of the sample material as "soil" instead of describing it as "sediment" as a mere misstatement. Instead it views Harsh's testimony as an admission that it was indigenous material and therefore not sediment, which could have washed into the ditch from some other source. In this regard Leed notes that lead and cadmium can occur naturally in soil and that lead can also show up in soil due to its former presence in gasoline. Thus, Leed argues that it is simply too speculative to claim that the lead came from Leed's facility. Leed PH Br. at 17-18.

Stipulation 6. As another example of the failure to account for other sources of contaminants, Leed points to Harsh's testimony concerning the hillside below Leed's facility but above SR 61. While Harsh identified erosion scars in this area and tied it to point source storm water discharge pipes from Leed's facility, he neglected to note that a significant part of that hillside is owned by Schuylcoal, Inc., not Leed. Later, he conceded that he could not state with certainty that the erosion scars were in fact on Leed's property, and he ultimately conceded that the material in the ditch along SR 61 could have come from Schuylcoal. Leed PH Br. at 19.

In sum, Leed's primary objection is that these samples failed to take into account the other adjacent sources of storm water discharge and that the sampling was taken off Leed's property. The Court rejects this contention. Once EPA has established that the Respondent is a source for storm water pollutants, the burden of establishing that there are alternative sources for such pollutants rests with the Respondent. This burden involves more than merely asserting that other sites may be pollutant sources. Further, even if other pollutant sources were established, that would not negate evidence of the Respondent's contribution. Similarly, Leed's claim that its own sample, which the Court has determined to have been sufficient by itself to establish liability, is merely a snapshot or an aberration and not representative of pollution discharges, requires that Leed, not EPA, establish that to be the case.

Addressing Feher's dust and sand samples, taken in the vicinity of Leed's cupola baghouse, on February 2, 2005, (Exhibits CX 29 & 81), Leed asserts that as these samples came some eleven months *after* Leed received its NPDES permit, which was more than four months subsequent to the filing of the Complaint, they have no relevance to the case. Even if considered, Leed has issues about the fairness of such samples, as it contends that Feher went out of his way to obtain the gravest results by shaking undiluted baghouse dust onto the ground for sampling. Leed PH Br. at 20. For the reasons already set forth, the Court does not agree with Leed's argument.

Accordingly, although Leed concedes that lead and cadmium are hazardous materials and that its production processes create dust, its overall objection to EPA's case is that having those materials present and conceding the dusty nature of a foundry operation, is not sufficient from an evidentiary standpoint to show that its storm water contained the addition of a pollutant. Thus it contends that the necessity for competent evidence and from the larger perspective, due process, require that such facts in the record in order to establish the alleged violation. Leed PH Br. at 21, n 6.

EPA focusing on the one Count which Respondent disputes, Count XIV, also takes note that the only disputed element of that charge is whether any of the discharges reflected the addition of a pollutant. EPA Reply Br. at 2. EPA maintains that "all of the evidence in the record demonstrates that precipitation falling on Leed's facility in fact picked up and transported pollutants present at the Leed facility" and establishes that from March 25, 1999 through March 25, 2004, the date Leed received its NPDES permit, Leed "repeatedly discharged storm water associated with industrial activity from its facility without an NPDES permit." EPA Br. at 33, 36-37. In support of this, EPA notes that in its answer Leed admitted that "at certain times during the referenced time period . . . rainfall and snowfall, which fell on the surface of [its] Facility

flowed across and in some cases off the Facility as sheet flow, entering various surface water channels including Mill Creek.” EPA Br. at 37. EPA also observes that, while Leed denies that these are point source discharges, it has admitted that “a small portion of its Facility contains a storm water collection point to convey a small percentage of the sheet wash off of its Facility into existing drainage channels, and that some portion of such flow is likely to enter Mill Creek or unnamed tributaries [to that Creek], depending on the size and duration of the precipitation event and other factors” *Id.* at 37. EPA also observes that when Leed filed its Notice of Intent to PaDEP, as part of its application for a NPDES permit, it acknowledged that the sampling it conducted on November 19, 2003 reflects that storm water discharged from its facility on that date and that the receiving water for such discharges is Mill Creek. *Id.* at 37. Stipulation Ex. 1. EPA maintains that these acknowledgments are themselves sufficient to establish liability for this Count.

Beyond this, EPA notes that it is not required to prove the *number* of days such discharges occurred in order to establish the violation, as that is a penalty consideration. Nevertheless, it declares that it has in fact established that such discharges occurred on many occasions during the years prior to Leed’s obtaining a storm water permit. In this regard it points to the testimony of its expert, Dr. Hwang, who used a “standard hydrologic formula and rainfall data to establish [the] discharges of storm water,” as well as the estimation of Leed’s consultant that discharges occur whenever there is rainfall exceeding one one-hundredth of an inch over a 24 hour period. When the rainfall data for the St. Clair Borough is consulted for the applicable time, it reflects that there were at least 417 such occasions where the rainfall met that threshold. EPA Br. at 38-39. Even using more conservative estimates, assuming that for drainage area 4 it takes a rainfall of 0.22 of an inch, and for areas 1 through 3, it takes 0.6 of an inch, in a 24 hour period, to have rain discharges leaving Leed’s facility, the rain data shows that there were 316 such events for the former area and 148 such events for the other three drainage areas. EPA Br. at 39.

EPA notes that CX 34 shows that from March 1999 through March 2004, there were at least 148 times when there was rainfall greater than 0.6 inches and 316 times during that period when the rainfall was at least 0.2 inches. The 0.6 measure meant, according to Dr. Hwang’s figures that storm water would flow to Drainage areas 1, 2, and 3 and be sufficient to reach the St. Clair municipal storm water sewer, while events of at least 0.2 inches would be sufficient to reach that sewer from drainage area 4. Even a rain event of at least 0.01 inches would cause storm water from all Outfalls 1 through 4. EPA points to Leed’s storm water sampling showing that storm water discharged from Outfalls 1 through 4 contained high levels of lead and cadmium, and other pollutants from Leed’s facility. EPA Reply Br. at 5. EPA takes these calculations and associates them with the rainfall data reflected in CX 34, the St. Clair Borough rainfall data, data that was unchallenged by Leed. Taken together, EPA submits that it has sustained its burden of proof, establishing that there were numerous unpermitted discharges from Leed’s facility from March 1999 through March 2004. The Court agrees that when one couples Leed’s own sampling results with a minimum of 148 rain events sufficient to cause rainwater to be discharged from Leed’s facility, EPA has thereby established 148 separate events when the discharge of pollutants occurred.

EPA believes that Leed's attempts to claim that there is no direct evidence of storm water discharge fail, pointing to Leed's Notice of Intent filed with PaDEP, which included Leed's own sampling of storm water discharges from Outfalls 1 through 4 on November 19, 2003. That sampling, it notes, showed the presence of lead, cadmium and other pollutants. EPA argues that as that sample preceded the time when Leed ultimately received its NPDES permit on March 25, 2004, it shows that unauthorized storm water discharges occurred. EPA Reply Br. at 6. Further, EPA argues that the fact this information came from Leed itself, rather than EPA, is completely irrelevant in terms of its probative value nor, EPA submits, is there any basis to support Respondent's suggestion that this sample is somehow not representative of its storm water discharges.

EPA also submits that Feher's testimony constitutes such direct evidence that "pollutant-laden storm water associated with industrial activity discharges" was discharged from Leed's facility. EPA Reply Br. at 7. It submits that Feher's observation of black sand from the roof of a building on the property, coupled with his viewing that sand washing off from there and flowing to a drain, as captured on a photograph he took, shows this. Contrary to Leed's claim, EPA states that Feher testified that he went to the drainpipe discharge point and saw black sand-laden storm water pouring from that pipe. EPA contends that, while Feher's observations were made after Leed received its NPDES permit, it is still probative because Leed's operation had not changed from the time of the violations through the time he made his observations. Indeed, Respondent's Brief makes the remark that there is no difference in Leed's operation. EPA Reply Br. at 8, quoting R's Br. at 5.

As EPA sees it, Leed's argument is really a contention that no amount of circumstantial evidence can be sufficient and, as a corollary to that, only direct observation and sampling can establish the violation. EPA submits this is contrary to the accepted bases for evidence in civil as well as criminal cases. EPA Reply Br. at 9, citing *Colbro Ship Management Co., Ltd. v. United States*, 84 F.Supp. 2d 253, 259 (D. Puerto Rico 2000). With regard to Leed's contention that its discharges are not an "addition of pollutants", EPA notes that Leed's storm water is not purely that, but is storm water associated with industrial activity as it is undisputed that when it rains on Leed's property that water comes into contact with the raw materials and waste associated with its industrial activity. EPA Reply Br. at 10. *Natural Resources Defense Council v. EPA*, 966 F.2d 1292, 1304 (9th Cir. 1992), *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004)

EPA contends that the reality is that Leed is asking the Court to accept the idea that when water falls on the piles of its raw materials and waste and the loose dust found at its facility, and then flows to the facility's various drainage points and ultimately is discharged through one or more of the facility's outfalls, this occurs without that storm water picking up or transporting any dust, particles or pollutants. EPA Reply Br. at 11.

Apart from this argument, EPA also contends that, factually, there is evidence that materials sampled near storm sewer inlets came from Leed's facility. It notes that Sample 3 (CX 66) was taken at an inlet at the bottom of the rock-lined channel shown on CX 18, and made part of Stipulated Ex. 3, page 0175a, and that Leed's own PPC states that water from its facility flows

down that channel to that inlet and from there to Outfall 4. EPA Reply Br. at 12. EPA takes issue with Respondent's claim that Mr. Harsh was vague in distinguishing solids from soils (or sediments), countering that his testimony was clear that his samples were taken from the path of storm water flows and that the materials sampled were deposited from those Leed flows. EPA Reply Br. at 12, n.4. As to Leed's claim that other discharge sources could explain the pollutants reaching the municipal storm sewer, EPA replies that, even if true, that does not negate the Respondent's contribution of pollutants. EPA Reply Br. at 12. In addition, while Leed has raised the specter of background, or naturally occurring, lead and cadmium, as potential explanations for that found in the samples, EPA points out that Leed offered no evidence to establish that in fact they were other sources for the pollutants. Accordingly, it asserts that the mere claim that a nearby landfill or coal mine could be pollutant contributors or the possibility that storm water discharge from State Route 61 could contain lead or cadmium is insufficient to establish that as facts.⁵⁰ EPA Reply Br. at 13-14.

Last, EPA discounts Respondent's use of its subsequent issuance of an NPDES permit in 2004, as that does not negate the unauthorized discharges which preceded the issuance of that permit. Beyond that, EPA disputes that no changes accompanied the issuance of the permit, asserting that it required effluent limitations in the form of best management practices. Such practices were to be developed by Leed with its Preparedness, Prevention and Contingency ("PPC") Plan, and EPA suggests that any failure to implement the PPC, as required by the NPDES permit, indicates that Leed would have violated its permit. EPA Reply Br. at 15.

The Court agrees with EPA's assertion that "[t]here is little, if any, dispute as to how storm water flows on the Leed Foundry facility, how it is discharged from [it], and where it winds up." EPA Br. at 9. There are four drainage areas or zones, as identified on EPA Ex. 18 and Stipulated Ex. 3. These drainage areas lead to outfalls.⁵¹ Except for outfall 4, the other three outfalls consist of pipes. In contrast, outfall 4 is a direct inlet to the local (St. Clair Borough's) municipal storm sewer. EPA's hydrology expert, Dr. Hwang, after factoring the amount of rain that would be absorbed otherwise intercepted, concluded that a rain event of 0.23 inches over a 24 hour period would result in a discharge from Drainage Area 4 of the Leed Foundry reaching the municipal storm sewer. That expert also opined that, for drainage areas 1 through 3, a rainfall of 0.6 inches over a 24 hour period would cause storm water to discharge to the outfalls for those areas and then to the municipal storm sewer. EPA Br. at 16. It is also noteworthy that Leed's own consultant expressed that "any measurable amount of rainfall in excess of one one-hundre[d]th of an inch (0.01 inches) over a 24-hour period would result in the discharge of storm water from the Leed Foundry facility." EPA Br. at 11, Stipulated Ex. 6.

⁵⁰EPA also notes that while Leed has pointed out that *some* of the inlets to the municipal storm sewer are not on its property, there is nothing in the CWA that requires that a discharger own the entire point source or the path that the discharge takes. Instead, the requirement is that the discharger cause the discharge. *United States v. Velsicol Chemical Corp.*, 438 F.Supp. 945, 947 (D.C. Tenn. 1976). EPA Reply Br. at 14, and n.7.

⁵¹An "outfall" refers to a "place where a sewer, drain or stream discharges." The American Heritage Dictionary of the English Language, 3rd Edit. 1992.

Accordingly, to sum up the foregoing discussion, Leed is found to have violated both of the Clean Water Act counts. Remembering that Leed challenged only whether EPA proved that pollutants were in its storm water discharges, Count XIV was established, at a minimum, through the evidence supplied by Leed itself, which was the storm water analysis it submitted in connection with its application for a NPDES storm water discharge permit. That evidence undeniably showed the presence of pollutants. While that evidence alone is sufficient, as an *independent* basis, to establish the violation for Count XIV, the Court also finds that pollutants were necessarily present for virtually all of at least 148 occasions when rainfall was more than 0.6 inches. This conclusion rests upon the determination that Leed remained a dusty and sandy operation during the period of time involved with the violation, and the common sense conclusion, which was buttressed by Leed's own storm water analysis, that such loose, unconsolidated materials will flow along with the water produced in rain events of more than 0.6 inches. Leed's assertions that other sources could have contributed to the pollutants in the storm water was speculative, rested on the erroneous believe that EPA had to prove that such other potential sources did not produce pollutants, and did not disprove EPA's establishment that Leed had provided its own contributions in any event. As for Count XV, Leed conceded liability for that alleged violation.

III. Determination of Penalty for Counts XIV and XV

A. EPA's Perspective regarding the appropriate penalty

EPA recognizes that, for CWA cases that proceed to trial, there are no applicable civil penalty guidelines for the Court to consider. Consequently, the Court's recommended penalty is to be based on the record evidence and the application of that evidence to the penalty criteria set forth in the Clean Water Act. The penalty factors are: the nature, circumstances, extent and gravity of the violation, any prior history of such violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, such other matters as justice may require and the violator's ability to pay.⁵² 33 U.S.C. § 1319(g). As this is a Class II penalty case, the total penalty cannot exceed \$157,500.⁵³ 33 U.S.C. § 1319(g)(2)(B). EPA is seeking that maximum penalty amount for the CWA violations alleged in Counts XIV and XV of the Complaint." EPA Reply Br. at 29.

EPA discusses the penalty criteria of the nature, circumstances, extent and gravity of the violations collectively, contending that these factors must be considered "extremely serious" due

⁵²Due to confidential business information ("CBI") issues, this consideration is discussed separately in "CBI" version of this decision. Accordingly, the publicly available version of this decision does not contain the CBI discussion.

⁵³The statutory provision itself caps a class II penalty at \$125,000 but the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, had the effect of boosting the cap to \$157,500. 69 Fed. Reg. 7121, 7124 (February 13, 2004).

to the toxicity of the pollutants, the large number of unauthorized discharges and the lack of controls employed. It maintains that even if the baghouse dust is exempt from regulation under RCRA, that does not reduce the gravity of the pollutants from that dust when that issue pertains to violations of the Clean Water Act. EPA is also critical of Leed for its virtual failure to implement any storm water controls and it notes the testimony of the inspectors who considered the site to be very dirty. Further, EPA rejects Leed's suggestion that such considerations should have been included in a sixteenth count for violations of its NPDES permit, and since that did not occur, the penalty should be reduced. EPA Reply Br. at 17. EPA also notes that Leed does not challenge that lead and cadmium are toxic pollutants, nor that their discharge is potentially harmful to human health and the environment. While Leed does contest whether it was established that it was the source of these pollutants, it does not dispute that the levels detected "often exceeded the levels of concern by orders of magnitude." EPA Reply Br. at 18 and Stip. Ex. 1. Although EPA acknowledges that this record does not establish that there was in fact any increase in pollution to the receiving waters, it responds that this is not necessary to show the seriousness of Leed's violations. Nor does EPA believe that the fact that Mill Creek has been identified as impaired by acid mine drainage is a basis for reducing a proposed penalty. This is because one goal of the CWA is to restore the integrity of the nation's waters. EPA Reply Br. at 19, citing *In re Pepperell Associates*, 9 E.A.D. 83, 117 (EAB 2000), aff'd 246 F.3d 15 (1st Cir. 2001).

As for Leed's arguments that its NPDES permit requires little more than it was already doing, EPA contends that this is a "misreading" of that permit, and it suggests that there is an issue whether the terms of that permit are relevant at all to discharges that preceded its issuance. EPA Reply Br. at 19. To Leed's contention that its NPDES permit imposed no effluent limits, EPA replies that the permit's requirement that Leed follow best management practices ("BMPs") amounts to a "type of effluent limitation" and that effluent limits need not be numeric anyway. *Id.*⁵⁴

Addressing Leed's culpability and history of violations, EPA states that Leed had "full control" over these violative conditions and that it has "demonstrated no diligence in identifying and correcting problems related to contaminated storm water runoff." EPA Br. at 59. In terms of the

⁵⁴EPA notes that Leed's consultant conceded that the PPC plan he prepared does not "contain a narrative discussion of appropriate BMPs to control the volume of storm water discharging from the facility as mandated by the NPDES permit." EPA Reply Br. at 21. However, the permit was issued on February 23, 2004 and the Complaint filed on September 30, 2004, yet EPA did not include this purported failure in its Complaint. EPA. Although it does not refute the consultant's statement that he submitted the Preparedness, Prevention and Contingency Plan ("PPC" Plan) to PaDEP at the time he submitted the NOI, EPA tries to avoid its own complicity in this by weakly claiming that there is no evidence that PaDEP ever approved the PPC plan when it issued the NPDES permit. EPA Reply Br. at 21-22 and n. 11. More importantly, the CWA Counts in this case are *not* about best management practices, nor PPC plans, nor the interpretation of appendices within Leed's plan. An understanding of the actual charges in Counts XIV and XV makes this clear. EPA has lost sight of this.

factor of culpability, EPA asserts that Respondent's own brief "reflects [Leed's] longstanding pattern of environmental negligence" but in making that claim, EPA refers to Leed's failure to cover its baghouse dust piles until after it was cited for that. It also refers to the installation of jersey barriers for those piles as occurring only after the Complainant's first inspection. Presenting its EPA own take on Mr. Quirin's testimony, EPA asserts that the decision to pave parts of the facility was strictly a business decision on his part and it takes a skeptical view of Quirin's claim of reliance on his consultant, and his assumption that the consultant would attend to acquiring the storm water permit. Instead EPA suggests that Mr. Quirin knew this obligation was being ignored. EPA Reply Br. at 24.

EPA highlights Leed's failure to monitor its storm water discharges as the "best example" of its attitude of trying to get away with as little as possible. EPA Br. at 61. In support of this contention, it disputes Leed's interpretation of Appendix J to its PPC Plan but it effectively concedes the merit of Leed's view by admitting that the Appendix does speak to Leed's duty to monitor its storm water. EPA now contends that PaDEP's reference to Appendix J was "inadvertent" and that it should have told Leed that Appendix B was the operative section. EPA Br. at 62. In a similar fashion, while at the hearing EPA maintained that Leed had a history of violations and that it would be supplying authority for its contention that violations of other environmental statutes are to be considered in assessing a Clean Water Act penalty, in its post-hearing brief, it retreated from that position, and admitted that Leed had no history of CWA violations. Despite this concession, it still contends that Leed has a "history of violations related to exposure of contaminants to the environment and the potential of release of fugitive pollutants." RX 9. With no case law to support this expansive view of violation history, EPA admits that inspector Harsh did indeed consider Leed's "history of violations related to fugitive dust and generally poor housekeeping at the facility . . . [as] evidence that the problems at the facility were ongoing." EPA Br. at 63.

In EPA's view, Leed realized an "economic benefit" from the CWA violations totaling \$24,843. This figure was derived upon inserting its estimate of the Leed's delayed and avoided costs into EPA's BEN model software program for calculating the economic benefit. EPA Br. at 47. It notes that Leed has conceded both the costs related to obtaining the NPDES permit of \$4,396 and the periodic site inspection cost of \$500. As to the costs Leed does dispute, EPA states that the avoided costs of semi-annual sampling should be included, noting that Leed's consultant agreed that the PPC Plan requires Leed to conduct sampling after *each* precipitation event, regardless of the terms of Appendix J to the NPDES permit. EPA Reply Br. at 16. However, apart from its interpretation of the PPC Plan, EPA asserts that its position that under the plan Leed must at least conduct semi-annual sampling is reasonable, since Leed stipulated that it conducts such sampling.

As to Leed's contention that the removal of baghouse dust is not relevant to consider as an delayed cost in computing a CWA penalty, EPA again points to Leed's PPC Plan's requirement that "[f]oundry sand from iron casting" is to be disposed of and "[f]ly ash is hauled by U.S. Bulk Incorporated. . . ." As these costs are required under the PPC Plan, EPA states they should be included as part of the calculation of the economic benefit realized by Leed's avoidance of its obligations. EPA Reply Br. at 17. EPA cites to *In re: John A. Capozzi d/b/a Capozzi Custom*

Cabinets, RCRA (3008) App. No. 02-01, 11 E.A.D. _ (EAB March 25, 2003) for the proposition that a “[c]omplainant’s compliance scenario for purpose of approximating economic benefit should reflect reality of method that Respondent actually used to come into compliance.” EPA Reply Br. at 17.

B. Leed’s perspective regarding the appropriate penalty.

In agreement with EPA, Leed also notes that there is no penalty policy to apply and therefore that one must evaluate the statutory criteria to determine the penalty . Addressing these factors, Leed asserts that its failure to obtain an NPDES permit was not deliberate. Leed PH Br. at 27. It points to Mr. Quirin’s testimony that, prior to 1998, Leed did not have storm water catch basins and pipelines with point source discharges. These were added in 1998 as an environmental control with the site paving initiative, which was undertaken in cooperation with PaDEP as part of a plant-wide dust management program. Leed’s point is that before it undertook those steps it had unregulated non-point source storm water flow. The Court takes note that EPA has not challenged this assertion. Quirin admitted that by adding these catch basins and pipes he knew that some permit would then be required but he assumed, incorrectly, that his engineer had obtained these. Leed PH Br. at 25. While this failure occurred, Leed asserts that it is clear that was not a willful or knowing omission on Leed’s part. It adds that, as the permit was later obtained without any changes in Leed’s storm water management, it is fair to conclude that the omission was not driven by any financial motive either.

Leed emphasizes that its NPDES permit does not change the way it manages its storm water. Although the permit required that it develop a Pollution Prevention and Contingency Plan, (“PPC Plan”), that plan, which was reviewed by Mr. Harsh, among others, *was* approved. While Leed does have to monitor its discharges and periodically inspect its facility, because Leed does not have to handle its storm water management any differently than it did before the permit was issued nor did the permit require it to alter its operation in any material way, it contends that the gravity associated with the violations is low. In terms of the economic benefit or avoided costs consideration, while Leed acknowledges that it is reasonable to include the deferred cost of obtaining the NPDES permit and the cost of periodic site inspections, which together total \$4,896, it disputes two of the avoided costs that EPA contends should be included. These are the costs of \$2,500 to sample discharges semi-annually and \$32,000 ascribed to the disposal of its fly ash. Harsh also agreed that in computing Leed’s disposal costs he took all of its waste manifests for 2004, totaled up those costs, and then projected out what Leed saved by not spending that money in prior years. Tr. 733. Leed contends that it is not subject to the former and that the fly ash disposal cost is not a proper cost to consider for a Clean Water Act penalty. Leed PH Br. at 30. Regarding the fly ash, Leed asserts that the fly ash waste stream is a “state-only” residual waste under Pennsylvania’s Solid Waste Management Act and that, even if it were deemed a federal hazardous waste, there is no basis to consider any cost associated with another federal statute, when the issue relates only to the Clean Water Act. Restated, Leed’s position is that nothing in the Clean Water Act or in its NPDES permit addresses the management of fly ash waste. Leed PH Br. at 30-31. The Court agrees. Neither of these disputed costs should be considered in determining Leed’s economic benefit from its compliance failures.

Leed also takes the position that it has no history of violations, despite EPA's attempt to suggest otherwise. While Mr. Harsh stated he had heard through a chain of other individuals that Leed had been cited in the past for dust related violations, EPA in fact only introduced two notices of violation. One, issued by PaDEP inspector Llewelyn in 2001 for alleged air emission violations, has never been deemed a final action by Pennsylvania, and consequently it is not appealable. The other, reflected in EPA Exhibit C 116, involving recordkeeping requirements, was issued *after* the time alleged in the Complaint and therefore, by definition, can not be considered to be part of a *history* of violations.⁵⁵ More importantly, neither alleged violation deals with storm water discharges and as such they should not be considered in any penalty calculation at all. Leed PH Br. at 32.

C. The Court's Determination of the appropriate penalty.

1. Penalty Factors other than ability to pay.

As an initial matter, the appropriate measure of the period of time that may be considered under the Complaint must be addressed. The parties agreed that the statute of limitations is five years, but the period of time applicable was in dispute. EPA asserted at the hearing that it can look back five years from the date Leed received its storm water permit in March 2004, while Leed contends that the period is measured from the date the Complaint was filed. Tr. 342. This is not without significance, as EPA's calculations of its proposed penalty considered the period from March 2004 to March 1999. By comparison the Complaint was filed on September 30, 2004, and by that measure, the statute could only look back to September 30, 1999, or six months less than the time EPA considered. Clearly, Leed's position is correct. Courts have applied the five year general federal statute of limitations to administrative actions for civil penalties under the Clean Water Act. 28 U.S.C. §2462; *3M Co. v. Browner*, 17 F.3d 1453, 1455-59 (D.C. Cir. 1994). The Environmental Appeals Board ("EAB") has also applied the five year statute of limitations running from the date of the filing of the administrative complaint. *In re Britton Construction Co., et al.*, CWA Appeal Nos. 97-5 & 97-8, 8 E.A.D. 261, 274-275 (EAB 1999).

Also, in evaluating EPA's proposed penalty from the broad perspective, Mr. Harsh, who calculated the penalty for EPA, admitted that he never ascribed a specific dollar amount to each of the two counts involved. That is, he simply arrived at a grand, (maximum), total for both, with no designated penalty amount for the two counts involved. Tr. 845. Harsh expressed EPA's position is that the statutory maximum of \$157,500 is based on the complaint, but that it is not related to the number of counts. Tr. 854. Although he believed that the maximum penalty was warranted in this case, Harsh acknowledged that Leed had no history of previous violations under the CWA. Tr. 578. However, contrary to the law, he felt it was appropriate to consider unrelated clean air violations and RCRA inspections that weren't specific to this case, on his personal

⁵⁵Leed is correct on this point. It received its NPDES permit in March 2004, while the notice of violation, issued in *April* 2004, pertaining to the Solid Waste Management Act, came after the CWA violations had ended. The notice was also described as "neither an order nor any other final action" and, last, as it does not involve the Clean Water Act, it is not part of "any prior history of *such* violations." 33 U.S.C. § 1319(g)(3). emphasis added.

theory that such other violations contribute towards the significance of the storm water violations. Tr. 578-579.

With regard to the nature, circumstances, extent and gravity of the violations, the Court makes the following findings. Although EPA described the violations as “extremely serious” due to the toxicity of the pollutants, the large number of unauthorized discharges and the lack of controls employed, a number of points must be made about these assertions in order to put the violations in proper perspective.

The Court agrees with EPA’s assertion⁵⁶ that the fact that the baghouse dust is exempt from RCRA regulation does not mean that the Clean Water Act violations cannot take account of the water pollutant sources created by the Respondent’s failure to cover that material to prevent it from being carried by storm water. However, having acknowledged this, it also must be pointed out that Leed has acted as a good corporate citizen by voluntarily having the dust disposed of as if it were RCRA regulated material. Further, EPA’s criticism of Leed for its “virtual failure” to implement any storm water controls, must be evaluated in the context that the approved PPC Plan did not require any special controls. It is fair to state that the Plan was, with the exception of one paragraph, a boilerplate creation, which did not distinguish any particular needs for Leed’s operation.⁵⁷ It is also worth noting that, as Mr. Quirin stated without contradiction, EPA never challenged the completeness of Leed’s PCC plan, nor did anyone from EPA or PaDEP ever call Leed, asserting that its plan or Leed’s implementation of it was inadequate. Tr. 1005. Accordingly, EPA can hardly claim now that Leed was woefully deficient in implementing the plan that PaDEP approved.

Although Leed has some degree of control over the discharge of pollutants, the Court does

⁵⁶The Court also agrees with EPA’s contention that it is not necessary for it to show there was in fact any increase in pollution to the receiving waters. Further, the Court agrees with EPA that if Mill Creek is an impaired water, that does not provide a basis for reducing the proposed penalty.

⁵⁷EPA’s Harsh conceded that, except with respect to the coal pile TSS limit, the permit issued to Leed does not impose any numerical effluent limitations on its discharges. Tr. 648. Stipulated Ex 2. Harsh also agreed that *only* page 0898 of the permit is actually individually written for Leed *and the rest is all boilerplate text*. Tr. 648. Harsh also agreed that the page added for Leed reads: “All monitoring requirements specified in Appendix J on Page 36 of this general permit apply to this discharge. The enclosed Discharge Monitoring Report, DMR, must be kept onsite or submitted to the department as specified in the permit.” Tr. 649. Harsh also agreed that Appendix J in the permit, which appears at EPA 0933, also sets forth the monitoring requirements. Tr. 650. As Harsh noted in reading from this provision: “Facilities subject to Appendix J are *not* required to monitor and may perform an annual inspection of the facility in lieu of monitoring.” Tr. 650 (emphasis added).

not agree with EPA's characterization that it demonstrated no diligence in identifying and correcting problems related to contaminated storm water runoff. First, as mentioned, Leed did, take action on its own volition by having its baghouse dust removed and disposed of as hazardous waste, despite the exemption provided by the Bevill Amendment. Thus, as of September 19, 2002 its accumulated fly ash was disposed of as RCRA hazardous waste and Leed continues to dispose of this waste in this manner. Further, the bins which collect the flyash are now lined with a plastic bags. EPA exhibits 5J and 4PP show these bags, renamed as R's Exhibits 5 and 6. Tr. 1053, 1054. Second, Leed has two sweepers at the site to help control dust and dirt. The presence of sweepers is evidence that Leed did not ignore housekeeping at the foundry. The Court finds, again based on Mr. Quirin's credible testimony, that at the end of a production day, Leed does run its sweeper. When possible, it will also run the sweeper during the day's operation.⁵⁸ Further, while the covering of piles of raw materials was not perfect, in large measure the piles were covered by tarps. As Mr. Quirin noted, Leed has taken steps to limit storm water contact with the bag house dust. There is also a concrete foundation, along with concrete walls on three sides and the material is tarped. Tr. 1011. To deal with the inevitable creation of bag house dust, Leed has sealed up the area where the bottom of the bag house meets the discharge bin. Tr. 1014.

In addition, before receiving the facility's NPDES permit, the Pennsylvania Foundrymen's Association provided some training for Leed's employees about materials management at the facility. Tr. 999. This training included hazardous waste and safety health issues as well as dust management. Tr. 999 - 1000, 1003. Mr. Quirin paid for this training. Tr. 1000. The Court rejects EPA's claim that Mr. Quirin knew he had no storm water permit.⁵⁹

⁵⁸Mr. Quirin credibly testified that both sweepers do not run every day, but one would. Tr. 1013, 1174.

⁵⁹The Court finds that although nominally in charge of Leed's environmental compliance and environmental management, Mr. Quirin has no independent expertise in these matters and consequently he relies on consultants for environmental compliance issues. These consultants included Earth Data and Guimond and Associates. Tr. 985. As noted, Mr. Quirin testified, credibly, that he thought he had a storm water permit. He also explained that in 1988 the entire property was not paved. A PaDEP representative visited the site, prompted by complaints that dust was coming off his property from truck traffic. The representative suggested that Leed use a water truck to reduce the dust but Mr. Quirin decided to pave the area. Tr. 994. Mr. Quirin expressed that his environmental engineer believed he did not need a permit until after the paving was done and he was under the impression that his consultant, Guimond and Associates, would thereafter take care of getting the permit. Tr. 994 - 995. The Court finds that Mr. Quirin's testimony was credible in asserting that he believed his consultant would take care of obtaining the necessary permit. Thus, the Court credits Quirin's description of the visit from Mr. Harsh in 2003, and his statement that when Harsh asked about Leed's storm water permit, he went to look for it, and it was then he realized Leed did not have one. Tr. 995. Harsh conceded that, based on Mr. Quirin's conduct, it appeared that Mr. Quirin believed he did have a NPDES permit, when Harsh inquired about the subject. Tr. 730. Hence, the Court credits Quirin's testimony.

With regard to Leed's economic benefit or savings resulting from the violation, the degree of culpability, and such other matters as justice may require, the Court makes the following findings: Regarding economic benefit or savings, Harsh described it as the "amount of money that should have been spent at some time, [but] that was[not] [spent]." Tr. 584. Such practice puts one at "a competitive advantage over similar industries that were complying with storm water requirements." Tr. 584. In Harsh's view, Leed benefitted from delayed costs, by avoiding the permit application fee, the initial sampling and the removal of the baghouse waste." Tr. 585. The preparation of the PPC plan would be another avoided cost. Although Harsh's primary concern was with the stockpiling of the baghouse waste, he acknowledged that there had been some tarping of this "sometime after 2001." Tr. 601.

With respect to Leed's degree of culpability, and such other matters as justice may require, it is fair to state that Mr. Quirin does not possess a high level of sophistication in these matters of regulatory compliance. As noted earlier, the Court has found that Mr. Quirin was credible in his testimony that he thought the environmental consultant would attend to obtaining any necessary permits. Also, as noted, Leed has taken the unrequired action of disposing of its baghouse dust as if it were RCRA regulated waste. This was an environmentally responsible approach for Leed to take and this action, alluded to earlier in this decision, should be reflected tangibly in the penalty computation under the factor of 'other matters as justice may require.' Beyond that, it is fair to state that Leed has displayed a cooperative attitude throughout the events which led to this litigation. When problems and shortcomings were identified, Leed went about correcting them promptly. For example, Mr. Feher admitted that Mr. Quirin did clean up the sand observed on the roof and did so promptly. Tr. 360. Although Feher denied that he refused Quirin's request that he take a photo of it after it was all cleaned up, he admitted that no photo was taken and, as Mr. Feher later admitted, he *would have* taken a picture if the roof had remained dirty. Tr. 361- 362.

It is also relevant to note that Mr. Epps, who submitted the Notification of Intent for a storm water permit application for Leed, which submission included a copy of the PPC plan, testified, credibly, that EPA's Harsh never called him after the submission to discuss issues related to the adequacy of the PPC plan, nor did anyone else from EPA or PaDEP call him. Instead, as Epps noted, the permit was issued. In fact, as of the time of the hearing, no one from these agencies has contacted Leed to raise issues of alleged deficiencies with their PPC plan.⁶⁰ Tr. 831- 833. Also, EPA's Harsh conceded that when Leed submitted its PPC plan, which his order required them to do, he made no comments on it after it was submitted. Tr. 696. Specifically, Harsh never commented to Leed or to PaDEP that he had any problems with either of those documents (i.e. the Notification of Intent or the PPC plan). Tr. 697. Although Mr. Harsh stated that he did have a conversation with PaDEP about Leed's permit, *this only occurred in the week before the hearing*. Tr. 698. Thus, Harsh conceded that, until the week before the hearing, he never called PaDEP and said, for example, "make sure Leed installs a catch basin" nor did he

⁶⁰While within its authority to do so, it is hoped that this decision will not spur EPA or PaDEP into launching a new action against Leed based on claimed inadequacies of the PPC plan but rather that, if deficiencies exist, the parties will work together to resolve such matters.

ever suggest that Leed should not get a general permit and that an individual permit should be required of them. Similarly he never called PaDEP to advise that the permit should specify that all Leed's raw material stock piles be covered. Tr. 700.

It is also noted that EPA's Harsh, when asked about the administrative order that was issued,⁶¹ explained that the Order required Leed to submit a complete Notice of Intent, which included items such as a site survey and a facility diagram as well as a requirement to identify all storm water outfalls and to develop a PPC Plan.⁶² However, after Harsh recited the many things Leed had to do and that these actions had to be done *within ten days*, he admitted that *Leed did exactly that*. Tr. 439. Accordingly, in assessing the penalty here, these actions by Leed bear on the evaluation of both the factors of the circumstances and such other matters as justice may require.

While it is true that EPA is not required to make any environmental assessment of any receiving water, nor is it duty bound to make any evaluation of possible impacts on organisms that use such waters, the absence of such information operates to diminish EPA's claim that the maximum penalty is warranted in this instance. Further, in assessing the penalty factors collectively, it cannot be ignored that Leed, now with its authorized permit, discharges storm water exactly as it did before it received that permit. Leed PH Br. at 21.

In terms of other pollutants at the site, Harsh stated these can come from anywhere on the site. Tr. 609. Pollutants include sediment. Tr. 610. (Thus erosion sediment control is addressed in the permit.) Harsh maintained that when he was at the site in April 2003 he saw no efforts at storm water control, although he then stated that the baghouse dust was no longer on the site. Tr. 611. Harsh then changes his answer for this, admitted some efforts had been made. As to sweeping efforts by Leed, Harsh said he saw no evidence of that. Tr. 612. Harsh stated that the storm water system only conveyed the water, it did not in any way treat it or its contaminants. Tr. 613. Had he observed such efforts he would have considered them to mitigate the penalty. Tr. 614. Harsh admitted that when Leed had "all the waste removed" by March 199, "that was a big part of this, in removing that waste," in terms of managing the storm water discharge. Tr. 614. Good housekeeping and covering things are two important steps to take. Directed to Stipulated exhibit 6, this is a letter from Leed describing the amount of rain in a 24 hour period that would result in a discharge. Tr. 616. This information showed that 1/100th of an inch would result in a discharge.

As for Mr. Harsh's idea of Leed's compliance history, he was far afield. He agreed that he had expressed that Leed's compliance history for air quality matters were related to this case, but when asked "[w]hat exactly did [he] consider as air quality violations in [his] calculation of the penalties [for this case], he replied: "Well, I'm not aware of the exact violations whether it be air quality or RCRA or whatever other specific violations whether they be notice of violations or

⁶¹While questioned about the administrative order, the questions were not propounded for the purpose of demonstrating the truth of the matters asserted within the order.

⁶²The PPC Plan is Pennsylvania's version of a SWPPP. Tr. 437- 438.

whatever else took place. It's in consulting with the other inspectors that have been out there and describing the types of things that were happening. That's what I'm talking about. I'm not necessarily referring to a specific violation on a specific date. It's these regulatory inspections and their findings that they relayed to me when I consulted with them." Tr. 710-711. Harsh explained further that he "consider[ed] their observations an indication of their compliance history." Tr. 711. Digging himself deeper, Harsh stated: "I didn't base this penalty on EPA's policies." Tr. 711. Rather he stated he "was looking at the statutory factors." Tr. 712. He expressed that one's "history of violations" refers to more than cited violations, at least "as they pertain to gravity, nature, circumstances, extent, so forth." Tr. 712. While he stated that he was "relying on more so the observations and the underlying inspections," he then stated that he did not rely on any inspections for 1999 or 2000. Tr. 714. For 2001, Harsh stated that he relied on information forwarded to him from Mr. Cox. But he did not know where Mr. Cox got his information and he was not relying on a specific inspection for that year, but he believed there was an inspection in 2001. Tr. 715. As he explained further, Harsh's calculation was based on what Cox had related concerning the piles and the operation generally. Tr. 717. Harsh asserted that the pile was not covered in 2001, but could not make a statement about it in 1999 or 2001. Tr. 718-719. Although he also affirmed that there were RCRA issues, when asked to assume that there were no RCRA violations, he still asserted that would not change his penalty calculation. Thus it is clear that Harsh's consideration of the penalty factors only worked in one direction. In sum, Harsh expressed that he relied "on general descriptions given to [him] by other folks to kind of get an idea of what the site was like prior to visiting it." Tr. 726. When Leed's counsel emphasized this point, by asking Harsh if was aware of any specific violation under other environmental statutes, to each question Harsh answered in the negative. Tr. 726-728.

Based on the foregoing discussion and having considered each of the statutory criteria, except for the following discussion regarding the violator's ability to pay, the Court finds that Leed should pay a civil penalty of \$39,375.00. The Court notes that in its own right this represents a substantial civil penalty and that, as particularly applied to Leed's operation, the impact of this penalty on Leed would be significant. The Court now turns to whether it is appropriate to reduce the penalty upon considering Leed's ability to pay.

2. Consideration of the factor of the Respondent's ability to pay a civil penalty.

[Portions of pages 40 and 45 and all of pages 41 through 44 are deleted from this "CBI Deleted" version of this decision.]

. . . Given this situation, a fair consideration of this factor compels a further reduction in the penalty to \$19,687.50. . . [This penalty] is still deemed appropriate as reduced, since [Mr. Quirin] is the CEO for Leed, and it is important to impress the importance of compliance with the Clean Water Act, as well as all environmental statutes. The Court is of the view that the penalty imposed will accomplish this.

ORDER

A civil penalty in the amount of \$19, 687.50 is assessed against Respondent, Leed Foundry, Inc. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the:

Treasurer, United States of America, and mailed to:

U.S. EPA, Region 3
Regional Hearing Clerk
P.O. Box 360582M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within 20 (twenty) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within 30 (thirty) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30 (b), to review the Initial Decision.

William B. Moran
United States Administrative Law Judge

April 24, 2007
Washington, D.C.

Appendix I

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. §§ 6921-6939e⁶³ and the Clean Water Act⁶⁴ (“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.

⁶³ 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.*

⁶⁴EPA 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.

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 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.”⁶⁵ *Id.* at 2. The coke is burned in the cupola to generate heat to melt the iron. Once in a 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 ⁶⁶ 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.”⁶⁷ *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.”⁶⁸ Leed Memorandum

⁶⁵“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 fossil fuels.

⁶⁶Leed 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.

⁶⁷Respondent 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.

⁶⁸Leed, 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

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 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 waste⁶⁹ 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.⁷⁰ *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

generated as a byproduct of fossil fuel combustion” Leed Memorandum at 7.

⁶⁹Leed 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.

⁷⁰The 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).

rulemaking.⁷¹

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 Motion⁷² 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

⁷¹Associated 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 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.

⁷²EPA 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.

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 Congress⁷³ on each category and ultimately decide whether or not Subpart C regulations should apply to them.⁷⁴ EPA’s first report was not 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 sag and flue gas emission control waste - *from combustion of coal at electric utility power plants.*”⁷⁵ 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.⁷⁶ Further, EPA determined that wastes from fluidized bed combustion of fossil

⁷³Regrettably, 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.

⁷⁴According 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 1978, EPA stated that utility wastes such as fly ash, bottom ash, and scrubber sludge, and other “special wastes” were to be regulated in a less rigorous manner. EPA Memorandum at 6, citing to the Federal Register at 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.

⁷⁵Restated, 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.

⁷⁶The 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,

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 10-12.⁷⁷

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 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,⁷⁸

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).

⁷⁷EPA 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)).

⁷⁸To 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

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 determined that “the remaining FCC (sic)⁷⁹ 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

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.

⁷⁹EPA 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).

toxic,” EPA admits that it decided *not* to list this waste as hazardous.⁸⁰ *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.⁸¹ 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

⁸⁰EPA 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.

⁸¹While 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* 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.

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.⁸² The 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.⁸³

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]."⁸⁴

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

⁸²Although 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.

⁸³In 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.

⁸⁴Although 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.

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 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.⁸⁵ 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.⁸⁶

⁸⁵Leed 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.

⁸⁶Leed 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

Id. at 6.

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 intendment conveyed by unclear statutory language may be

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 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.

discernible from its legislative history.”⁸⁷ 318 F.3d at 48 (citations omitted). Courts “traditionally refer[] to the legislative history and the atmosphere⁸⁸ 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 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.*”⁸⁹ *Id.* at 3361 (emphasis added). Further,

⁸⁷It 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.

⁸⁸As discussed, the ‘atmosphere’ in which the Bevill Amendment was passed could not have been clearer.

⁸⁹Subparagraph 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

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.**” 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 regulatory burdens EPA has proposed”⁹⁰

Further, Mr. 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*

immediately before he spoke about it and the language in issue in this case was not changed at all. 26 CONG. REC. 3360 (1980).

⁹⁰This 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. Public Law 96-482. 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.

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.”⁹¹

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.⁹² 96th Congress 2d Session, Senate Report No. 96-1010, October 1, 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... .”⁹³ *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

⁹¹It 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.

⁹²In fact the Senate Bill had essentially the same language as the House with regard to this provision.

⁹³The 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.*

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.

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.⁹⁴ *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.⁹⁵

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,

⁹⁴The 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.

⁹⁵Although 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.

with the extended comment period ending on September 3, 1981. 46 Fed. Reg. 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.”⁹⁶ As it summed up its tentative conclusions⁹⁷, 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.* at 22821. 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,⁹⁸ concluding that regulation under subtitle C was not appropriate . . . [and] not warranted.”⁹⁹ 64 Fed. Reg. 22821.

⁹⁶EPA’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.

⁹⁷EPA’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.

⁹⁸As 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.

⁹⁹The 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 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

EPA's March 1999 Report continues its disconcerting description of the Bevill Amendment that RCRA Section "3001(b)(3)(A)(I)¹⁰⁰ ... 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 Decree¹⁰¹ resulted from the citizens' suit and, as EPA describes it, a schedule was created under the Decree to complete its regulatory 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

amendment of RCRA Section 3001 and for that reason "excluded fossil fuel combustion wastes from the[] regulations." 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.*

¹⁰⁰It 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.

¹⁰¹The 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").

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.¹⁰²

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 4.8.3. (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 4.0.¹⁰³ 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 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.

¹⁰²Chapter 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.

¹⁰³It 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 citing 4.1, 4.1.3, and 4.2. Thus it is noted that, at the time of this Report, EPA still did not have the facts, as expressed in the Bevill 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.

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 facilities¹⁰⁴ ... **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.

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 fo 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

¹⁰⁴As 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.

Second Report dealt with any other wastes.¹⁰⁵ 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,"¹⁰⁶ 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 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.¹⁰⁷

¹⁰⁵To be precise, as EPA described the other wastes as "comanaged utility combustion wastes" and "non-utility coal combustion waste."

¹⁰⁶EPA Memorandum at 15.

¹⁰⁷Thus, 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.

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