

**AMERICAN PORTLAND CEMENT ALLIANCE**

1130 CONNECTICUT AVE. N.W., SUITE 1250, WASHINGTON, D.C. 20036
PH: 202 408-9494 FAX: 202 408-0877 E-MAIL: ANDYOHARE@APCA.ORG

May 28, 2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Room 10235
725 17th Street, N.W.
Washington, D.C. 20503

The American Portland Cement Alliance is pleased to provide the Office of Management and Budget (OMB) comments on the notice titled "Draft Report to Congress on the **Costs** and Benefits of Federal Regulations," which was published in the *Federal Register* on March 28, 2002 (67 FR 15014). The notice was published with a Report to Congress on the costs and benefits of federal regulation and requests recommendations from the public regarding the disposition of regulations proposed and promulgated by federal agencies.

The American Portland Cement Alliance (**APCA**) is a trade association representing virtually all **domestic** production of portland cement. APCA's **42** member companies **operate** 104 manufacturing plants in 33 states and distribution centers in **all 50 states**.

Of interest to APCA is Chapter IV of the Report to Congress, titled "Review of Regulations and Regulatory Programs" (67 FR 15033). In this chapter, OMB **seeks** nominations from commenters regarding federal agency rules that ought to **be** rescinded on the grounds that they are outmoded or unnecessary. OMB **suggests** that in developing their nominations, commenters consider whether the agency has discretion under the statute to modify *or* rescind the nominated rule.

APCA believes that it has a **prime** candidate for an unnecessary agency rulemaking, and one which the Environmental Protection Agency (**EPA**) clearly **has** the authority to rescind. **As will be explained below**, this rulemaking relates to cement kiln dust (CKD), a byproduct of the Portland cement manufacturing **process**. It **also** relates to the "Bevill amendment" under the federal Resource Conservation and Recovery Act (RCRA), **42 U.S.C. §§6901 et seq.**

The **Bevill** amendment was enacted in 1980 to govern certain types of industrial wastes **deemed to be** of high volume but low toxicity. It generally provides that EPA may not regulate certain categories of wastes **as** hazardous wastes under RCRA Subtitle C, unless the Agency concludes pursuant to a **study** that a waste **is** deserving of Subtitle C status. CKD **is** specified **as** one of these "Bevill" **wastes**.

Demonstrably, CKD is the **least** toxic and least risky of all Bevill wastes. For every other **Bevill** waste that **EPA** has studied and made determinations, **EPA** has determined **that** RCRA Subtitle C regulation is not warranted. For CKD, however, **EPA has issued a** determination that **Subtitle C regulation** is warranted and **has issued** proposed Subtitle C regulations. **APCA** has steadfastly opposed the **EPA** regulatory determination and has argued that the Subtitle C rule addressing CKD is not remotely justified. **CKD** does not warrant such a **rule because** of: the negligible **risk** posed by the **material**, the amount recycled **as a** raw material and the diminishing amount disposed of at cement plants.

I. Background to the Amendment and its Implementation

For several **types** of industrial wastes, **RCRA** requires **EPA** to take **at least** two separate administrative steps. First, **EPA** must study the waste by analyzing it with respect to several criteria **set forth in** RCRA 8002. This study must **be** submitted to certain congressional committees, and is often referred to **as a** Report to Congress.

Second, **after** submission of the study to Congress, **EPA is** to make a "determination." More precisely, EPA must "either determine to promulgate regulations" for the waste under Subtitle C "or determine that such regulations **are** unwarranted." RCRA 3001(b)(3)(C). This **is usually** referred to **as** a regulatory determination.

In conducting a Bevill study **EPA** must analyze not only **the** adverse effects on **health** and the environment (if any) of the particular waste, but also **several** other factors specified in RCRA 8002 such **as**: source and volume of materials generated; documented cases of endangerment from such materials; alternatives to current **disposal methods**; and the costs of the alternatives.

Thus **far**, **EPA has** complied with the Bevill requirements by issuing the following studies (Reports to Congress) and determinations:

	<u>Study</u>	<u>Determination</u>
Mining (extraction and beneficiation of ores and minerals)	December 1985	July 3, 1986 51 FR 24496
Oil and Gas (exploration, development, and production)	December 1987	July 6, 1988 53 FR 25446
Mining (20 "processing" wastes)	July 1990	June 13, 1991 56 FR 27300

Utility (coal-burning wastes – Phase I)	March 1988	August 9, 1993 58 FR 42466
Cement Kiln Dust	December, 1993	February 5, 1995 60 FR 7366
Utility (coal-burning wastes – Phase II)	March, 1999	May 22, 2000 65 FR 32215

Except for CKD, EPA **has** in this 17-year history always **made** exactly the same determination: regulation under RCRA Subtitle C **is** unwarranted. For all wastes studied both before **and** after CKD, EPA has **in** effect decided that regulations for non-hazardous **solid wastes** would suffice to protect human health and the environment.

As CKD is the only waste for which **EPA** has determined RCRA Subtitle **C** regulation **is** appropriate, one might logically conclude that **CKD** is more toxic or more risky than all of these other Bevill wastes. In fact, however, CKD is the least toxic and risky of all these wastes, and we believe **EPA's** actions viewed in this light are quintessentially arbitrary and capricious.

II. APCA Petition

On May 11, 2001, **APCA** filed a rulemaking petition with EPA. A copy **is** attached. The **APCA** petition followed by several months a letter from **APCA** to **EPA** requesting precisely the same relief (letter of Andrew O'Hare to Michael Shapiro dated August 1, 2000), **so** in fairness **APCA's** requests for relief from EPA have now been pending **for** over **21** months.

APCA's petition cites the foregoing statutory and regulatory history to **show** that EPA's actions regarding **CKD** stick out like a sore thumb and **are** arbitrary **and** capricious on their face. **APCA's** petition also demonstrates the following points:

a. The overall **risks** from CKD are exceedingly low, even **under** the highly questionable assumptions of **EPA's** "indirect" **exposure** risk analysis approach. (Petition at pp. 3-4.) Note that **EPA** conceded the "indirect" exposure **risk** assessment showed a total of 0.0006 excess cancer cases **per** year in a population of 3.4 million individuals living near cement plants, and non-cancer risks were projected at **less** than one-tenth of one percent. **As** also shown in the petition, **EPA's** **risk** assessment procedure **was** flawed in several regards in **a** manner that would **skew** the results to be artificially high. Indeed, the Agency **has** acknowledged that the **CKD** **risk** assessments need to **be** redone to conform to the methodology employed for fossil fuel combustion wastes. Using the fossil fuel waste approach would most likely confirm the negligible potential risk associated with **CKD**.

b. The risks posed **by** CKD are much lower than risks **posed** **by** other Bevill wastes studied both before and after **EPA** rendered **its** anomalous **CKD** determination.

(Petition at pp. 4-10.) Several pages are devoted to the fossil-fuel combustion wastes that **EPA** had determined not worthy of RCRA Subtitle C as recently as May, 2000. **Additional** discussion covers other Bevill wastes.

c. CKD disposal rates have been decreasing significantly in recent years, making a national regulatory approach even more inappropriate. At the same time, the amount recycled back to the manufacturing process as a raw material has steadily increased. Petition at 10-11.

III ept of Retaining Status Quo

EPA personnel might argue that **APCA** and its members are not actually being adversely affected by the current situation, *because* the CKD regulatory determination imposes no requirements *in* and *of* itself and **EPA** *has* merely proposed, but never finalized, Subtitle C regulations. If **EPA** were simply to never finalize the proposal, so this argument would go, **APCA** and its members will never be harmed.

We anticipated this argument in the petition and strongly disagreed with it. Petition at pp. 11-12. We explained that CKD is now singled-out **by EPA** for regulation as a hazardous waste under RCRA Subtitle C, even though EPA has never *gone* this far **for** any of the riskier Bevill wastes. We explained that **EPA** has **thus** unfairly discriminated against **CKD** with the potential for injury to **APCA's** members. **As** long as the current CKD Bevill determination remains in effect, parties may unfairly place CKD in a different category than other materials with ramifications that could be felt in the marketplace, in regulatory decisionmaking, and in **possible** tort **suits**. For instance, a plaintiff in a toxic tort action involving CKD may unfairly **seek** to capitalize on the fact that of all the wastes **EPA** has ever studied in the 20 years of Bevill implementation, CKD **is** the only one that **EPA** deemed sufficiently hazardous to trigger a positive Bevill determination. State and regional environmental decisionmakers could also treat CKD unfairly in **countless** other ways **because** CKD currently **stands as** the only Bevill waste to have triggered a positive Bevill determination.

While the **facts** and the record **before EPA** would make such a **characterization** grossly unfair, as long **as EPA's** Bevill determination stands, the potential for **abuse** will remain. **APCA's** members may have to incur additional costs and burdens to **defend** against such unfair and unwarranted allegations. **APCA** concluded that the record must out of fairness be set straight to avoid unfair injury to its members, and the only way this can be done **is** for **EPA** to formally withdraw the **proposed** Subtitle C regulations and reverse its **Bevill** determination.

IV. Lack of Meaningful EPA Response After 21 Months

It **has** now been **21** months since **APCA** wrote to **EPA** seeking this relief and over 12 months since **APCA** filed its rulemaking petition. Thus far, **EPA** staff have been cordial in their willingness to meet with **APCA** personnel, but EPA does not appear **poised** to take **any final** action in **response** to our requests.

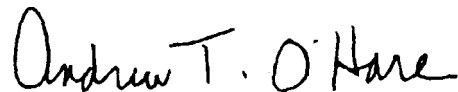
An examination *of the* record as reflected in our attached petition will show conclusively that **Subtitle C** regulation of CKD is not only totally unnecessary and a **waste** of government time and resources, but is **also** illegal. Petition at pp. 12-15. While OMB need not resolve the **legal issues**, the **lack of necessity** makes EPA's **actions** here a strong candidate for high priority treatment **under OMB's** March 28, 2002 notice.

V. Conclusion

For **all** the foregoing reasons, **we** respectfully urge OMB to include EPA's current CKD rulemaking under OMB's **list** of high priority rules that are unnecessary. We urge OMB to **direct EPA** to proceed **expeditiously** to **reverse its** Beville determination with respect to CKD, **and** to withdraw its proposed regulations under RCRA Subtitle C regarding CKD.

Attached please find a summary of **APCA** comments **in** the format suggested by OMB in its March 28 *Federal Register* notice. **See 67 FR at 15034.**

Sincerely,



Andrew T. O'Hare
Vice President

**ATTACHMENT TO
SUBMISSION OF AMERICAN PORTLAND CEMENT ALLIANCE
IN RESPONSE TO THE OFFICE OF MANAGEMENT AND BUDGET'S
REQUEST FOR COMMENTORS TO IDENTIFY EXAMPLES
OF UNNECESSARY RULES**

I. Name of Regulation

EPA's Regulatory Determination Under RCRA Regarding Cement Kiln Dust and EPA's Proposed Rulemaking Under RCRA Regarding Cement Kiln Dust

II. Regulating Agency

Environmental Protection Agency

III. Citation

Regulatory Determination: 60 FR 7366, **February 5**, 1995
Proposed Regulations: **64** FR **45631**, August 20, 1999

IV. Authority

Purportedly under "Bevill" Amendment to the Resource Conservation and Recovery Act (RCRA), RCRA §§3001(b)(3)(A)(iii), 8002(0)

V. Description of Problem

Of several **types** of industrial wastes **EPA has** studied under the "Bevill" amendment, cement kiln dust (CKD) **is** the least toxic. For every other "Bevill" **waste EPA has** studied before and **after** it studied CKD, **EPA has** determined the waste **does** not warrant regulation under RCRA Subtitle C (hazardous waste authority). Yet for the least toxic of these wastes – CKD – **EPA has** determined Subtitle C regulation **is** warranted **and EPA has proposed** regulations. This situation **places APCA** members in a very unfair situation.

VI. Proposed Solution

OMB **should** instruct **EPA** to **reverse** the **regulatory** determination and withdraw the **proposed** regulations **as** soon **as** possible.

VII. Estimate of Economic Impacts

A Subtitle C rulemaking would **be** unduly **burdensome on** the cement industry. In the **proposed rule**, the Agency claims that: **'We** rule would require incremental

compliance **costs** for the portland cement industry of about **\$44** million per year." The Agency then **makes** the assumption that the costs will **be** passed onto **the** consumer.

The **EPA** assumption **is** premised upon conclusions contained in an Economic Impact Analysis prepared **by EPA**. **APCA** was highly critical of the **EIA**, primarily because **of** the incorrect Agency conclusions concerning the domestic cement market, **EPA** failed to assess the impact cement imports **have** on cement pricing. Importers will not **be** subject to the higher production costs of domestic producers, resulting in a significant potential disadvantage for **U.S.** manufacturers.

Finally, and perhaps most importantly, the purported benefits outlined by EPA in the proposal are highly **suspect, as** they rely **on** conclusions in flawed risk assessments concerning theoretically impacted indirectly exposed populations (e.g., subsistence farmers and fishermen). **APCA** **is** certain that the size of these potentially affected populations would diminish considerably if the risk assessments were conducted properly. The net effect would **make** an already outlandish cost **to benefit** ratio that much more **so**.

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

AMERICAN PORTLAND CEMENT
ALLIANCE,

Petitioner,

CHRISTINE T. WHITMAN,
ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

RULEMAKING PETITION OF THE
AMERICAN PORTLAND CEMENT ALLIANCE
RELATING TO CEMENT KILN DUST

1. General Background

This rulemaking petition relates to EPA's actions under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901, *et seq.*, and particularly the so-called "Bevill Amendment" to RCRA (RCRA §§ 3001(b)(3)(A)(iii), 8002(o)). Under the Bevill Amendment, specified types of materials cannot be regulated as "hazardous wastes" under Subtitle C of RCRA unless and until EPA undertakes and completes certain studies and rulemaking steps.

Under RCRA § 3001(b)(3)(C), EPA is obligated to make a "Regulatory Determination" for each Bevill waste. The Regulatory Determination is to follow one of two courses for the waste in question: (i) a determination to promulgate Subtitle C regulations; or (ii) a determination that Subtitle C regulations are unwarranted.

One of the types of materials Congress specified as a "Bevill waste" is cement kiln dust (CKD) waste. The American Portland Cement Alliance (APCA) is the umbrella trade association of virtually all companies that manufacture portland cement, and APCA's members generate CKD as a by-product of the manufacturing process.

EPA completed its Bevill study on CKD pursuant to RCRA § 8002(o) in 1993, and issued the study in the form of a Report to Congress on December 30, 1993. (See 59 FR 709 *et seq.*, January 6, 1994.) EPA then issued a Regulatory Determination for CKD under

RCRA §3001(b)(3)(C). The CKD Regulatory Determination is published at 60FR 7366 *et seq.*, February 5, 1995.

In its implementation of the Bevill Amendment since 1980, EPA had issued several Regulatory Determinations for various Bevill wastes prior to issuing its CKD Regulatory Determination. In every one of these prior Regulatory Determinations, EPA determined that no Subtitle C regulation of any kind was warranted.

Nevertheless, in its 1995 CKD Regulatory Determination, EPA determined that Subtitle C regulations should be developed. While EPA found that subjecting CKD management to the full panoply of RCRA Subtitle C regulations on an unconditional basis would not be appropriate, EPA nevertheless determined that CKD should be regulated under a "conditional exclusion" regime in which Subtitle C hazardous waste regulations could be triggered in the event various management standards were violated.

In 1999, to follow up on its 1995 Regulatory Determination, EPA issued proposed regulations for CKD. 64 FR 45631, *et seq.*, August 20, 1999. EPA proposed a comprehensive and complex set of management standards for CKD that would be implemented by the States as a general rule under their RCRA Subtitle D (non-hazardous waste) authorities. The proposed regulations contain provisions, however, that would trigger Subtitle C hazardous waste jurisdiction and regulation in the event certain Subtitle D requirements were violated.

In 2000, EPA issued another Regulatory Determination under the Bevill Amendment. The Bevill wastes at issue are known as wastes from the combustion of fossil fuels, or "FFC Wastes." In this Regulatory Determination, EPA determined that no Subtitle C regulation of any kind was warranted. 65 FR 32214, *et seq.*, May 22, 2000. No further Bevill studies or Regulatory Determinations appear to be currently underway or on the drawing boards, according to EPA's most recent regulatory agenda.

Thus, in its implementation of the Bevill Amendment over the years, EPA has issued a Regulatory Determination that some type of Subtitle C controls are warranted only once: for CKD. For every other Bevill waste on which EPA has taken action, both before and after the CKD Regulatory Determination, EPA has determined that no Subtitle C regulation whatever is warranted.

As we will explain further below, we believe this singling out of CKD for Subtitle C treatment is grossly unfair and has no basis in science or law. We will show that the risks to human health and the environment from CKD are exceedingly low, particularly in comparison to other Bevill wastes EPA has addressed both before and after it issued its CKD Regulatory Determination. (It is important to stress that we agree with all the other Bevill determinations. Even though the other Bevill wastes are comparatively more toxic than CKD waste, the risks they pose are still far too insignificant to warrant Subtitle C regulation.)

We will also show that the continually diminishing level of CKD land disposed in the U.S. can be (and is) being managed in a fully protective manner under state law. We will also explain why, even if EPA were now to decide not to issue final CKD rules as a follow-up to its August, 1999 proposed CKD rules, it is fundamentally unfair and unacceptable to keep those proposed rules pending and to leave the 1995 Regulatory Determination unchanged.

We are accordingly petitioning the EPA Administrator to take two actions with respect to CKD under the Beville amendment:

- (1) withdraw the proposed CKD rules of August 20, 1999; and**
- (2) reverse the CKD Regulatory Determination of February 5, 1995, and instead issue a new Regulatory Determination, consistent with every other Beville determination that EPA has issued before or since, that no Subtitle C regulation is warranted for CKD.**

2. Overall CKD Risks Are Quite Low, Even Under EPA's Extremely Conservative "Indirect" Exposure Risk Analysis Approach

One of the primary factors EPA cited in support of subjecting CKD to RCRA Subtitle C was the potential impact on subsistence farmers and fisherman through indirect exposure to CKD through the food chain. EPA restated these potential risks in the proposed rule, as follows:

Potential Cancer Risks: "The overall population cancer risk can be characterized as follows; A total of 0.0006 excess cancer cases per year could potentially occur within this population of 3.4 million [estimated population of individuals residing near cement plants] due to indirect exposures." (64 FR 45637)

potential Non-cancer Risks: "The overall population non-cancer effects can be characterized as follows: less than one-tenth of one percent among the population of 3.4 million." (64 FR 45637)

Clearly these are negligible to non-existent risks. Not explained in conjunction with the statements above, however, is the approach EPA used to develop the conclusions. EPA relied solely on screening assessments to generate the conclusions. Such assessments employ assumptions about site circumstances drawn from complex risk assessment models, not from actual sites. At a minimum, EPA should have tested the validity of the results of the screening assessments with a representative set of site-specific assessments. APCA is confident that the site-specific risks are much lower. Notably, EPA's cancer risk conclusion is extrapolated for all cement plants. Fewer than 40 cement plants in the U.S. dispose of significant amounts of CKD.

Making matters worse, EPA relied on high end point estimates rather than central tendency values when selecting input parameters for the screening risk assessments. This approach violates EPA's own guidance on risk assessments. The guidance stipulates that

central tendency values be employed when the data is available or obtainable. (Policy for Risk Characterization at the U.S. Environmental Protection Agency; Science Policy Council, U.S. EPA, February 1995).

3. Risks Posed by CKD Lower than Risks Posed by Other Bevill Wastes

a. Comparison of Alleged Damages Associated with CKD and FFC Wastes

In conducting studies of various Bevill wastes as required under Section 8002 of RCRA, Congress instructed EPA to determine whether there were “documented cases in which danger to human health and the environment has been proved.” RCRA §8002(o)(4). For CKD, EPA interpreted this statutory direction to include both acute and chronic effects and impairment to ecological receptors. “Proven” damage cases were identified as those that met the EPA “test of proof” criteria. The criteria fall into three categories: (1) data from scientific investigations, (2) administrative actions, such as enforcement notices, and (3) court decisions. (Technical Background Document for the Report to Congress on Remaining Wastes from Fossil Fuel Combustion: Potential Damage Cases, March 15, 1999, pages 1-1 and 1-2).

A comparison of EPA’s analysis of damage cases for CKD and FFC wastes shows that EPA took very inconsistent approaches to the disadvantage of CKD. For in searching for CKD damage cases, EPA surveyed a far greater percentage of facilities in its database than for FFC facilities and applied far more lax criteria for deciding what was “proven damage” for CKD when compared to the criteria employed for FFC wastes.

EPA identified 19 “proven” damage cases among the 127 active and inactive cement manufacturing sites studied by the Agency. Seven of these cases involved alleged damage to groundwater and/or surface water. Twelve cases involved exceedances of opacity, a surrogate standard for particulate matter. (Report to Congress on Cement Kiln Dust, Volume II: Methods and Findings, December 1993, pages 5-4 and 5-5) Most notably, EPA found “no direct impacts on human health” from any of the alleged damage cases identified in the Report to Congress. (Report to Congress on Cement Kiln Dust, Page 5-5)

All of the seven cases alleging groundwater and/or surface water contamination address historical contamination resulting from management practices no longer employed at these sites. Two of the seven cases involved exceedances of secondary MCLs (e.g., pH and total dissolved solids). None of the cases involved human exposure.

For the twelve cases involving opacity exceedances, there were no indications that the underlying particulate matter standards were exceeded. In addition, these cases—for the most part—merely involved alleged one-time exceedances of an opacity standard. Moreover, several of the “damage” cases address opacity exceedances associated with clinker coolers or other pollution control devices at the cement plant. These process units do not collect CKD, and, thus, the alleged “damage” was not caused by CKD. Only those pollution control devices associated with the cement kiln collect CKD.

Furthermore, the so-called opacity exceedances were based on "notices of violation." The fact that a facility has received such a notice represents only an allegation, not a "proven" case. In any event, it is exceedingly difficult to equate a one-time opacity violation with a "damage" to health or the environment. Many particulate matter standards are set at technology-based levels, not on health-based levels. The fact that there is a one-time violation of a technology-based standard does not mean that there has been any health or environmental damage. Moreover, even where a particulate matter standard may be health-based, it is commonly based on an assumption of continuous exposure over an extended period of time. A single opacity violation even in these circumstances does not constitute damage to health or the environment.

EPA identified only 11 "proven" damage cases and 36 potential damage cases in the FFC Report to Congress, (Report to Congress, Wastes from the Combustion of Fossil Fuels, Volume 2, March 1999). However, EPA restricted its search for damage to only 5 of the 50 states in the United States and focused only on FFC waste facilities at electric utilities. In addition, the Agency did not assess the FFC waste sites for opacity standard exceedances nor did EPA count secondary MCL exceedances as "proven" damage (as was done for CKD).

In commenting on the FFC Report to Congress, environmental groups alleged that there were numerous additional damage cases in 13 states not studied by EPA. In responding to questions posed by the Office of Management and Budget on a March 5, 2000 draft of the FFC Waste Regulatory Determination, the Agency stated that "it is highly likely that numerous other cases of proven and potential damage exist in the remaining 32 states" (i.e., those not studied by EPA or the environmental groups). (Regulatory Determination for Fossil Fuel Combustion Wastes, Compendium, Office of Management and Budget and Federal Inter-agency Review, May 4, 2000, Docket Number FF2F-S0002 [March, 16, 2000, "EPA Response to OMB Questions of March 9, 2000," page 10])

The approach used by EPA for FFC wastes contrasts sharply with that used for CKD. For CKD, the Agency went to great lengths to assess damage not only at the 15 operating cement plants but also at 12 inactive plants. In contrast, the Agency examined only a small percentage of the 440 utility plant and 958 non-utility plants that manage FFC wastes. There is no record of the Agency looking for information on inactive or closed FFC waste facilities. It is reasonable to assume that there must be many such sites given the size of the universe of active plants. In addition, included in the "proven" damage cases for CKD were cases involving secondary MCL exceedances (e.g., pH, total dissolved solids). EPA ignored such exceedances for FFC wastes sites when assessing proven damage. Commenters on the FFC Report to Congress identified at least 19 cases of potential damage attributable to secondary MCL exceedances. Notably, two of the seven groundwater/surfacewater cases identified for CKD involved only secondary MCLs. (Report to Congress on Cement Kiln Dust, Volume II: Methods and Findings, December 1993, pages 5-6 through 5-8)

It is especially remarkable that the Agency made no effort to identify damages resulting from exceedances of opacity or particulate matter standards at FFC facilities as

EPA did for cement plants. Utility boilers and non-utility boilers are equipped with pollution control equipment similar to that employed by cement plants to capture particulate matter. It is, therefore, reasonable to assume that these facilities could also periodically exceed state or federal standards for opacity or particulate matter. Consequently, the damage assessment conducted for FFC wastes was limited only to impacts on groundwater and/or surface water. APCA believes that a review of utility and non-utility records of compliance with opacity standards would reveal numerous alleged one-time opacity exceedances. While APCA maintains that such exceedances have no relationship to substantive impacts on human health or the environment, APCA believes that the inclusion of this category of "damage" in the roster of cases for FFC waste facilities would indeed dwarf the number of cases identified by EPA for CKD.

In summary, APCA strongly endorses EPA's conclusion that the minimal environmental damage attributable to FFC wastes supports the determination that the use of Subtitle C authorities is not warranted for these wastes. APCA strongly believes that there is no way the Agency could not come to the same conclusion for CKD were the Agency to apply the logic used for assessing the significance of FFC damage cases to those for alleging CKD damage. Indeed, EPA further dismissed the FFC damage cases in the Regulatory Determination. The Agency stated:

Although these damage cases indicate that coal combustion wastes can present risks to human health and the environment, they also show the effectiveness of states' responses when damages were identified. None of these cases involved actual human exposure. (65 FR 32225)

This statement applies equally to CKD. In short, the record shows that had EPA applied the same decisionmaking criteria to CKD as it did for FFC wastes, there is no rational or logical way EPA could have determined that CKD warranted Subtitle C treatment. As EPA was correct in deciding that FFC wastes should not be subjected to Subtitle C, we believe it is incumbent upon EPA to reverse its CKD determination.

In this regard, we should note that the following statement from the FFC determination is particularly unfair and inaccurate:

Our principal basis for determining that CKD when managed in land-based units would no longer remain exempt from being regulated as a hazardous wastes was our concern about generally poor management practices characteristic of that industry. Our conclusion was further supported by the extremely high percentage of proven damage cases occurring at active CKD sites for which ground water monitoring data was available. (63 FR 32224)

As to the "extremely high percentage of proven damage cases," the discussion above shows the absurdity of such a characterization. As to the "generally poor management practices characteristic of [the Portland cement manufacturing] industry," we take vigorous exception. These remarks are unfair and wholly without foundation. The fact that EPA had to stretch its criteria so far to come up with its few "proven" CKD damage cases after surveying every facility in our industry is itself testimony to the fact that our members have

been disposing of CKD in a responsible manner over the years. In addition, the record in this rulemaking is replete with evidence of Portland cement manufacturers utilizing even more comprehensive controls on CKD management throughout the U.S. We object most vigorously to EPA's unfair characterization of our members' practices in the quote above, and urge EPA to correct the record in this regard at the earliest opportunity.

b. Comparative Leachability of Toxic Constituents from CKD and FFC Wastes

As part of APCA's effort to demonstrate that the proposed CKD rule is inappropriate in its treatment of cement kiln dust, we have conducted a comparative analysis of the potential for metals to leach from CKD and from FFC wastes. The first analysis concerns the volume of wastes produced. This is an important measure of relevant toxicity, as the larger the volume of waste disposed, the greater the potential for environmental consequences. This logic also extends to the comparative number of sites managing the wastes. The more sites, the greater the potential for environmental consequences.

Table 1

Types of Fossil Fuel Combustion Wastes with Available Annual Waste Volumes

<u>Coal-fired utility large-volume wastes</u>	105 million tons
Fly ash	60 million tons
Bottom ash	17 million tons
Boiler slag	3 million tons
FGD waste	25 million tons
 <u>Non-utility coal combustion wastes</u>	 5.8 million tons
 <u>Oil combustion wastes</u>	 20,500-105,500 tons
 <u>Fluidized bed combustion wastes</u>	 9-13 millions tons

Source: Report to Congress Wastes from the Combustion of Fossil Fuels, Volume 2, March 1999.

Table 1 outlines the volumes of various fossil fuel combustion wastes, as described in the U.S. EPA Report to Congress on wastes from fossil fuel combustion. These volumes compare to a total of 11 million tons of CKD generated in 1998. Of this figure, only 3 million tons was disposed of in on-site monofills and other Landfills. Moreover, the volume of CKD produced and disposed has fallen sharply in recent years, as more plants recycle the majority of their waste. (See Section 4.) Over 70% of all CKD generated in the U.S. in 1998 was recycled as a raw material in the manufacturing process. FFC wastes cannot be recycled in this manner. Thus, all FFC wastes must be managed on-site in disposal units or used beneficially offsite.

The next step **was** to **examine** the toxicity characteristic leaching procedure (TCLP) values for CKD and fossil fuel combustion wastes. **This** procedure **is** designed to estimate the potential for leaching of **the** analyzed compound beyond the liner of a landfill. A **1992** report of **the** Portland Cement Association examined the **TCLP** concentrations for all 12 RCRA metals at 97 U.S. cement plants, the **majority** of the facilities in the United **States**.

In all cases, the average TCLP values for CKD were far below **the RCRA** limits, typically at least one and often more than two orders of magnitude lower than the limit. The average values did not include non-detects, which for several compounds—including **arsenic**—comprised **over** 50 percent of the **results**. If these samples had been included into the computation, even at the detection limit, the industry averages would have been even lower.

Out of **1164** analyses (97 samples **times** **12** compounds), there **were** only **4** instances when the measured value exceeded the **RCRA** limit. There were two **exceedances** each for **two** compounds. In both cases, the **readings came from** two different kilns in the same plant and one of **the two** was **only** slightly above **the** limit. Moreover, both plants with exceedances recycle the majority **of** their CKD to **the** manufacturing process. Consequently, though the plants dispose of only a small amount of **CKD**, the in-process recycling has the effect of concentrating **some** metals in **the CKD**.

Table 2 compares the CKD findings with those for several fossil fuel combustion wastes. Coal utility **fly** ash, with annual volumes of 60 million tons—compared to 11 million tons or **less** of CKD—had higher average TCLP values than CKD for each metal analyzed, except for barium, selenium, and silver. **FBC** combined ash had **higher** values than CKD for **arsenic**, mercury, antimony, and barium. The EPA report did not include a volume for **this** particular waste, but the annual volume for all three **FBC wastes** is cited as **9-13 million** tons.

While the volume of oil combustion wastes (OCW) is **low**, these wastes provide another example of fossil fuel combustion wastes that have higher **TCLP** values than CKD. **OCW** wastes typically have higher **TCLP** concentrations than CKD for arsenic, cadmium, chromium, and nickel, with some higher values for lead, mercury, and **chromium**.

Finally, and perhaps most importantly, the rate at which **fossil fuel** combustion wastes exceed the RCRA **TCLP** limit is greater than **that** for CKD. **The** exceedance rates are compared in the bullets following Table 2. **All of the information** assembled in Tables 1 and 2 **was** collected from EPA documents on the **fossil fuel** combustion wastes, except for **the CKD** data. The CKD data **was** derived from "**An Analysis of Selected Trace Metals in Cement and Kiln Dust**, Portland Cement Association, 1992."

We again **stress that we** strongly support EPA's determination not to subject **FFC wastes** to Subtitle C. Even though **FFC** wastes are generally more toxic than CKD wastes and **are** generated and disposed at much higher volumes than CKD wastes, **FFC** wastes still fall far short of presenting the degree of **risk** that would warrant Subtitle C

regulation. This simply accentuates the degree of unfairness in EPA's regulatory determination for CKD.

TABLE 2: COMPARATIVE TCLP FOR CKD AND SELECTED FOSSIL FUEL COMBUSTION WASTE (AVERAGE MG/L)

Metal	RCRA Limit	CKD	Coal Util. Fly Ash ¹	OCW ² Fly Ash	OCW Bottom Ash	OCW SSB Solids	FBC ³ Comb. Ash
Antimony	1.0	0.012	n/a ⁴	n/a	n/a	n/a	0.121
Arsenic	5.0	0.066	0.563	0.319	0.391	0.0666	0.102
Barium	100.0	1.04	0.382	0.370	1.88	0.647	1.22
Beryllium	0.007	0.0004	n/a	n/a	n/a	n/a	n/a
Cadmium	1.0	0.0288	0.078	0.160	0.130	0.0187	0.0181
Chromium	5.0	0.10	0.556	0.447	0.387	0.0621	0.0667
Lead	5.0	0.349	0.455	0.164	1.23	0.0824	0.13
Mercury	0.2	0.0018	0.0048	0.0011	0.00133	0.00267	0.002
Nickel	70.0	0.13	n/a	n/a	30.7	28.8	0.121
Selenium	1.0	0.152	0.037	0.0622	0.0887	0.0605	0.0584
Silver	5.0	0.07	0.012	0.0248	0.0542	0.0353	0.0253
Thallium	7.0	0.38	n/a	n/a	n/a	n/a	n/a

- The total percentage of TCLP exceedances for CKD was 0.3%, 4 analyses out of 1164 (97 samples times 12 compounds).
- The total percentage of exceedances for coal utility fly ash is 2%⁵ or 6 times higher than that for CKD.
- The total percentage of exceedances for oil-combustion wastes is 2.8%, 9 sites out of 320 (40 sites times 8 compounds)⁶. This is more than 8 times the exceedance rate for CKD.

c. Comparison With Other Bevill Wastes

EPA has studied numerous other Bevill wastes including those from the mining and oil and gas exploration and production industries. These wastes were generally much more likely to fail the toxicity characteristic than either FFC wastes or CKD. Nonetheless, EPA

¹ Averages do not include non-detects, which, for antimony, arsenic, cadmium, nickel, and selenium, comprise over 50% of the results. Computing these into the average, even at the detection limit, would bring the resulting averages far lower.

² Oil Combustion Wastes.

³ Fluidized Bed Combustion Combined Ash.

⁴ "n/a" indicates that data on the fossil fuel values for these metals are not available in the EPA documents.

⁵ Source: Draft Regulatory Determination on Wastes from the Combustion of Fossil Fuels. March 2000.

⁶ Source: U.S. EPA, Report to Congress: Wastes from the Combustion of Fossil Fuels, Volume 2, Methods, Findings, and Recommendations. Page 6-14.

determined that these much higher volume waste stream with a greater tendency to fail the toxicity characteristics should be exempted from Subtitle C regulation.

A simple analysis for two wastes from the mineral processing industry (Regulatory Determination, 56 FR 27300), presents a stark comparison with the data for CKD. Calcium wastewater treatment sludge from primary copper processing was found to consistently exceed the EP toxicity test (precursor to the TCLP) for select metals, including arsenic, cadmium and selenium. These exceedances were ten to hundreds of times over the hazardous waste regulatory limits. In the Report to Congress for oil and gas wastes, EPA found that some constituents of concern presented potential cancer risks of 1×10^{-4} (or one in 10,000) from direct exposures to the wastes at 5% of the sites that were studied. (Report to Congress, Management of Wastes from the Exploration, Development, and Production of Crude Oil, Natural Gas and Geothermal Energy, December 1987, Executive Summaries, page 43). See also Exhibit 1-1 to APCA's comments of April 1994 on EPA's CKD Report to Congress (pages 1-11, 1-12).

In sum, the potential risk posed to human health and the environment by CKD are considerably lower than those for other Beville waste streams (that are also generated in much greater volumes) for which EPA determined Subtitle C was not warranted.

4. In Recent Years, CKD Disposal Rates Have Been Diminishing, Recycling Has Increased and Management Practices Have Been Enhanced

Table 3 demonstrates the diminishing levels of CKD disposed in recent years as more plants recycle the dust back into the process. This table focuses on the 37 plants that together accounted for 95 percent of the CKD landfilled in the United States in 1998. Thirty-five of these plants responded to a 2000 survey conducted by APCA. The purpose of the survey was to add additional data to a CKD trend analysis begun in 1990. Four surveys have been conducted by APCA to gather this CKD information.

Table 3: CKD Landfilled by Most Significant Contributors

Year	27 Plants Responding 4 Years		34 Plants Responding 3 Years	
	CKD Disposed	Clinker Produced	CKD Disposed	Clinker Produced
1990	2,147,515	20,016,697		
1995	2,212,098	22,123,886	2,737,664	26,912,034
1998	2,012,207	23,173,258	2,473,295	28,388,643
2000	1,673,537	24,341,501	2,100,534	29,480,110

Table 3 demonstrates that the amount of CKD disposed by the most significant disposers of the dust has been reduced by over 22 percent since 1990, while during the same period clinker production among these same plants has increased by almost 22 percent. In other words, in a time when production increases would typically result in increased CKD disposal, the falling disposal volumes demonstrate a strong trend towards alternative practices to minimize CKD disposal. The principal reason for this trend is that more CKD is

being recycled as a raw material, a very positive movement up the waste management hierarchy.

Another way of examining this progress is a ratio of CKD disposal to clinker production. This ratio has dropped from 0.107 in 1990 to 0.069 in 2000 for the 27 plants responding to all four surveys.

Another trend identified in recent surveys is a reduction in the total amount of CKD generated by the industry. This results from the many manufacturing improvements that have been undertaken and completed by the industry since 1990. As more and more plants utilize the preheater/precalciner process of cement manufacturing, less CKD is generated, since it is recycled into the process in a closed loop system. This of course means that less CKD is available for disposal. APCA envisions a time in the not so distant future when there will be virtually no CKD disposal.

As the number of plants generating CKD diminishes, the amount of CKD landfilled is also reduced. This further focuses the majority of active CKD landfill sites on fewer plants in fewer states, bolstering APCA's position that state regulation—as needed—is a more appropriate means of addressing CKD disposal than is federal regulation. Another interesting trend in the 2000 survey was the reclamation of CKD from existing CKD management units for use as a raw material. Four plants that responded to the 2000 survey removed over 11,000 tons of CKD from existing units for this purpose. Additional plants that were not asked to respond to the 2000 survey are also engaged in this practice.

At the same time, CKD management techniques have improved. Of the 35 plants responding to the 2000 survey, 34 (97%) practice landfill dust control techniques, 30 (86%) CKD compaction, 32 (91%) road-dust control, and 27 (77%) water runoff control. In addition, 20 (57%) have groundwater monitoring and 11 leachate control systems. The landfills at 24 of the plants have been permitted or approved by the state, with seven more having already applied for a permit or in the process of doing so. As plants take the steps necessary to ensure safe disposal of CKD—through voluntary measures and cooperation with state authorities—the need for federal regulation of these practices is further diminished.

5. Preserving the Current Bevill Status Quo for CKD is Fundamentally Unfair and Legally Unacceptable

We believe all the forgoing shows that CKD is less toxic and poses fewer potential risks to human health and the environment than any other Bevill waste EPA has addressed, both before and after CKD. Yet CKD is now singled-out by EPA for regulation as a hazardous waste under RCRA Subtitle C, even though EPA has never gone this far for any of the riskier Bevill wastes.

We believe EPA has thus unfairly discriminated against CKD with the potential for injury to APCA's members. As long as the current CKD Bevill determination remains in effect, parties may unfairly place CKD in a different category than other materials with

ramifications that could be felt in the marketplace, in regulatory decisionmaking, and in possible tort suits. For instance, a plaintiff in a toxic tort action involving CKD may unfairly seek to capitalize on the fact that of all the wastes EPA has ever studied in the 20 years of Bevill implementation, CKD is the only one that EPA deemed sufficiently hazardous to trigger a positive Bevill determination.

While the facts and the record before EPA would make such a characterization grossly unfair, as long as EPA's Bevill determination stands, the potential for abuse will remain. APCA's members may have to incur additional costs and burdens to defend against such unfair and unwarranted allegations. State and regional environmental decisionmakers could also treat CKD unfairly in countless other ways because CKD currently stands as the only Bevill waste to have triggered a positive Bevill determination.

This is why we cannot be satisfied with a "no further action" result in this matter. In other words, we cannot accept a response from EPA in which it merely commits not to finalize the current proposed Subtitle C regulations and leave the 1995 regulatory determination standing. The record must out of fairness be set straight to avoid unfair injury to our members, and the only way this can be done is for EPA to formally withdraw the proposed Subtitle C regulations and reverse its Bevill determination. Only in this manner will CKD – which again is less problematical than all other Bevill wastes that EPA has been addressed – be placed within its proper status under RCRA.

We also believe that the current situation places EPA's decisionmaking in a *per se* arbitrary and capricious status and that a reviewing Court would agree with us. For EPA to subject less risky material to Subtitle C while exempting riskier material (both before and after addressing the less risky material) is, we submit, a clear violation of reasoned decisionmaking requirements. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983); *CMA v. EPA*, 217 F.3d 861, 865 (D.C. Cir. 2000).

6. Legal Authority Under Which Petition Is Filed

RCRA §7004(a) provides as follows:

Any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this Act. Within a reasonable time following receipt of such a petition, the Administrator shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefor.

We believe that our petition fits within the types of actions contemplated by RCRA §7004(a). In essence we are petitioning EPA not to promulgate the proposed regulations it has issue for CKD, and we believe this falls within the category of actions envisioned by the phrase "promulgation of a regulation." We are also in essence petitioning EPA for the repeal of a proposed regulation, and we believe this similarly falls within the contemplation of §7004(a). In addition, we are in effect petitioning EPA for the repeal of a Regulatory

Determination and the promulgation of a new Regulatory Determination, and once again, we believe these actions fill within the contemplation of §7004(a).

EPA has published regulations, codified at 40 C.F.R. §260.20, prescribing requirements for RCRA rulemaking petitions. Subsection (b) of this section requires that each petition must be submitted to the Administrator by certified mail, and we have complied with this requirement. In order to comply with the remainder of the requirements in subsection (b), we state the following:

(1) Petitioner is the American Portland Cement Alliance (APCA), located at 1225 Eye Street, N.W., Suite 300, Washington, D.C. 20005.

(2) APCA represents virtually every cement company affected by the CKD Regulatory Determination and that would be subject to the proposed Subtitle C regulations if finalized. Accordingly, it has a Vital interest in the subject of this petition.

(3) We have described the proposed action in part 1 above.

(4) We have explained the need and justification for the proposed action in parts 2-5 above.

Additional authority for this petition is found in §553(e) of the Administrative Procedure Act (APA), 5 U.S.C. §553(e), which provides as follows:

Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

APA §551(2) defines "rule" in part as:

[T]he whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy

We believe this provision confers jurisdiction for this petition even if RCRA §7004(a) did not. If, for instance, one were to take the view that a Regulatory Determination is not a "regulation" under RCRA §7004(a), a Regulatory Determination is nevertheless most clearly a "rule" under the APA. We are petitioning both for the repeal of one rule (the 1995 CKD Regulatory Determination) and for the issuance of another rule (a new Regulatory Determination declaring that Subtitle C regulations are unwarranted for CKD). Most certainly a Regulatory Determination that Subtitle C regulations are warranted is an agency statement of general applicability and future effect, and it is designed to implement law and policy. Exactly the same can be said for a Regulatory Determination that no Subtitle C regulations are warranted.

In addition, APA §555(b) provides that “within a reasonable time each agency shall proceed to conclude a matter presented to it.” We believe this provides independent grounds for our petition, and places upon EPA a non-discretionary duty to take action on our petition. It also underscores our point that in light of all the circumstances, EPA now has a duty to conclude the rulemaking it has already initiated by withdrawing its proposed rules and reversing the CKD Regulatory Determination.

7. Intent to Seek Judicial Review

If EPA denies this petition, APCA will have the right to seek judicial review in either the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) or in a United States District Court. RCRA §7006(a)(1) provides for D.C. Circuit review of, among other things, action of the Administrator “in denying any petition for the promulgation, amendment, or repeal of any regulation under this Act.” We believe it is clear that a failure to act within a reasonable time is equivalent to a denial. See, e.g., APA §551(13) (“agency action” includes failure to act).

If for some reason it were found that this petition did not fit within a strict construction of the clause in RCRA §7006(a)(1) conferring jurisdiction to the D.C. Circuit, judicial review of a denial (or failure to act within a reasonable time) would lie in an appropriate federal district court under 28 U.S.C. § 1331 (general federal question jurisdiction) as well as the APA §704.

We note that APA §704 provides that “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” (Emphasis added.) Thus, even if RCRA does not make denial of this petition (or failure to act on it) judicially reviewable, the APA would because there would be no other adequate remedy in court. There is no question that an agency’s failure to act within a reasonable time would be covered, as the APA §551(13) defines “agency action” to include the “failure to act.” Moreover, APA §706(1) authorizes courts to “compel agency action unlawfully withheld or unreasonably delayed.”

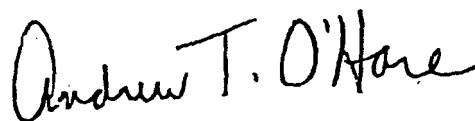
Alternatively, we believe the agency’s denial of this petition, or failure to act within a reasonable time, would be reviewable under the APA under the logic of the D.C. Circuit’s recent decision in *Barrick Goldstrike Mines v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000).

If EPA denies this petition or fails to act upon this petition within a reasonable time, we fully intend to pursue our judicial review rights. We believe that EPA’s other Bevill decisions, both prior and subsequent to the CKD Regulatory Determination, on their face show EPA’s CKD Regulatory Determination to be arbitrary and capricious and believe that a reviewing Court would accordingly vacate the CKD Regulatory Determination. See *CMA v. EPA*, 217 F.3d 861 (D.C. Cir. 2000).

As shown in the discussion above, jurisdiction to review EPA’s denial or failure to act on this petition would lie either in the D.C. Circuit or in a federal district court.

Depending upon possible future refinements in the case law, we reserve the right to seek judicial review in either or both of these fora.

Respectfully submitted,



Date: May 11, 2001

Andrew T. O'Hare, P.G.
Vice President, Regulatory Affairs
American Portland Cement Alliance
(202) 408-9494

COUNSEL:

Richard G. Stoll, Esq.
Foley & Lardner
Suite 500
3000 K Street, NW
Washington, D.C. 20007
202-295-4021