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I. INTRODUCTION

Regulation of the treatment, transportation, storage, and disposal of mineral processing waste has proven problematic for the United States Environmental Protection Agency (EPA). As the administrative agency charged with regulating all forms of hazardous waste, EPA has spent nearly two decades determining whether certain mine processing wastes should be regulated as hazardous.

The Resource Conservation and Recovery Act of 1976 (RCRA) gives EPA the authority to oversee and regulate the treatment, transportation, storage, and disposal of hazardous substances which pose a threat to human health and the environment. As part of its responsibilities under RCRA, EPA outlined a unique category of wastes which, though high in volume, contained relatively low levels...
of toxicity.\(^5\) Congress, through the Bevill Amendment,\(^6\) excluded this “special wastes” category from RCRA regulation in order to give EPA time to study these wastes and to determine their potential harm to human health and the environment.\(^7\) One such special waste is the copper ore processing waste slag.\(^8\)

The Bevill Amendment, with its regulatory exclusions under RCRA, is incorporated in subsection 101(14)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act

5. Hiles & Wilkinson, supra note 4, at 393. EPA’s proposed regulations, promulgated in 1978, created a “cradle to grave” program to regulate all aspects of hazardous waste handling and disposal. Id. Part of this program involved the management of waste. Id. In this part, EPA developed a category of wastes known as “special wastes” which are characterized as being high volume, low hazard. Id. Special wastes encompassed wastes from the extraction, beneficiation, and processing of ores and minerals which include slag waste, a byproduct of the processing of copper. Id. at 393 n.14.

6. RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A) (enacted as part of the amendments to the Solid Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993)). This amendment is named after Alabama Representative Thomas Bevill, who offered this measure to temporarily exclude mining wastes from RCRA regulation until EPA had a chance to study and rule on the appropriateness of such exclusions. See Gerrard, supra note 4, at 1067; see also Hiles & Wilkinson, supra note 4, at 391-92, 394-95 (noting Congressman Bevill’s successful introduction of the amendment); Environmental Defense Fund, 852 F.2d at 1328 (noting only minor modifications to the amendment prior to adoption). Explaining his purpose for proposing the amendment, Congressman Bevill stated:

[I]t would require EPA to defer imposition of regulatory requirements on the disposal of the waste by-product of fossil fuel combustion, of discarded mining materials and of cement kiln dust waste until after EPA has completed studies to determine whether, if at all, these materials present any hazard to human health or the environment.

Environmental Defense Fund, 852 F.2d at 1328 (citing 26 CONG. REC. 3961 (1980)). With regard to EPA’s 1978 classification of “special wastes,” Congressman Bevill commented:

EPA has itself recognized that it has “very little information on the composition, characteristics, and degree of hazard posed by these wastes.” In its announcement, printed in the Federal Register of December 18, 1978, EPA announced it did not have data on the effectiveness of current or potential waste management technologies or the technical or economic practicability of imposing its proposed regulations. In that same announcement EPA also stated that it believed that any potential hazards presented by the materials “are relatively low.”

Id. In conclusion, Bevill defended his amendment as “requir[ing] 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 [in] the amendment.” Id. See Environmental Defense Fund, 852 F.2d at 1328-29 (summarizing other House floor discussions).

7. See Hiles & Wilkinson, supra note 4, at 393 (discussing Congress’ recognition of unique problems associated with management and disposal of “special wastes” due to insufficient data on their hazards and potential dangers).

8. For a discussion of the special wastes category, see infra notes 34-64 and accompanying text.
of 1980 (CERCLA).\(^9\) Section 101(14) defines hazardous substances for the purpose of imposing CERCLA liability for the cleanup of inactive hazardous waste disposal sites.\(^10\) Since the focus of RCRA and CERCLA are slightly different in scope, the question that arises is whether the exclusion of certain hazardous wastes from regulation under RCRA implies a similar regulatory exclusion under CERCLA once the latter incorporates the former's exclusion provisions.\(^11\) To date only a handful of federal courts have addressed the issue of whether the Bevill Amendment, as an exception to CERCLA subsection 101(14)(C), is also an exception to section 101(14) regulation entirely.\(^12\)


10. CERCLA § 101(14), 42 U.S.C. § 9601(14). The section states: "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6901] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2602 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

11. CERCLA is retrospective in nature and imposes liability once hazardous substances have contaminated the environment and/or caused injury to natural resources. Rufus C. Young, Jr., Beyond Superfund: Other Federal Hazardous Substance Related Laws Affecting Land Use, C930 ALI-ABA 173, 176-177 (1994). RCRA, on the other hand, is prospective in nature and is meant to regulate the generation, transportation, storage, and disposal of hazardous waste. Id. at 177.

In *Louisiana-Pacific Corp. v. ASARCO, Inc.*,13 the United States Court of Appeals for the Ninth Circuit addressed the issue of whether the American Smelting and Refining Company (ASARCO) was liable under CERCLA to site owners who purchased slag from ASARCO for the cleanup of heavy metal contamination found at the sites despite slag’s Bevill Amendment exclusion from CERCLA regulation under subsection 101(14)(C).14 The Ninth Circuit affirmed the district court’s assessment of comparative fault liability on ASARCO under CERCLA.15 In reaching its conclusion, the ASARCO court followed the reasoning of the district court, noting that the specific Bevill Amendment special wastes, incorporated in subsection 101(14)(C) of CERCLA, are neither excluded individually16 nor in their component forms from regulation under the other subsections of section 101(14).17 In so holding, the Ninth Circuit relied upon statutory construction and plain language to interpret CERCLA section 101(14).18 The court also discussed the appropriate standard of judicial review of an administering agency’s interpretation of statutory language as enunciated in prior United States Supreme Court decisions.19 Based upon these considerations, the Ninth Circuit concluded that “the Bevill Amendment has no bearing on whether slag in its component forms is excepted from the other subsections” of CERCLA section 101(14).20

Furthermore, the Ninth Circuit addressed the issue of whether a jury finding that slag is a product under state law precludes a court finding that slag is waste under CERCLA.21 The court held that the sale of slag can simultaneously be the sale of a product

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13. 24 F.3d 1565. For a detailed discussion of the history of this case and related cases, see infra notes 65-84 and accompanying text.
14.  Id. at 1569.
15.  Id. at 1570, 1572. ASARCO was assessed with 79% -100% liability for CERCLA cleanup costs under theory of comparative fault. Id. at 1572.
16.  See Eagle-Picher, 759 F.2d at 930.
17.  ASARCO, 24 F.3d at 1573-74.
18.  Id. at 1573.
19.  Id. at 1573-74. For a discussion of the appropriate standard of judicial review, see infra note 96 and accompanying text.
20.  Id. at 1573.
21.  Id. at 1574-75.
under state law and the disposal of hazardous waste under CERCLA.\textsuperscript{22} In reaching its conclusion, the ASARCO court distinguished the objectives of the two laws: the state law focusing on common law products liability, and the federal law addressing environmental concerns.\textsuperscript{23} The court found no conflict of law issue since CERCLA is "designed to facilitate the cleanup of waste that threatens the environment"\textsuperscript{24} and is not meant to "treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion" with respect to unsafe products.\textsuperscript{25}

This Casebrief first surveys the historical development of ore and mineral processing waste regulations under federal law.\textsuperscript{26} Next, this Casebrief traces the facts and intricate procedural history of ASARCO's challenge to the status of CERCLA regulation of mineral processing waste as a hazardous substance.\textsuperscript{27} It then examines the Ninth Circuit's rationale, analysis, and balancing of the relevant factors in hazardous waste cleanup cases. Finally, this Casebrief concludes that the ASARCO decision points to the crucial need for congressional guidance and final determination concerning the appropriate regulatory standard for mining processing waste under the Bevill Amendment.\textsuperscript{28}

\textsuperscript{22} ASARCO, 24 F.3d at 1575. For a discussion of the product versus waste dichotomy, see infra notes 102-107 and accompanying text.

\textsuperscript{23} Id. at 1575.

\textsuperscript{24} Id.


\textsuperscript{26} For a discussion of the historical development of ore and mineral processing waste regulations, see infra notes 34-64 and accompanying text.

\textsuperscript{27} This appeal came before the Ninth Circuit on ASARCO's motion for partial summary judgment regarding the status of copper smelting slag as a CERCLA hazardous substance. See Louisiana-Pacific Corp. v. ASARCO, Inc., 33 Env't Rep. Cas. (BNA) 1079 (W.D. Wash. 1990) (ASARCO II). Before the district court, ASARCO asserted that slag and other certain mining and smelting processing wastes were intended by Congress to be subject to RCRA regulation only. Id. at 1080. As such, ASARCO argued that regulation under CERCLA was precluded. Id.

The district court rejected this argument adopting instead the position taken by Louisiana-Pacific and the other logyard plaintiffs. Id. The court denied ASARCO's motion for partial summary judgment finding that it was not the intent of Congress in passing the Bevill Amendment to shield from CERCLA regulation the hazardous constituents of mining and processing waste. Id.

For a discussion of the litigation related to this motion and other claims asserted by ASARCO, Louisiana-Pacific, and the other parties to this case, see infra notes 71-84 and accompanying text.

\textsuperscript{28} For a discussion of the possible future direction of mine processing waste regulation under CERCLA, see infra notes 109-13 and accompanying text.
II. BACKGROUND

RCRA was enacted in response to public concern over the environment.29 RCRA, like other environmental legislation of the day, put enormous obligations on, and gave tremendous authority to, EPA to create and implement policies relating to the management of hazardous wastes.30 Specifically, RCRA established a comprehensive regulatory framework for the treatment, transportation, storage, and disposal of hazardous wastes under Subtitle C.31 Congress then directed EPA to promulgate regulations which would identify characteristics of hazardous waste, list the specific hazardous wastes subject to Subtitle C regulation, and standardize facility treatment, storage, and disposal of such wastes.32 As part of its Subtitle C instructions, Congress further directed EPA to take into account certain criteria including "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, ... and other hazardous characteristics" when developing its regulations.33

In the area of solid waste from surface and underground mines, Congress directed EPA to conduct comprehensive studies of these wastes, to note any adverse effects they had on the environ-

29. See Philip Weinberg, Environmental Protection in the Next Decades: Moving From Clean Up to Prevention, 27 Loy. L.A. L. Rev. 1145 (1994). Specifically, Congress’ enactment of RCRA, CERCLA, and other environmental acts was thought to be a direct response to the first Earth Day observation in 1970 and the critical writings of such writers as Rachel Carson and Garrett Hardin. Id. at 1145 & nn.1-3.

30. Donald W. Stever, Experience and Lessons of Twenty-Five Years of Environmental Law: Where We Have Been and Where We Are Headed, 27 Loy. L.A. L. Rev. 1105, 1109-11 (1994). This type of statute is known as command and control law. Id. at 1109 n.7. Congress through the statute announces the formation of a program giving few details (“command”) and then delegates to an administrative agency the responsibility of giving substance to the skeletal framework (“control”). Id. The agency must create and implement specific policies. Id. This type of congressional rule making was criticized in AFL-CIO v. American Petroleum, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring) on the basis of the nondelegation doctrine. Under this principle, Congress is to make hard policy decisions giving administrative agency an “intelligible principle” before delegating its authority. Id. at 685-86. In the case of RCRA, congressional guidance was unclear and limited. Stever, supra, at 1110.


32. See Environmental Defense Fund, 852 F.2d at 1318 (summarizing congressional mandate to EPA).

33. RCRA § 3001(a), 42 U.S.C. § 6921(a).
ment, and to make recommendations for alternative disposal methods. EPA responded by promulgating proposed regulations governing all aspects of Subtitle C hazardous waste management and by creating a category of "special wastes." This category, characterized by extremely high volumes of waste that pose relatively low levels of hazard to the environment, included wastes from the extraction, beneficiation, and processing of ores and minerals. As such, these wastes were subject to fewer regulatory requirements than Subtitle C hazardous wastes because they were "not amenable to the control techniques" enunciated by EPA in its proposed regulations. EPA dropped the special wastes category in its interim final regulations, however, thereby subjecting these wastes to full Subtitle C regulation.

Congress enacted the Solid Waste Disposal Act, which included the Bevill Amendment, just prior to the effective date of RCRA Subtitle C regulations. The Bevill Amendment revived the special wastes category dropped from EPA's interim final regula-

34. RCRA § 8002(f), 42 U.S.C. § 6982(f). See also Environmental Defense Fund, 852 F.2d at 1318-19 (pointing to need for alternative methods to lessen adverse effects on environment); Hiles & Wilkinson, supra note 4, at 393 (noting studies to include recommendations for appropriate management action). Congress authorized these studies because it lacked sufficient information regarding the hazardous nature and potential dangers posed by certain wastes, including mine waste. Hiles & Wilkinson, supra note 4, at 393 & n.7. EPA's studies were to include checking the source and composition of mine wastes, and the existing methods of disposal of such wastes. Id. (citing H.R. Rep. No. 1491, 94th Cong., 2d Sess. 4 (1976)). These studies were to be completed no later than 18 months after the enactment of RCRA. RCRA § 3001(b)(1), 42 U.S.C. § 6921(b)(1).

35. Environmental Defense Fund, 852 F.2d at 1319. See also Hiles & Wilkinson, supra note 4, at 393 (wastes believed to be not amenable to proposed regulatory scheme). These regulations were promulgated on December 18, 1978. See 45 Fed. Reg. 58,946 (1978) (EPA's proposal for management of hazardous wastes under Subtitle C of RCRA).

36. Hiles & Wilkinson, supra note 4, at 393. Other "special wastes" included cement kiln dust waste, utility waste including bottom ash waste and fly ash waste, phosphate rock mining waste, uranium rock mining waste, oil and gas drilling muds, and oil production brines. Id. at 393 n.14. See also Environmental Defense Fund, 852 F.2d at 1319 (noting lack of information concerning special wastes' composition and environmental effects).


38. 45 Fed. Reg. 33,066, 33,174 (1980) (codified at 40 C.F.R. § 261.4(b)). See also Environmental Defense Fund, 852 F.2d at 1319 (explaining revision in hazardous criteria led to exclusion of special waste category). These interim final regulations were promulgated on May 19, 1980. Id.


40. Environmental Defense Fund, 852 F.2d at 1319. See Hiles & Wilkinson, supra note 4, at 394. For a discussion of the Bevill Amendment, see supra note 6 and accompanying text.
tions and excluded these wastes from Subtitle C regulation until EPA completed all studies mandated by Congress.41 Furthermore, the Bevill Amendment extended the deadline for completion of these studies.42 EPA broadened the scope of the mining waste exclusions when it amended the interim final regulations to incorporate the Bevill Amendment.43 Specifically, EPA added solid wastes from the smelting and refining of ores and minerals to the initial congressional directive covering solid wastes from the extraction, beneficiation, and processing of ores and minerals.44

EPA failed to complete the Bevill Amendment special wastes studies by the deadline.45 Without these studies, EPA was unable to determine whether mining wastes should be subject to RCRA Subtitle C regulation.46 Consequently, the Environmental Defense Fund sued EPA for failure to complete the mandated studies within the time allotted and for failure to determine whether Bevill Amend-

41. Environmental Defense Fund, 852 F.2d at 1319 (discussing two provisions of Bevill Amendment).

42. See RCRA § 8002(p), 42 U.S.C. § 6982(p); see also RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A) (extending exemption from regulation until six months after studies completed). Specifically, the Bevill Amendment extended the deadline of RCRA § 8002(f) allowing the study of mining wastes to continue until October 21, 1983, and added § 8002(p) directing EPA to conduct a similar study of the “disposal and utilization of solid waste from the extraction, beneficiation, and processing of ores and minerals including phosphate rock and overburden from uranium mining.” Environmental Defense Fund, 852 F.2d at 1319 (quoting RCRA § 8002(p), 42 U.S.C. § 6982(p)). Fly ash waste, bottom ash waste, slag waste, and cement kiln dust waste were also targeted for EPA study. Id. See also RCRA § 8002(n), (o), 42 U.S.C. § 6982(n), (o) (listing wastes to be studied).

The Bevill Amendment also mandated that EPA exclude from Subtitle C regulations these special wastes and determine, after completion of its studies, whether subsequent RCRA regulation of such wastes was warranted. RCRA § 3001(b)(3)(C), 42 U.S.C. § 6921(b)(3)(C).


44. Hiles & Wilkinson, supra note 4, at 395. EPA broadened the scope of the mining waste exclusions as an accommodation to the mining industry. 45 Fed. Reg. 76,618, 76,619. See also Environmental Defense Fund, 852 F.2d at 1320 (noting EPA’s accommodation as “temporary”). EPA questioned whether Congress wanted to include wastes “generated in the smelting, refining and other processing of ores and minerals that are further removed from the mining and beneficiation” processes. 45 Fed. Reg. 76,618, 76,619.

45. Environmental Defense Fund, 852 F.2d at 1321.

46. Id. In fact, as of January, 1990, EPA submitted only two reports to Congress: the first report on wastes from extraction and beneficiation of metallic ores, phosphate rock, asbestos, overburden from uranium mining and oil shale (December 31, 1985); and the second report on wastes from the combustion of coal by electric utility power plants (1988). Hiles & Wilkinson, supra note 4, at 394 & n.20. See also Environmental Defense Fund, 852 F.2d at 1322 (noting first report’s limited content).
moment special wastes warranted Subtitle C regulation.47 As a result of this suit, the Court of Appeals for the District of Columbia ordered EPA to, among other things, propose a reinterpretation of the Bevill Amendment mining waste exclusions and to take final action on that reinterpretation.48

EPA narrowed the proposed scope of mining wastes subject to Subtitle C exclusion to comply with this court order.49 Relying on the legislative history of the Bevill Amendment, EPA determined that congressional intent was to limit solid wastes from the processing of ores and minerals and was not meant to include other processes further removed from the mining of such raw materials.50 After this reinterpretation, only four processing wastes from the original list of Bevill Amendment special wastes remained.51

The high volume, low hazard criteria for determining which mine processing wastes would be excepted from Subtitle C hazardous waste regulation was problematic for EPA.52 As a result, EPA withdrew its proposed reinterpretation, thereby reinstating its expansive interpretation of the Bevill Amendment as “permissible,” though not the only acceptable interpretation available.53 Thus,

47. Environmental Defense Fund, 852 F.2d at 1321 (discussing Concerned Citizens of Adamstown v. EPA, No. 84-3041 (D.D.C. Aug. 21, 1985)).
48. Id. The deadline set for proposing a reinterpretation was September 30, 1985, and for final action on such proposal, September 30, 1986. Id. In addition, the court ordered EPA to complete all studies mandated under RCRA §§ 8002(f) and 8002(p) by December 31, 1985. Id. For a discussion of the reports completed by EPA after this decision, see supra note 46.
50. Hiles & Wilkinson, supra note 4, at 395.
51. Environmental Defense Fund, 852 F.2d at 1322. The reinterpretation was published on October 2, 1985. Id. at 1321. These wastes were: red and brown muds from bauxite refining; phosphogypsum from phosphoric acid plants; and slag from primary metal smelters and phosphorus reduction facilities. Id. at 1322 (citing 50 Fed. Reg. at 40,294, 40,301). EPA used the high volume, low hazard standard enumerated in its 1978 proposed regulations to determine which wastes would remain. Id. The six other smelting wastes previously excluded from Subtitle C regulation under EPA's expansive interpretation of the Bevill Amendment were slated to be relisted for Subtitle C regulation. Id. EPA, however, in its report on wastes from extraction and beneficiation of metallic ores, did not discuss its reinterpretation of processing waste exclusions. Id.
52. Hiles & Wilkinson, supra note 4, at 395-96. Among the problem areas were waste grouping and classification, and definitions of high volume and low hazardous. Id. at 396 (citing 51 Fed. Reg. 36,233, 36,234-35). Specifically, EPA found that, although the definition of the latter terms were not unsound, its proposed reinterpretation did not establish a criteria which clarified the distinction between processing and non-processing wastes. Environmental Defense Fund, 852 F.2d at 1323.
the broad interpretation which included smelting and refining wastes was to stand until EPA completed its mandated studies. As might be expected, EPA's withdrawal met legal opposition by the Environmental Defense Fund. Consequently, the Court of Appeals for the District of Columbia held EPA's withdrawal of its proposed reinterpretation to be "arbitrary and capricious and contrary to law." The court further imposed a schedule on EPA for determining which high volume processing wastes remained within the Bevill Amendment exclusion and for completing the study of such processing wastes which remained as exclusions.

Furthermore, in compliance with the Environmental Defense Fund court order, EPA issued a notice of proposed rulemaking which defined mining processing wastes and set forth proposed rules that had the effect of removing most processing wastes from the Bevill Amendment exclusion. Although EPA developed explicit high volume criterion requirements in this notice, it failed to develop similar low hazard criterion. EPA also addressed the topic of processing waste streams and those factors which would allow a given stream to remain as a Bevill exclusion. Based upon its high volume analysis of these waste streams, EPA slated fifteen mineral processing wastes for retention under the Bevill Amendment exclusion. Later, in early 1989, EPA enumerated its low hazard

54. Id.
55. Hiles & Wilkinson, supra note 4, at 396. The Environmental Defense Fund and Hazardous Waste Treatment Council brought suit against EPA on several allegations including a challenge to EPA's withdrawal of its proposed reinterpretation. Environmental Defense Fund, 852 F.2d at 1324.
56. Id. at 1331.
57. Id. Noting EPA's further statutory obligation to submit a report to Congress, the timetable imposed by the court was October 15, 1988. Id. Final determinations were to be made by February 15, 1989, and with respect to remaining processing wastes, § 8002 studies were to be completed by July 31, 1989. Id.
59. Hiles & Wilkinson, supra note 4, at 397.
60. Id. EPA analyzed individual waste streams and their associated degree of aggregation to determine the definition of "high volume" processing wastes. 53 Fed. Reg. 41,288, 41,292 (1988) (codified as amended at 40 C.F.R. § 261.4(b)(7)).
61. 58 Fed. Reg. 41,288 (1988) (codified as amended at 40 C.F.R. § 261.4(b)(7)). The 15 special wastes included slag from primary copper smelting, slag from primary lead smelting, red and brown muds from bauxite refining, phosphogypsum from phosphoric acid production, and slag from elemental phosphorous production. Id.
criterion while at the same time it modified the high volume criterion.\textsuperscript{62}

Late in 1989, EPA promulgated final regulations retaining five processing special wastes as Bevill Amendment exceptions.\textsuperscript{63} In addition, EPA also modified its high volume and low hazard criterion and clarified its definition of processing wastes.\textsuperscript{64}

III. FACTS AND PROCEDURAL HISTORY

ASARCO began smelting copper from copper ore in the State of Washington in 1905.\textsuperscript{65} For much of that time, ASARCO had an agreement with the Metropolitan Park District of Tacoma to dump most of its copper mining byproduct slag in the Commencement

62. Hiles & Wilkinson, supra note 4, at 397-98. See also 54 Fed. Reg. 15,316 (1989) (codified as amended at 40 C.F.R. § 261.4(b)(7)). By adopting a low hazard criteria and modifying its earlier notice, EPA reduced the 15 mining processing wastes list down to 6 wastes including slag from primary copper smelting, slag from phosphoric acid production, slag from elemental phosphorus production, and furnace scrubber blowdown from elemental phosphorus production. Id. at 15,354. In addition, EPA conditionally retained most of the removed processing wastes in its listing of 33 processing wastes which would be subject to additional evaluation to determine if they met the new hazard criterion. Id.

63. Hiles & Wilkinson, supra note 4, at 398. EPA also reduced the list of 33 conditionally retained processing wastes to 20. 54 Fed. Reg. 36,592, 36,641-42 (1988) (codified as amended at 40 C.F.R. §§ 261.3(a)(2)(i), (iii), 261.4(b)(7)(i),(iii)). Subsequently, EPA proposed to remove 7 of the 20 conditionally retained processing wastes. Hiles & Wilkinson, supra note 4, at 399 n.47. Instead, EPA removed only five. Id. at 400. See also 55 Fed. Reg. 2322, 2353 (1990) (codified as amended at 40 C.F.R. §§ 261.4(b)(7), 262.23(e)).

64. Hiles & Wilkinson, supra note 4, at 399 (describing modifications to high volume and low hazard criterion). On January 23, 1990, EPA promulgated a final regulation permanently reducing the list of 20 conditionally retained to 15. Id. at 400 (citing 55 Fed. Reg. 2322 (1990) (codified as amended at 40 C.F.R. § 261.4(b)(7))).

65. ASARCO, 24 F.3d at 1570. ASARCO maintained a copper mill in Ruston, Washington. Louisiana-Pacific Corp. v. ASARCO, Inc., 29 Env't Rep. Cas. (BNA) 1450, 1451 (W.D. Wash. 1989) (granting successor and purchaser of copper smelting slag processing and marketing company motion for summary judgment on ASARCO's third party suit), aff'd, 909 F.2d 1260 (9th Cir. 1990) (ASARCO I). It was the slag from this mill which was processed and marketed. Id. ASARCO consequently ceased its operations in March, 1985. Id.

Smelting is part of the mining process used to change raw ore materials to refined mineral products. WEBSTER'S NINTH NEW COLLEGiate DICTIONARY 1113 (1984). The raw materials are first extracted from the earth; then, through the process known as beneficiation, the ore is crushed and ground in preparation for smelting. Gerrard, supra note 4, at 1066 n.114. Smelting separates the mineral from the ore either by physical or chemical techniques, the latter process often producing volumes of byproduct. Id. In ASARCO, the copper processing byproduct produced was slag. Id.
Bay.\textsuperscript{66} In 1973, ASARCO decided to market, rather than dump, its slag and contracted to resell as much of the byproduct as possible with a portion of the proceeds going to ASARCO.\textsuperscript{67} The contracting company successfully marketed the slag as ballast to six logyards,\textsuperscript{68} which subsequently hauled their used slag and woodwaste mixture to a landfill.\textsuperscript{69} In 1986, after several years of state and federal investigations, the landfill along with each of the logyard sites required formal CERCLA cleanup for heavy metal contaminations.\textsuperscript{70} A barrage of litigation ensued.

First, Louisiana-Pacific sued ASARCO under CERCLA for response costs for cleanup of its own logyard and for contribution or indemnification for its liability for the cleanup of the landfill.\textsuperscript{71} ASARCO filed a counterclaim against Louisiana-Pacific under CERCLA and Washington state law.\textsuperscript{72} ASARCO also brought numerous

\begin{itemize}
\item \textsuperscript{66} ASARCO, 24 F.3d at 1570. The agreement with the park district required ASARCO to maintain a breakwater at the dumping site. \textit{Id.}
\item \textsuperscript{67} Id. \textit{See also} Louisiana-Pacific Corp. v. ASARCO, Inc., 5 F.3d 431, 492 (9th Cir. 1993) (\textit{ASARCO IV}). ASARCO started its marketing efforts in 1973 and solicited the services of Black Knight, Inc. \textit{ASARCO,} 24 F.3d at 1570. Black Knight decided to market the byproduct as a ballast in logyards. \textit{Id.} The logyards used the slag as a stabilizer to make the ground firmer for the storage of logs and to ease operation of heavy equipment. \textit{Id.} at 1570-71. Once the slag became too diluted with other debris to maintain its stabilizing function, it was removed, hauled away, and replaced with a new load. \textit{Id.} at 1571.
\item Black Knight was a subsidiary of Industrial Mineral Products, Inc. (IMP). \textit{ASARCO IV}, 5 F.3d at 432. ASARCO tried unsuccessfully to join IMP, a dissolved corporation, as a third-party defendant for contribution or indemnification for CERCLA cleanup costs. \textit{Id.} at 433. \textit{See also infra} note 73 and accompanying text.
\item \textsuperscript{68} ASARCO, 24 F.3d at 1570, 1571 n.1.
\item \textsuperscript{69} \textit{Id.} at 1571. In 1978, the logyards began hauling their used slag/woodwaste to the B&amp;L Landfill located in Tacoma. \textit{Id.} The six logyards listed as contaminated by ASARCO's slag included: (1) Louisiana-Pacific site owned and operated by Louisiana-Pacific; (2) Portac site owned by the Port of Tacoma and operated by Portac; (3) Wasser & Winters site owned by the Port of Tacoma and operated by Wasser & Winters; (4) Cascade Timber site owned by the Port of Tacoma and operated by Cascade Timber; (5) Murray-Pacific #1 site owned and operated by Murray-Pacific; and (6) Murray-Pacific #2 site owned by Port of Tacoma and operated by Murray-Pacific. \textit{Id.} at 1571 n.1.
\item \textsuperscript{70} \textit{Id.} at 1571. EPA, in 1980, discovered high concentrations of heavy metals in water runoff from one of the six logyard sites. \textit{ASARCO,} 24 F.3d at 1571. In cooperation with EPA, the Washington Department of Ecology (WDOE) determined that the likely cause of the contamination was the ASARCO slag. \textit{Id.} Formal cleanup actions did not commence until 1986. \textit{Id.} The B&amp;L Landfill was found to be contaminated by ASARCO slag dumped by the six logyards. \textit{Id.} at 1571 n.1. The owners and operators of the six logyards as well as the owner and operator of the B&amp;L Landfill, who also owned the two trucking companies that transported the slag to the landfill, were held liable for the cleanup costs at each of the six logyards and the landfill under CERCLA. \textit{Id.}
\item \textsuperscript{71} \textit{ASARCO,} 24 F.3d at 1571.
\item \textsuperscript{72} \textit{Id.}
\end{itemize}
third-party claims against some of the other logyards that disposed their slag and woodwaste mixture at the landfill.⁷³ Some of the third-party defendants then counterclaimed.⁷⁴

Next, the Port of Tacoma, as owner of several of the contaminated logyard sites, sued ASARCO for response costs under CERCLA and Washington state law, and for contribution or indemnification for cleanup of the landfill. The United States District Court for the Western District of Washington consolidated the Louisiana-Pacific and Port of Tacoma suits to include all six logyards as plaintiffs acting in concert against ASARCO as the sole defendant.⁷⁵

The state law claims asserted under the Hazardous Waste Management Act (HWMA)⁷⁶ and the Washington Products Liability Act (WPLA)⁷⁷ were tried by a jury, while the CERCLA claims were tried by the court.⁷⁸ All other claims made on motion by ASARCO were dismissed.⁷⁹

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73. *Id.* ASARCO's third-party claims and motions include: (1) a suit against William Fjetland, owner and operator of the B&L Landfill who owned and operated the trucking companies that transported the logyard mixture, *id.*; (2) a suit against L-Bar Products, Inc., successor corporation of IMP, for share of CERCLA response costs liability incurred during IMP's activities at ASARCO, ASARCO *v.* IMP, 29 Env't Rep. Cas. (BNA) at 1451 (granting L-Bar's motion for summary judgment); (3) a motion for partial summary judgment regarding status of copper smelting as a CERCLA hazardous substance, Louisiana-Pacific *v.* ASARCO, Inc., 33 Env't Rep. Cas. (BNA) 1079 (W.D. Wash. 1990) (predecessor of focus case), *aff'd*, 24 F.3d 1565 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 780 (1995); (4) a suit against United States Gypsum Interiors, Inc. (USGI), producer of mineral wool which dumped its processing by-product at B&L Landfill between 1978 and 1980, for response costs for cleanup of the landfill, Louisiana-Pacific *v.* ASARCO, Inc., 735 F. Supp. 358, 360 (W.D. Wash. 1990) (ASARCO III) (denying USGI's motion for summary judgment); and (5) a motion to amend complaint relating it back to date of original complaint in order to add IMP as a third-party defendant for CERCLA response costs for the cleanup of B&L Landfill, ASARCO *v.* IMP, 5 F.3d at 431.

74. ASARCO, 24 F.3d at 1571. The counterclaims were brought against ASARCO under CERCLA and various Washington state laws including its Model Toxic Control Act (MTCA), Hazardous Waste Management Act (HWMA), and Washington Products Liability Act (WPLA). *Id.* In addition, common law claims of trespass, nuisance, negligence, negligent misrepresentation, fraud, and breach of warranty were asserted against ASARCO. *Id.*

75. ASARCO, 24 F.3d at 1571 n.2. William Fjetland, owner and operator of the B&L Landfill, and his companies remained the sole third-party defendants. *Id.*

78. ASARCO, 24 F.3d at 1571.
79. *Id.* ASARCO moved to have some of the common law claims against it dismissed. *Id.* The district court, in granting ASARCO's motion, dismissed all the common law claims finding them preempted by WPLA. *Id.* The court also dismissed a claim for a private cause of action brought under the Model Toxic Control Act (MTCA), Wash. Rev. Code Ann. § 70.105D.010. (amended 1993), claims finding no ground for a private cause of action under this act. *Id.* The Washington legislature, however, amended MTCA after oral arguments were made on this
The jury found ASARCO liable to each of the plaintiffs under HWMA and WPLA. In determining the damages, the jury found ASARCO to be 75% to 100% liable under Washington state law for cleanup costs at the logyard sites. The district court also found ASARCO liable under CERCLA, and determined ASARCO's comparative fault to be 79% to 100% for the cleanup costs at each site, including the landfill. ASARCO filed an appeal, and plaintiffs filed cross-appeals to the Ninth Circuit.

IV. DISCUSSION

A. CERCLA Regulation of Bevill Amendment Special Wastes

The question of whether the special wastes exclusion of the Bevill Amendment, as found in subsection 101(14)(C) of CERCLA, appeal. ASARCO, 24 F.3d at 1571 n.3. Consequently, the Ninth Circuit reversed the district court's dismissal and remanded the MTCA issue. Id. at 1583.

80. Id. at 1571.
81. Id. at 1572.
82. Id. at 1571.
83. ASARCO, 24 F.3d at 1572. The district court applied these percentages to compute ASARCO's liability for cleanup activity at the Portac site. Id. The court then awarded attorneys fees and costs under CERCLA and Washington state law applying the respective comparative fault percentages. Id.
84. Id. On appeal, ASARCO reasserted its contention that slag as excepted from the definition of hazardous substance under CERCLA § 101(14)(C) is therefore completely excepted from CERCLA regulation. Id. This position was first taken in ASARCO's motion for partial summary judgment regarding status of copper smelting slag as CERCLA hazardous substance. See ASARCO II, 33 Env't Rep. Cas. (BNA) 1080. ASARCO alleged that its mining operations, through the Bevill Amendment, were only subject to regulation under RCRA. Id. Thus, it was completely precluded from liability under CERCLA. Id.

ASARCO further alleged on appeal that the meaning of CERCLA § 101(14) is not clear from its language alone and the legislative history of the statute is ambiguous. ASARCO, 24 F.3d at 1573. It also asserted that EPA's interpretation of the section is unreasonable since such a reading would render the Bevill Amendment completely nullified and meaningless. Id. at 1574.

Similar arguments were made by the petitioners and rejected by the United States Court of Appeals for the District of Columbia in Eagle-Picher. See Eagle-Picher, 759 F.2d at 927. The court in that case found these contentions unpersuasive due to the lack of evidence, including citations in CERCLA, legislative history, or the record of the case, supporting petitioners' assertions that all mining wastes have constituents which are hazardous substances under CERCLA, thus rendering as meaningless the interpretation that § 9601(14)(C) was meant to be a total exemption. Id. at 927-28. ASARCO tried to address this evidentiary problem by offering expert testimony that all or virtually all Bevill Amendment wastes fall within one or more of other § 9601(14) definitions of hazardous substances. ASARCO, 24 F.3d at 1574. On this point, the Ninth Circuit simply referred to its reliance on the clear and plain language of the statute. Id. The court concluded that if Congress intended to exclude the Bevill Amendment wastes from CERCLA regulation, Congress would have included an express general exemption similar to the general exclusion for petroleum products enunciated at the end of § 9601(14). Id.
completely precluded these wastes from hazardous waste regulation under CERCLA, was one of first impression for the Ninth Circuit. The court commenced its substantive analysis by adopting the approach taken by the Court of Appeals for the District of Columbia. The Ninth Circuit concluded that the special wastes exception in subsection C did not prevent those wastes from regulation under other subsections of section 101(14) of CERCLA. Specifically, the ASARCO court found that the Bevill Amendment exception under subsection C has “no bearing” on whether slag, as one such excepted waste, found in its component forms is excepted from regulation under the remaining subsections of section 101(14) of CERCLA. In order to completely exclude the Bevill Amendment special wastes from CERCLA regulation, the court reasoned that a general exception, applicable to all of the subsections, would be required.

Alternatively, the Ninth Circuit suggested that, at the very least, Congress could have made a general exception applicable to the relevant subsections of section 101(14) which encompass slag

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85. ASARCO, 24 F.3d at 1573.
86. Id. The approach taken in Eagle-Picher was to limit the specific Bevill Amendment in subsection 101(14) (C) to apply only to that subsection and not to section 101(14) in general. Id.
87. Id. at 1573. The Court of Appeals for the District of Columbia in Eagle-Picher addressed the issue of whether CERCLA authorized EPA to place certain mining companies and an electric utility company, which produced mining wastes or fly waste, on the National Priorities List (NPL). Eagle-Picher, 759 F.2d at 925, 926. In denying the companies’ petitions for review of an EPA order, the Eagle-Picher court concluded that “a substance is a 'hazardous substance' within the meaning of CERCLA if it qualifies under any of the several subparagraphs of section 101(14).” Id. at 927. This finding was deemed consistent with EPA’s construction of the statutory provision. Id.
88. ASARCO, 24 F.3d at 1573.
89. Id. Here, the court analyzed Congress’ treatment of petroleum products under CERCLA. Id. Congress made a general exception applicable to all of the subsections of CERCLA § 101(14) for petroleum products. Id. Specifically, the term “hazardous substance” does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).
CERCLA § 101(14), 42 U.S.C. § 9601(14). It is this general exception found at the end of the section, which both the Ninth Circuit in the instant case and the District of Columbia Circuit in Eagle-Picher, found to be persuasive in ruling that the specific exception in CERCLA § 101(14)(C) did not apply to the entire section. See Eagle-Picher, 759 F.2d at 927.
through its components.\textsuperscript{90} This measure would have the effect of completely excepting slag from CERCLA regulation.\textsuperscript{91} Since, however, Congress did not make such an exception, the Ninth Circuit found no basis to read an exception into the statute.\textsuperscript{92} Thus, the ASARCO court relied upon the plain language and structure of section 101 of CERCLA, and EPA’s construction of the statute, to conclude that the Bevill Amendment exception for slag applied only to subsection C.\textsuperscript{93} The court held that if slag is found within the definition of hazardous substance under any other subsections of section 101(14), then it could be regulated under CERCLA.\textsuperscript{94}

The Ninth Circuit next considered, arguendo, ASARCO’s contention that the statute was ambiguous given its legislative history.\textsuperscript{95} To establish the proper course of judicial review of an administrative agency’s statutory interpretation, the court looked to the United States Supreme Court’s decision in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{96} The Ninth Circuit deter-

\textsuperscript{90} ASARCO, 24 F.3d at 1573. The basic premise that a general exception for Bevill Amendment special wastes or a specific exception for slag and its components were necessary was deemed by the Ninth Circuit as being “logical” in light of Congress’ treatment of petroleum products. \textit{Id.} For a discussion of the general exception for petroleum products and natural gas under CERCLA, see supra note 89.

\textsuperscript{91} See id. at 1573.

\textsuperscript{92} Id. In fact, the court is not permitted to read into a statute its own construction. \textit{Id.} For a discussion of this prohibition, see infra note 97.

\textsuperscript{93} Id. at 1573.

\textsuperscript{94} Id. EPA construed the statute as only excepting slag from consideration as a hazardous substance under subsection C. \textit{Id.} at 1572. If, however, the slag released substances that could be deemed hazardous under any of the other subsections, EPA concluded that slag was subject to CERCLA regulation. \textit{Id.} at 1573, 1574. See also 48 Fed. Reg. 40,669 (1983).

Once again, the Ninth Circuit in reaching the above conclusion followed the approach of the District of Columbia Circuit in \textit{Eagle-Picher}. In the latter case, the District of Columbia Circuit noted its obligation to accept an agency’s reasonable construction of a statute it administers. \textit{Eagle-Picher Industries, Inc. v. United States EPA}, 759 F.2d 922, 927 n.5 (D.C. Cir. 1985). In particular, the court applied the principles for judicial review of an administrative agency’s statutory interpretation set forth by the United States Supreme Court in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984). \textit{Id.}

For a discussion of the judicial standard of review of an agency’s statutory construction enumerated in \textit{Chevron}, see infra notes 96-99 and accompanying text.

\textsuperscript{95} ASARCO, 24 F.3d at 1573. ASARCO offered as legislative history a Senate report on a draft of CERCLA. \textit{Id.} In relevant part, the report stated “[i]t should be noted that any substance or material for which regulation is specifically suspended by Act of Congress under the Solid Waste Disposal Act is excluded from designation for the purpose of S. 1480, notwithstanding the presence in such substance of any hazardous or toxic chemical.” S. REP. NO. 848, 96th Cong., 2d Sess. (1980).

\textsuperscript{96} ASARCO, 24 F.3d at 1573 (citing \textit{Chevron}, 467 U.S. at 840). In \textit{Chevron}, the Court faced the issue of whether EPA’s construction of the Clean Air Act term
minded, based on the principles enunciated in *Chevron*, that even if the statute was ambiguous on its face, the court was not free to simply create and impose its own statutory construction, as ASARCO suggested. The *ASARCO* court found that when an agency has interpreted the meaning of a statute, the next inquiry proscribed by *Chevron* for the court to consider is whether that construction is permissible. Thus, the court concluded that EPA's interpretation of section 101(14) of CERCLA, that the Bevill Amendment exceptions only applied to subsection C, was reasonable given the plain language of the statute.

"stationary source" was reasonable. *Chevron*, 467 U.S. at 840. Specifically, the Court determined whether the Court of Appeals for the District of Columbia made a legal error thus resulting in an erroneous judgment by setting aside EPA's construction of the Clean Air Act. *Id.* at 842. The *Chevron* court found that in adopting a "static judicial definition of the term 'stationary source'" the court of appeals erred. *Id.* Thus, the Court held EPA's definition of the term permissible. *Id.* at 866.

In its analysis of a court's review of an administering agency's construction, the *Chevron* court established a two-prong test. *Id.* at 842-44. The first prong requires the court to determine whether Congress has spoken directly to the exact question at issue. *Id.* at 842. If congressional intent is clear, then the inquiry ends. *Id.* As noted by the Court, the judiciary "as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (footnote omitted).

The second prong applies when the court determines that Congress has not spoken directly to the exact question at issue. *Id.* at 843. Thus, if a "statute is silent or ambiguous with respect to the specific issue," the court must address whether the administering agency's construction of the statute is permissible. *Id.* In establishing this prong, the *Chevron* court reasoned:

[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Chevron*, 467 U.S. at 843-44 (footnotes omitted).

97. *Id.* (citing *Chevron*, 467 U.S. at 842-43). The *Chevron* court stated, "[i]f, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction. . . ." *Chevron*, 467 U.S. at 842-43.

98. *ASARCO*, 24 F.3d at 1573 (citing *Chevron*, 467 U.S. at 842).

99. *Id.* at 1574. The Ninth Circuit's determination of the reasonableness of EPA's construction of CERCLA § 101(14) is circular. Under the *Chevron* test, only if the statute is ambiguous and congressional intent is unclear, does the court inquire whether the agency's construction is permissible, i.e., reasonable. *Id.* See *Chevron*, 467 U.S. at 843 n.11 (noting court need not determine whether agency's construction is only one permissible). Here, however, the Ninth Circuit in reaching its conclusion with respect to the second prong used the proscriptions of the first prong, namely, the clear and unambiguous language of the statute. *ASARCO*, 24 F.3d at 1573. This analysis begs the question since the two prongs of *Chevron* are mutually exclusive. *Chevron*, 467 U.S. at 842-44.
In relying on the plain meaning and structure of section 101 of CERCLA, the Ninth Circuit rejected ASARCO's argument that EPA's interpretation makes meaningless the Bevill Amendment exceptions in subsection C.100 Once again, the court concluded that since Congress expressly granted petroleum products a general exception from all CERCLA regulation, but only exempted slag under

ASARCO further argued that the United States Supreme Court in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), gave no deference to an administering agency's construction of a statute when a question of pure statutory construction arose. ASARCO, 24 F.3d at 1574. The Ninth Circuit in rejecting this argument distinguished Cardoza-Fonseca as being derived from the first prong of the Chevron test. Id. (citing NLRB v. United Food & Commercial Workers Union, Local 29, AFL-CIO, 484 U.S. 112, 123 (1987)). Since ASARCO's principle contention was that the statute is ambiguous, thus falling under the second prong, the court found ASARCO's argument in conflict with Chevron. Id. See also NLRB, 484 U.S. at 123 (reconciling Cardoza-Fonseca and Chevron decisions).

The Ninth Circuit's analysis of ASARCO's argument based on Cardoza-Fonseca failed to address the substantive differences between that case and the instant case. In Cardoza-Fonseca, the United States Supreme Court faced the issue of whether two standards for providing relief to an otherwise deportable alien were the same. 480 U.S. at 448. The first standard, found in the Immigration and Nationality Act § 245(h), required the withholding of deportation of such an alien if it is demonstrated that "it is more likely than not that the alien would be subject to persecution" upon return to his country. Id. at 423 (quoting INS v. Stevic, 467 U.S. 407 (1984)).

The second standard, found in the Immigration and Nationality Act § 208(a), authorized the discretionary grant of asylum to such an alien who is unable or unwilling to return to his country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Cardozo, 480 U.S. at 423. It was against this backdrop that the Court concluded, "[t]he question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide." Id. at 446.

Furthermore, the Court distinguished this type of narrow question for judicial review from that which arises when a "question of interpretation ... in which the agency is required to apply either or both standards to a particular set of facts." Id. at 448. It was the former narrow question of pure statutory construction which the Cardoza-Fonseca court found to be "well within the province of the Judiciary." Id. ASARCO dealt with the latter question, that of statutory interpretation as applied to a specific set of facts.

100. ASARCO, 24 F.3d at 1574. This is identical to the first argument presented by the petitioners in Eagle-Picher. See Eagle-Picher, 759 F.2d at 927. The Court of Appeals for the District of Columbia, in rejecting this argument, pointed to the petitioners' lack of evidence in CERCLA, its legislative history, or the record of the case which supported their proposition that all or virtually all mining waste and fly ash "have constituents which are 'hazardous substance.' " Id. at 928. Furthermore, the court concluded that "[w]ithout a showing that Congress believed that the regulation of mining wastes and fly ash under other subparagraphs of section 101(14) would render the exception in subparagraph (C) meaningless, we are disinclined to reject the plain meaning of section 101(14)." Id.

To overcome this evidentiary deficiency, ASARCO offered the expert testimony of a doctor of metallurgical engineering who concluded that all or virtually all Bevill Amendment wastes would fall under one of the other subsections of CERCLA § 101(14). ASARCO, 24 F.3d at 1574. The Ninth Circuit found this testimony unpersuasive. Id.
subsection 101(14)(C), slag can be regulated as a hazardous substance under other CERCLA provisions.\textsuperscript{101}

B. Slag: Product or Waste?

The Ninth Circuit next considered the question of whether the sale of slag can simultaneously be the sale of a product under state law and the disposal of a hazardous waste under federal law.\textsuperscript{102} Answering the question in the affirmative, the Ninth Circuit distinguished the purposes and independent functions of these two laws.\textsuperscript{103} It determined that WPLA represented the State of Washington's codification of common law products liability, while CERCLA represented federal environmental law.\textsuperscript{104} Thus, the two laws addressed different concerns which the ASARCO court found to be mutually exclusive.\textsuperscript{105} To support this conclusion, the Ninth Circuit relied on several federal court decisions which imposed CERCLA liability on wastes also deemed to be products.\textsuperscript{106} The court determined that since ASARCO wanted to discard its slag, whether by resale or disposal, a finding of slag as a product under WPLA does not preclude a finding of slag as a waste under CERCLA.\textsuperscript{107}

\textsuperscript{101} 24 F.3d at 1574.

\textsuperscript{102} Id. The jury after special instructions found slag to be a product under WPLA. \textit{Id.} In relevant part, WPLA defined a product to be "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts and produced for introduction into trade or commerce." WASH. REV. CODE ANN. § 7.72.010(3) (West 1992).

At the same time, the district court found slag to be a hazardous substance under CERCLA. 24 F.3d at 1574. In particular, the district court concluded "the Bevill Amendment did not intend to shield hazardous constituents of waste produced by mining and smelting operations." ASARCO II, 33 Env't Rep. Cas. (BNA) at 1080. Since slag contained constituents listed as hazardous under CERCLA, it was deemed to be hazardous waste. \textit{Id.}

\textsuperscript{103} ASARCO, 24 F.3d at 1575.

\textsuperscript{104} Id.

\textsuperscript{105} Id. The court found that CERCLA is given a broad interpretation in order to achieve its remedial goals. \textit{Id.}

\textsuperscript{106} Id. Specifically, the court cited several district court decisions holding that a mine processing byproduct, if sold, is regulable as both a product and waste. ASARCO, 24 F.3d at 1575. \textit{See, e.g., United States v. Conservation Chem. Co.,} 619 F. Supp. 162, 241 (W.D. Mo. 1985) (concluding CERCLA's "hazardous substances" definition fails to distinguish between sale of a product for primary use or sale of waste for disposal purposes); New York v. General Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (rejecting characteristic of disposal arrangements as "sales" so as to circumvent CERCLA liability); and United States v. A&F Materials Co., 582 F. Supp. 842, 844-45 (S.D. Ill. 1984) (finding hazardous waste definition as expansive to include hazardous materials which are sometimes sold or reused).

\textsuperscript{107} ASARCO, 24 F.3d at 1575. The court further distinguished cases in which the sale of a product was not deemed to be disposal of waste for the purpose of imposing CERCLA liability. \textit{Id. at 1575 n.6.} These cases were distinguishable, according to the court, because the products were not byproducts for disposal. \textit{Id.}
V. Conclusion

The United States Supreme Court has not addressed the issue of whether the Bevill Amendment special wastes, as excluded from subsection 101(14)(C) regulation, are completely excluded from CERCLA regulation under all subsections of section 101(14). 108 Therefore, the decisions of the Ninth Circuit and the District of Columbia Circuit provide the only precedent for subsequent court decisions regarding the scope of the Bevill Amendment exception. 109 Specifically, the ASARCO court has determined that unless there is a clear and explicit general exclusion from CERCLA section 101(14) regulation or, alternatively, unless the administrative agency interprets such a general exclusion, the special wastes listed under subsection C may be regulated under any other subsection of section 101(14). 110 This approach significantly limits the ability of the mining industry to circumvent CERCLA regulation of its hazardous waste disposal. 111 Furthermore, in light of EPA’s failure to complete its studies of mine processing wastes, the Ninth Circuit has given CERCLA a broad interpretation which is consistent with prior court opinions. 112

The future of mine processing waste regulation and the Bevill Amendment exception under CERCLA may be given a new direction in light of CERCLA’s pending expiration. 113 Without further

108. Eagle-Picher is the leading federal court case concluding that mining wastes are not excluded from CERCLA regulation if the wastes or any of their components fall within one of the other definitions of hazardous substance in section 101(14). Royster, supra note 12, at 634 n.594. The petition for a writ of certiorari was denied in ASARCO. See ASARCO, 115 S. Ct. 780 (1995) (granting leave to file amici curiae briefs to American Petroleum Institute and Alaska Miners Association).

109. For a discussion of related federal district court decisions, see supra note 12.

110. ASARCO, 24 F.3d at 1574.

111. For a discussion of the current treatment of mining processing waste, see supra notes 58-64 and accompanying text.

112. See Hiles & Wilkinson, supra note 4, at 394 n.20 (noting, as of January 1, 1990, only two reports have been submitted by EPA to Congress in conjunction with § 8002 mandated studies). EPA promulgated its final regulations on January 23, 1990, without completing these studies. Id. at 400. See also 55 Fed. Reg. 2353 (1990) (modifying both high volume and low hazard criteria as well as finalizing conditionally retained processing wastes list).

113. CERCLA is slated to expire in 1995 unless Congress reauthorizes it. Richard E. Bartelt & David E. Polter, Analysis and Perspective: Summary of the Proposed Superfund Reform Act of 1994, Current Developments, 25 Env’t Rep. (BNA) 608 (July 29, 1994). The Clinton administration and the 103d Congress have attempted to revise and overhaul CERCLA in what is known as the Superfund Reform Act of 1994. Id. The major changes proposed in the 1994 Act are intended to:

• Enhance EPA’s information-gathering activities and ability to respond to emergencies and to perform removal actions;
congressional clarification on the topic, it appears certain that mine processing wastes in general, and the Bevill Amendment in particular, will remain subject to CERCLA regulation with few exceptions.

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- Sharply limit the application and use of strict, joint and several liability specifically as it applies to de minimis parties and those who settle with the government in accordance with a new liability allocation system;
- Create an allocative system designed to apportion liability among PRPs based on the volume and toxicity of a PRP's wastes and the degree of care exhibited by the PRP in the management of those wastes;
- Limit the liability of municipalities;
- Limit the liability of lenders who acquire contaminated properties;
- Create more flexibility within the remedy selection process while also establishing national acceptable risk standards expressed as numerical concentration levels;
- Increase opportunities for public participation in the decision-making process and incorporate environmental justice concerns within the CERCLA process;
- Encourage the voluntary cleanup of contaminated sites through state lead programs and thereby avoiding the need for listing on the National Priorities List;
- Allow states to seek, through contracts and cooperative agreements with the U.S. Environmental Protection Agency, delegation of remedy selection and enforcement authorities;
- Create a fund and claim resolution procedure for insureds to collect eligible response costs from their insurers; and
- Establish minimum standards for performance of Phase I Environmental Site Assessments and standards for organizations certifying environmental professionals.

Id.