April 26, 2021

Via email

Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW #1101A
Washington, D.C. 20460

Administrator Regan:

The National Mining Association ("NMA") respectfully submits this letter opposing the petition for rulemaking[1] (hereinafter, "Petition") filed with the U.S. Environmental Protection Agency ("EPA") on Feb. 8, 2021, which seeks the promulgation of certain rules pursuant to the Resource Conservation and Recovery Act ("RCRA") § 7004(a)[2], the Toxics Substances Control Act ("TSCA") § 21[3], and the Administrative Procedure Act ("APA") § 553[4]. In light of existing federal and state laws and an ongoing EPA enforcement initiative regulating the management of phosphogypsum ("PG") and process wastewater from phosphoric acid production ("process wastewater"), the rulemakings requested by petitioners are unnecessary, would substantially undermine ongoing regulation and enforcement, and would likely result in considerable needless cost and regulatory burden to the phosphate manufacturing industry. Thus, NMA urges EPA to deny all of petitioners' requests.

Statement of Interest

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting

1 The petitioners include the People for Protecting Peace River, Atchafalaya Basinkeeper, Bayou City Waterkeeper, Calusa Waterkeeper, Center for Biological Diversity, Cherokee Concerned Citizens, Healthy Gulf, ManaSota-88, Our Santa Fe River, People for Protecting Peace River, RISE St. James, Sierra Club's Florida and Delta chapters, Suncoast Waterkeeper, Tampa Bay Waterkeeper, Waterkeeper Alliance, Waterkeepers Florida, and WWALS Watershed Coalition.

2 42 U.S.C. § 6974(a).

3 15 U.S.C. § 2620.

4 5 U.S.C. § 553.

firms, financial institutions, and other firms serving the mining industry. NMA's membership includes the owners and operators of phosphate manufacturing facilities that produce the PG and process wastewater targeted for regulation in this Petition. EPA's response to this Petition is of direct interest to those members.

As the agency is aware, these wastes have undergone extensive review as directed by Congress[5] and based on that review are not regulated as RCRA Subtitle C hazardous wastes.[6] In requesting that EPA reverse a Bevill regulatory determination, petitioners' raise an important legal issue that would, if agreed to by the agency, establish adverse legal precedent with broad regulatory repercussions outside the phosphate manufacturing sector as well.

NMA's letter focuses on petitioners' request that EPA: (1) reverse the agency's 1991 Bevill Regulatory Determination excluding PG and process wastewater from RCRA Subtitle C hazardous waste regulation; and (2) promulgate a rule that governs the safe treatment, storage and disposal of PG and process wastewater as hazardous wastes under RCRA Subtitle C. NMA has an extensive history weighing in on all RCRA-related regulatory issues pertaining to the mining industry's extraction, beneficiation, and mineral processing wastes.[7] Most recently, NMA participated in EPA's rulemaking process establishing RCRA Subtitle D non-hazardous waste regulations for coal combustion residuals ("CCR") that raised similar issues regarding the Bevill Amendment.[8]

NMA understands that The Fertilizer Institute ("TFI") submitted a letter to EPA on Mar. 29, 2021,[9] responding to petitioners' allegations and opposing petitioners' requests. TFI's Opposition includes extensive information regarding the robust and mature federal and state regulatory frameworks that already govern PG stacks and process wastewater. TFI's Opposition also highlights the consent decrees and RCRA consent orders being negotiated through EPA's mining and mineral processing compliance and enforcement initiative ("MMPI") that specify PG stack system design, construction, operation, closure,

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[5] The Solid Waste Disposal Act Amendments of 1980 included several provisions directly related to the regulation of mining and mineral processing wastes (collectively called the "Bevill Amendment."). *See* RCRA §§ 3001(b)(3)(A)(ii) (42 U.S.C. 6921(b)(3)(A)(ii)), 3001(b)(3)(C) (42 U.S.C. 6921(b)(3)(C)), 8002(f) (42 U.S.C. § 6982(f)), & 8002(p) (42 U.S.C. § 6982(p)).

[6] *See* 40 C.F.R. § 261.4(b)(7); *See also* EPA's "Final Regulatory Determination for Extraction and Beneficiation Waste," 51 Fed. Reg. 24,496 (July 3, 1986) (RCRA Subtitle C regulation of extraction and beneficiation wastes was unwarranted); EPA's "Final Regulatory Determination for Special Wastes from Mineral Processing (Mining Waste Exclusion)," 56 Fed. Reg. 27,300 (June 13, 1991) (RCRA Subtitle C regulation for 20 mineral processing wastes unwarranted).

[7] Prior to NMA's formation in 1995, its predecessor the American Mining Congress advocated on these issues. NMA will furnish these comments upon request.

[8] *See* NMA comments to EPA on the "Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities," 75 Fed. Reg. 35,128 (filed Nov. 19, 2010) (EPA-HQ-RCRA-2009-0640-7681) ("NMA CCR Comments"), *available at* https://www.regulations.gov/comment/EPA-HQ-RCRA-2009-0640-7681.

[9] TFI Opposition to Petition for Rulemaking (filed Mar. 29, 2021) ("TFI's Opposition").

and post-closure care, as well as financial assurance requirements and groundwater protection and corrective action provisions. As briefly discussed below, these measures were carefully tailored to individual facility conditions. NMA strongly encourages EPA to consider this information as it demonstrates that additional federal regulation is not only unnecessary for PG and process wastewater but would upend significant investment and efforts already made by EPA and today's operating facilities to design and implement those agreed upon measures.[10] NMA also endorses TFI's arguments opposing petitioners' TSCA claims.

A. EPA Lacks the Statutory Authority to Reverse its Bevill Regulatory Determination Excluding PG and Process Wastewater from RCRA Subtitle C Regulation

Contrary to petitioners' claims, Congress has indicated, EPA has agreed, and case law has held that EPA lacks the authority to reverse its 1991 Bevill Regulatory Determination excluding PG and process wastewater from RCRA Subtitle C regulation.

1. The Bevill Amendment & Regulatory Process

Congress enacted RCRA in 1976. Subtitle C of RCRA generally established a "cradle to grave" management scheme governing the generation, transportation, treatment, storage, and disposal of the hazardous wastes that would be subject to this stringent RCRA Subtitle C program.[11]

On Dec. 18, 1978, EPA proposed regulations identifying hazardous waste under RCRA Subtitle C.[12] EPA proposed to exempt certain "special wastes" – high volume, low hazard wastes – including "phosphate-rock mining, beneficiation, and processing wastes."[13] EPA's 1978 proposal explained that "special wastes" would be subject to fewer regulatory requirements because they were generated in "very large volumes," "posed relatively low" risks, and "were not amendable [sic] to the control techniques" proposed for hazardous waste treatment, storage, and disposal.[14] EPA abandoned the "special waste" concept, however, when the agency promulgated final hazardous waste regulations in

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10 NMA is aware of the reported March 28, 2021, breach of a pond liner at the "Eastport Terminal" owned by HRK Holdings, LLC., which is sited on property formerly occupied by the closed Mulberry Phosphates Co. Piney Point, Florida facility. NMA endorses the letter submitted by TFI on Apr. 9, 2021, explaining why this site is not representative of phosphate manufacturing facilities currently in operation and should not be used to call into question the responsible management of PG and process wastewater at active facilities.

11 42 U.S.C. §§ 6921-6931.

12 43 Fed. Reg. 58,946 (Dec. 18, 1978).

13 *Id.* at 59,015.

14 *Id.* at 58,992.

1980.[15] EPA's final rule sought to apply the full suite of hazardous waste regulations to mining and mineral processing wastes.

Recognizing the absurdity of regulating "special wastes" in such an inflexible, onerous manner, Congress stepped in before the effective date of the final Subtitle C regulations in October 1980 with the Bevill Amendment.[16] As a counterpoint to EPA's prior actions described above, the Bevill Amendment established a special process that EPA was required to follow before "special wastes" could be regulated as hazardous wastes under RCRA Subtitle C.[17] Congress included within the wastes to be studied "solid waste from extraction, beneficiation, and processing of ores and minerals, *including phosphate rock*."[18]

First, the Bevill Amendment established a temporary exemption from regulation under Subtitle C, until the completion of a study and submittal of the report described below.[19] Second, Congress directed EPA to conduct "a detailed and comprehensive study on the adverse effects on human health and the environment, if any, 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."[20]

In contrast to EPA's 1980 rulemaking, Congress expressly directed that the Bevill study include an analysis of:

1) the source and volumes of such materials generated per year;

2) present disposal and utilization practices;

3) potential danger, if any, to human health and the environment from the disposal and reuse of such materials;

4) documented cases in which danger to human health or the environment from surface runoff or leachate has been proved;

5) alternatives to current disposal methods;

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15 45 Fed. Reg. 33,084 (May 19, 1980).

16 *See* RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A).

17 *See Environmental Defense Fund v. EPA,* 852 F.2d 1309, 1314 (D.C. Cir. 1988) (EDF) ("Indeed, our reading of the statute and legislative history strongly suggests that Congress designed the Bevill Amendment to break with the previous approach to regulation of hazardous industrial wastes.").

18 RCRA §3001(b)(3)(A)(ii) (42 U.S.C. §6921(b)(3)(A)(ii)) (emphasis added).

19 RCRA § 3001(b)(3)(A) (42 U.S.C. § 6921(b)(3)(A)).

20 RCRA § 8002(p) (42 U.S.C. § 6982(p)) (emphasis added).

6) the costs of such alternatives;

7) the impact of those alternatives on the use of phosphate rock and uranium ore, and other natural resources; and

8) the current and potential utilization of such materials.

Third, Congress directed that EPA publish a report on such study, which was to include "appropriate findings."[21] The report was required in conjunction with a second report on a study of mining wastes. Both were due not later than 36 months after Oct. 21, 1980.[22] The Bevill Report was to be submitted to the Committee on Environment and Public Works of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives.[23]

Fourth, the Bevill Amendment further stipulated that within six months after the Report to Congress, EPA, after public hearings and the opportunity for comment, had to determine whether to promulgate regulations under RCRA Subtitle C for mining and mineral processing wastes, or determine that such regulations were unwarranted.[24] Finally, if EPA determined that such regulations were warranted, EPA could then engage in notice and comment rulemaking to promulgate the RCRA Subtitle C regulations.[25]

2. EPA's Actions to Implement the Bevill Amendment for Mineral Processing Wastes Including PG and Process Wastewater

On Nov. 19, 1980, EPA took the first step in responding to Congress' directives by issuing an interim final rule ("IFR") amending its hazardous waste regulations to exclude from RCRA Subtitle C regulation solid waste from the extraction, beneficiation and processing of ores and minerals — including phosphate rock.[26] EPA noted that its IFR was meant to provide "clear guidance" to the mining and mineral processing industries that these streams were not subject to regulation as hazardous waste. The agency, however, also indicated its intent to engage in further rulemaking regarding the scope of

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21 *Id.*

22 *See id. See also* RCRA § 8002(f) (42 U.S.C. § 6982(f)).

23 *Id.*

24 RCRA § 3001(b)(3)(C)(42 U.S.C. § 6921(b)(3)(C)).

25 *See American Portland Cement Alliance v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996) ("Section 3001(b)(3)(C) provides that the product of the notice and comment process [on the Report to Congress] will be a determination of whether regulation is warranted in the future, not regulations themselves.")

26 *See* 45 Fed. Reg. 76,618 (Nov. 19, 1980) (Interim Final Rule). EPA specifically excluded from hazardous waste regulation, "[s]olid waste from the extraction, beneficiation and processing of ores and minerals (including coal), including phosphate rock and overburden from the mining of uranium ore." *Id.* at 76,620 (40 C.F.R. § 261.4(b)(6)).

the Bevill Amendment.[27] Over the next five years, EPA completed a study of mining wastes (consisting of extraction and beneficiation) and submitted a report to Congress.[28] On July 3, 1986, EPA published a determination that regulation of such wastes under RCRA Subtitle C was not warranted.[29]

EPA's study of mineral processing wastes occurred on a second track and covered the PG and process wastewater streams that are targeted in the Petition. EPA evaluated these waste streams under the Bevill Amendment over the span of nearly six years and issued the final Regulatory Determination for mineral processing wastes in June 1991.[30] Throughout this rulemaking process (described below), EPA consistently viewed PG and process wastewater as meeting the "high volume" and "low hazard" criteria the agency used to decide which mineral processing wastes should be temporarily excluded from Subtitle C regulation pending the agency's Report to Congress and ultimate Regulatory Determination.

Specifically, EPA published a series of proposals concluding that PG met the "high volume" and "low hazard" criteria and warranted temporary deferral from Subtitle C regulation, pending its Report to Congress and a Regulatory Determination.[31] On Sept.1, 1989, EPA issued a final rule concluding that PG met the criteria.[32] Accordingly, EPA amended 40 C.F.R. § 261.4(b)(7) to exclude from hazardous waste regulation:

> Solid waste from the . . . processing of ores and minerals (including coal), including phosphate rock and overburden from the mining of uranium. . . . (i) The following solid waste from the processing of ores and minerals [] are retained within this exclusion: . . . (D) Phosphogypsum from phosphoric acid production; . . . .[33]

Similarly, EPA published a series of proposals concluding that process wastewater should be subject to temporary deferral from Subtitle C regulation, pending completion of

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27 *Id.*

28 EPA, "Report to Congress on Wastes from the Extraction and Beneficiation of Metallic Ores, Phosphate Rock, Asbestos, Overburden from Uranium Mining, and Oil Shale," EPA/530-SW-85-033 (1985). EPA was sued for failure to meet the statutory deadline to publish studies on mining and mineral process wastes. *See Concerned Citizens of Adamstown v. EPA*, 1985 U.S. Dist. LEXIS 16605 (D.D.C. Aug. 21, 1985) (imposing two schedules for completing the RCRA § 8002 studies).

29 51 Fed. Reg. 24,496 (July 3, 1986).

30 56 Fed. Reg. 27,300 (June 13, 1991).

31 *See* 50 Fed. Reg. at 40,294 (Oct. 2, 1985); 53 Fed. Reg. at 41,296 (Oct. 20, 1988); and 54 Fed. Reg. at 15,342 (Apr. 17, 1989).

32 54 Fed. Reg. 36,592, 36,631 (Sept. 1, 1989).

33 *Id.* at 36,641-642.

its Report to Congress and a Regulatory determination.[34] On Jan. 23, 1990,[35] EPA issued a final rule retaining process wastewater as one of the 20 mineral processing streams subject to temporary Subtitle C deferral.[36] Accordingly, EPA revised 40 C.F.R. § 261.4(b)(7) to exclude from hazardous waste regulation:

> Solid waste from the . . . processing of ores and minerals (including coal), including phosphate rock and overburden from the mining of uranium ore. . . . For the purposes of § 261.7(b)(7), solid waste from the processing of ores and minerals will include only the following wastes, until EPA completes a report to Congress and a regulatory determination on their ultimate regulatory status: . . . (iv) Phosphogypsum from phosphoric acid production; . . . (xvi) Process wastewater from phosphoric acid production . . . ."[37]

In the 1990 Report to Congress, EPA tentatively determined that "regulation under Subtitle C of RCRA [was] unwarranted for . . . process wastewater from phosphoric acid production [and PG] from phosphoric acid production[.]"[38] EPA explained that it was addressing radionuclide hazards from PG under the National Emission Standards for Hazardous Air Pollutants (40 C.F.R., Part 61, Subpart R).[39] EPA also acknowledged certain damage cases and concerns over the characteristics of PG and process wastewater and preventing contamination.[40] However, EPA determined that the cost of full or partial Subtitle C regulation would significantly affect viability of the domestic industry. Ultimately, EPA decided to further examine whether additional regulation was needed under RCRA or other statutes.[41] EPA's conclusion in the Report to Congress was consistent with the primary concerns underlying Congress' enactment of the Bevill Amendment and ensuring a strong and economically viable American mining and minerals industry.[42]

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34 54 Fed. Reg. at 15,342, 15,344, Table 2 (Apr. 17, 1989) (proposing the inclusion of process wastewater); 54 Fed. Reg. at 36,631, Table 2 (Sept. 1, 1989) (proposing to conditionally retain process wastewater); 54 Fed. Reg. at 39,305 (Sept. 25, 1989) (proposing to permanently retain process wastewater).

35 55 Fed. Reg. 2322 (Jan. 23, 1990) (Final Rule).

36 *Id.* at 2338, 2341-42, Table 2 (concluding that process wastewater "is [a] high volume and low hazard waste and, is, therefore, retained in the exemption").

37 *Id.* at 2353.

38 Report to Congress, Vol. I at 11-12.

39 *Id.* at 13.

40 *Id.*

41 *Id.* at 14.

42 *Envtl. Def. Fund v. EPA*, 852 F.2d 1309, 1315 (D.C. Cir. 1988) (". . . Congress intended attention to cost and the economic impact of regulatory controls in making a regulatory determination. The emphasis on economic factors is consistent with Congress' obvious goal in passing the Bevill Amendment — to

Finally, on June 13, 1991, EPA concluded its statutory duties under the Bevill Amendment with publication of its Regulatory Determination for the twenty "high volume" and "low hazard" mineral processing wastes.[43] For both PG and process wastewater, the 1991 Regulatory Determination concluded that RCRA Subtitle C regulation was unwarranted.[44] EPA concluded that even a Subtitle C-Minus program would result in the industry incurring compliance costs that would be "difficult to withstand" and "would create economic hardship for and threaten the continued viability of many of the facilities in the industry."[45] In view of these economic impacts, EPA determined that RCRA Subtitle C controls were too inflexible and costly.[46] Moreover, because EPA believed that even a RCRA Subtitle D program might be difficult for the industry to withstand, EPA stated that it "ha[d] serious reservations regarding the economic feasibility of a traditional waste management program designed within the contours of the RCRA statute."[47] Thus, with its Regulatory Determination, EPA retained both streams under its exclusion from RCRA Subtitle C hazardous waste regulation at 40 C.F.R. § 261.4(b)(7).

After ruling out any form of Subtitle C regulations and seriously discounting the possibility of Subtitle D as a feasible regulatory program, EPA identified a two-pronged approach for PG and process wastewater. First, the agency would "rely upon existing authorities under RCRA Section 7003 and CERCLA Section 106 to respond effectively to emergency situations that arise."[48] Second, the agency would evaluate *potential* options under TSCA "to address the complex issues associated with phosphoric acid industry special

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relieve the mining industry of the onerous economic burden of stringent Subtitle C controls if at all possible.").

43 56 Fed. Reg. at 27,300.

44 *Id.* at 27,316.

45 *Id.* The evaluation of Subtitle C-Minus assumed EPA would exercise all of the regulatory flexibility provided under RCRA § 3004(x) (42 U.S.C. § 6924(x)). In their Petition, petitioners cite to this provision as a basis for Subtitle C-Minus regulation of PG and process wastewater (Petition at 39); however, such an application was already evaluated, and rejected, by EPA in the 1990 Report to Congress and 1991 Regulatory Determination.

46 *Id.*

47 *Id.*

48 *Id.* RCRA § 7003 (42 U.S.C. § 6973) provides EPA with broad authorities to address activities that pose an imminent and substantial endangerment to health or the environment, and CERCLA § 106 (42 U.S.C. § 9606) provides EPA with similar authorities to address the release or threatened release of hazardous substances. Notably, although the Petition cites to these provisions, there is no recognition that they are in place to address activities at phosphoric acid manufacturing facilities that may pose an imminent and substantial endangerment. *See* Petition at 16. The Petition also fails to acknowledge that EPA and its state partners have spent well over a decade employing such authorities to address the very types of concerns asserted by petitioners, through negotiated consent decrees and orders tailored to each individual operating facility pursuant to EPA's MMPI. EPA's MMPI and the extensive environmental protection enhancements adopted by industry pursuant to the MMPI are described in TFI's Opposition.

wastes."[49] NMA disputes petitioners' assertion that EPA's Regulatory Determination "announced the development and future promulgation of a TSCA regulatory program for [PG] and process wastewater."[50] EPA merely stated it would "focus on developing risk management strategies to reduce or eliminate risks posed by phosphoric acid production wastes," including methods to "reduce the toxicity and/or volume of these wastes."[51]

To that end, EPA established the TSCA Phosphoric Acid Waste Dialogue Committee ("Committee"), comprised of representatives of industry, environmental organizations,[52] and state and federal agencies. The Committee, through the assistance of EPA and technical resources, exhaustively evaluated potential process modifications for phosphoric acid production. As aptly explained in TFI's Opposition, the Committee ultimately concluded that no better alternatives to the existing process were available, and, as a result, that TSCA regulation was inappropriate.

3. The Bevill Amendment Establishes a One-Time Special Process for Making Bevill Regulatory Determinations

An analysis of the Bevill Amendment reveals that the above-described special Bevill process established by Congress provided for a one-time evaluation of mining and mineral processing wastes that cannot be subsequently reversed. First, the Bevill Amendment by its terms calls for a "study" and a "report."[53] The use of the singular, as well as the statutory context, means that Congress deliberately established a one-time study and one-time Report to Congress obligation. Similarly, Congress called for a one-time regulatory determination when it stated that "not later than six months after the date of submission of the applicable study" EPA should "either determine to promulgate regulations . . . or determine that such regulations are unwarranted."[54]

Second, Congress made it clear it was establishing a one-time study, report and regulatory determination obligation when it required that the report and study be completed by a date certain, *i.e.*, Oct. 21, 1980.[55] Finally, the Bevill Amendment established a temporary exemption from RCRA Subtitle C regulation for "special wastes," an approach consistent with a one-time study, report, and regulatory determination.[56] If

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49 56 Fed. Reg. at 27,316.

50 Petition at 16.

51 56 Fed. Reg. at 27,316.

52 Notably, one of the Petitioners here, ManaSota-88, was a member of the Committee. *See* TFI's Opposition at 14 n. 74.

53 RCRA § 8002(n) (42 U.S.C. §§ 6982(n)).

54 RCRA § 3001(b)(3)(C) (42 U.S.C. § 6921(b)(3)(C)).

55 RCRA § 8002(n) (42 U.S.C. § 6982(n)).

56 RCRA § 3001(b)(3)(A) (42 U.S.C. § 6921(b)(3)(A)).

Congress had intended to extend the Bevill process forty years beyond the 1980 date Congress established for completion of the Bevill study and report, Congress would have done so explicitly.[57] That Congress did not do so confirms that it intended the Bevill process consist of a one-time report, study, and regulatory determination for mineral processing wastes.

EPA's issuance of the 1991 Regulatory Determination completed the Bevill process for mineral processing wastes, including PG and process wastewater. For the reasons stated above, EPA lacks the authority to reverse its 1991 Regulatory Determination. Any attempt by EPA to do so in a future rulemaking would be unlawful. Accordingly, EPA should deny petitioners' request to reverse the 1991 Regulatory Determination and issue regulations under RCRA Subtitle C.

4. The D.C. Circuit Has Ruled that the Bevill Amendment Established a One-Time Study, Report, and Regulatory Determination Process

In *Solite Corp. v. EPA*,[58] NMA argued that future waste streams from the mineral processing industry should be eligible for the Bevill study, report and Regulatory Determination process before they were subject to RCRA Subtitle C regulation. In *Solite*, NMA challenged EPA's decision that only those mineral processing wastes that were generated between 1983 and 1988 were eligible for Bevill Amendment coverage,[59] and that processing waste streams generated at some future point would therefore be subject to RCRA Subtitle C regulation.

In denying NMA's challenge, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") relied on the explicit language of the Bevill Amendment for extraction, beneficiation, and processing wastes. The Court stated as follows:

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[57] The Bevill Amendment is completely silent on EPA's authority to redo or reverse a final regulatory determination that the Agency has already properly reached pursuant to the Amendment's statutorily prescribed procedures and deadlines. If Congress had wanted to give EPA this authority, it would have done so explicitly. It is a fundamental principle of administrative law that an agency's authority to act must come directly from Congress. Absent such authority, an agency may not act. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) ("[S]tatutory silence simply leaves th[e] lack of authority untouched. In other words, the failure of Congress to use Thou Shalt Not language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference."); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse ... to presume a delegation of power merely because Congress has not expressly withheld such power."); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

[58] 952 F. 2d. 473 (D.C. Cir. 1991).

[59] 54 Fed. Reg. at 36,596.

> The statutory provision directing EPA to study Bevill wastes suggests by its terms that a one-time study is sufficient. *See* 42 U.S.C. § 6982(p) ("The Administrator shall conduct a detailed and comprehensive study. . . . [and] shall publish a report of such study. . . .").[60]

The Court explained further:

> The way in which the temporary nature of the Bevill Amendment is expressed in the statute also lends support to EPA's interpretation [that the Bevill Amendment establishes a one-time Bevill process]. *See* 42 U.S.C. § 6921(b)(3)(A) (Bevill exclusion operative "until at least six months after.... submission of the applicable study").[61]

Finally, the Court stated:

> In any event, this court's holding in *EDF II* secures EPA's position that a one-time determination is sufficient. There we interpreted the Bevill Amendment as an exclusion specifically for "the category of wastes designated as 'special wastes[]'....in EPA's 1978 proposed hazardous waste regulations." *EDF II*, 852 F.2d at 1329 (quoting 51 Fed. Reg. 36,234 (1986)). While we did not go so far as to foreclose Bevill status for a future waste that might satisfy a pre-set criterion, *we clearly enough rejected the theory that Congress intended the coverage of the Bevill exclusion to evolve with time*.[62]

The D.C. Circuit has already ruled that the Bevill Amendment creates a one-time Bevill study, report and Regulatory Determination process. Therefore, EPA should deny petitioners' request to reexamine and reverse the 1991 Regulatory Determination for mineral processing wastes.

Petitioners' request is diametrically opposed to EPA's position in *Solite*. Significantly, in that case EPA argued that the Bevill Amendment established a one-time process. In a notice of proposed rulemaking that was part of the regulatory history of the rule challenged in *Solite*, EPA stated that:

> Both the administrative record and Congressional intent clearly indicate that the Bevill Amendment was intended to provide a temporary exclusion, pending further study, over a fixed time period. Congress directed EPA to conduct a single study of wastes generated by mineral mining and processing facilities, because of concern that existing wastes might not be readily amenable to Subtitle C controls and might pose relatively low hazard to human health and the environment. Moreover, contrary to some

60 *Solite*, 952 F.2d at 491.

61 *Id.*

62 *Id.* (emphasis added).

> commenter's assertions, the statutory language includes explicit time limits on the Bevill exclusion, which apply to the submission of the required Report to Congress and subsequent regulatory determination.
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> In addition, EPA believes that making a one-time reinterpretation is not contrary to the interests of either industry or the environment. With regard to the concern raised by several commenters that the development of new technologies would be stifled, EPA notes that any new wastes generated in the future will be regulated under an established regulatory scheme (*i.e.*, either the Subtitle C or D program). Therefore, rather than facing regulatory uncertainty and incentives to generate large volumes of any new mineral processing wastes, industry will instead have substantial knowledge of the regulatory regime that it will face.[63]

In justifying its position that the Bevill Amendment created a one-time obligation in *Solite*, EPA then stated to the D.C. Circuit in its Brief for Respondent that:

> This decision followed from EPA's reading of congressional intent based on the statutory language and scheme of sections 3001(b)(3) and 8002(p) of RCRA, which establish a temporary exclusion for a fixed period of time and which fail to expressly impose a continuing obligation to study new wastestreams. EPA's construction was also based on other indicia, such as the strict statutory time periods governing the mineral processing waste exclusion in section 3001(b)(3)(A) of RCRA. 54 Fed. Reg. at 15,338; 54 Fed. Reg. at 36,956. From this evidence of congressional intent, EPA reasonably determined that Congress authorized EPA to make a one-time interpretation or snapshot of mineral processing wastes, rather than a continuing series of studies and regulatory determinations. . . .[64]

EPA concluded that:

> There is nothing in the statute itself which suggests that the Bevill process should be an ongoing, evolving process, with updated reports to Congress and regulatory determinations.[65]

EPA should not be allowed to reverse the position it previously took on the same Bevill rulemaking and before the D.C. Circuit. For this reason, EPA should deny the Petition seeking reversal of the 1991 Regulatory Determination and promulgation of RCRA Subtitle C regulations for the disposal of PG and process wastewater.

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63 54 Fed. Reg. 15,316, 15,338 (April 17, 1989).

64 Brief for the Respondent, *Solite Corp. v. EPA*, at 68, May 8, 1991 (Final Brief).

65 *Id.* at 69.

NMA is aware that EPA recently interpreted its authority differently during the RCRA CCR rulemaking and accepted public comment on whether to reverse its previous CCR Regulatory Determinations and list CCRs as a "special waste" to be regulated under RCRA Subtitle C.[66] NMA filed comments on EPA's proposal and objected to such actions, explaining that EPA lacked authority to revisit previous Bevill Regulatory Determinations.[67] Ultimately, EPA declined to revisit its prior Regulatory Determinations, citing the need for additional information.[68] As a result, the issue of whether EPA had authority to reverse its prior Bevill Regulatory Determinations regarding CCR was never adjudicated.[69] NMA maintains its position that EPA lacks the statutory authority to reverse Regulatory Determinations in any case.[70]

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66 75 Fed. Reg. 35,128, 35,132-33 & 35,149-60 (June 21, 2010).

67 *See* NMA CCR Comments at 14-21.

68 *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015) ("EPA is deferring its final decision on the Bevill Regulatory Determination because of regulatory and technical uncertainties that cannot be resolved at this time."). *See also id.* at 21,309 ("This rule defers a final Bevill Regulatory Determination with respect to CCR that is disposed in CCR landfills and CCR surface impoundments until additional information is available on a number of key technical and policy questions.")

69 In *Appalachian Voices v. EPA*, the agency argued that it "does have authority to revise these initial Bevill Amendment Regulatory Determinations should it conclude that it is appropriate to do so." *See* EPA's Opening Brief, No. 1:12-cv-00523-RBW (D.D.C. filed Oct. 11, 2012) at 14 n.5. *See also* EPA Reply Brief, No. 1:12-cv-00523-RBW (D.D.C. filed Dec. 13, 2012) at 4 ("[W]e wish to make clear that we disagree with Intervenor-Defendants' arguments concerning the scope of EPA's authority to reverse prior Regulatory Determinations. Contrary to Intervenors' arguments (*see* Intervenors Mem. at 18-21), EPA *does* have the authority to reconsider Bevill Amendment regulatory determinations based on new information.") (emphasis in original). NMA was one of the Intervenor-Defendants in this case. The United States District Court for the District of Columbia did not decide this issue. *See Appalachian Voices v. EPA*, 989 F. Supp. 2d, 30, 53 ("Whether these statutory provisions create a one-time obligation, as the Intervenor-Defendants contend, or whether they create a process which the EPA must follow before regulating coal ash under Subtitle C, as the EPA argues, it is clear that the Bevill Amendment removes the regulation of coal ash as a hazardous waste from the RCRA's general regulatory scheme by creating a different process for regulating coal ash as hazardous waste.")

70 Assuming, for purposes of argument, that EPA has the authority to reverse its prior Regulatory Determinations, which it does not as demonstrated above, EPA must go through the entire statutorily mandated Bevill process before proposing a reversal of a Regulatory Determination. *See Envtl. Def. Fund v. EPA*, 852 F.2d 1309, 1314 (D.C. Cir. 1988) ("The statute clearly states that the agency is to base its regulatory determinations on the information gathered for the § 8002(p) [the extraction, beneficiation and processing waste] study"). The legislative history supports this reading. Representative Bevill, the sponsor of the statutory amendment that bears his name, stated explicitly that any EPA Regulatory Determination would be based in part on the public hearings and any comments that were submitted on the Report to Congress: "Finally, let me direct the House's attention to the fact that after EPA concludes these studies, it will be required to obtain public views on them and to make known whether as a result of this process EPA believes any regulation of these materials is necessary." 126 Cong. Rec. at 3362 (1980). The multi-step decision-making process set forth in the Bevill Amendment, including the submission of a Report to Congress, was specifically designed to enable Congress and other federal agencies to "evaluate the basis of the Agency's decision, and to address the question of what degree of regulation, *if any*, is appropriate." *Id.* (emphasis added).

B. EPA Should Reject the Petition Because Robust Regulatory Frameworks and Individually Tailored and Extensive Controls are in Place at Phosphate Manufacturing Facilities

Petitioners cite several "damage cases" in support of their claim that additional federal regulation is warranted under RCRA and TSCA. But those cases relate to facilities that are no longer operational or predate EPA's enforcement initiative, enhancements in state regulations, and the federal EPA consent decrees and RCRA consent orders adopted under EPA's MMPI.

TFI's Opposition describes the existing state and federal regulation of PG stacks in detail.[71] TFI also explains the extensive requirements contained in various consent decrees and RCRA consent orders governing such stacks, which are tailored to the facilities in question and address many of the same issues raised in the Petition.[72] These decrees and RCRA orders protect human health and the environment. Among many other things, they include requirements for enhanced PG stack design, operational standards, stack and pond liners, groundwater monitoring, corrective action (where appropriate), closure, post-closure care and financial assurance obligations.[73]

This existing regulation and the ongoing state and federal oversight of PG stacks confirm that additional federal regulation is not warranted. Such additional regulation would interfere with ongoing state and federal oversight and would likely result in considerable needless cost and regulatory burdens on EPA, states, and the phosphate manufacturing industry. Additional regulation would also upend the reliance interests of companies that have expended significant resources negotiating and implementing the various decrees and RCRA orders over the past several years. Indeed, as TFI explains, EPA recently evaluated the need for additional federal regulation of PG stacks under CERCLA on two occasions, and both times concluded that additional regulation was not warranted.[74]

Petitioners fail to explain why a different result is compelled or even appropriate here. Instead, if issues arise and warrant, EPA has enforcement authority under section 7003 of RCRA to take action to abate any imminent and substantial endangerment to human health or the environment. In fact, EPA has exercised this authority with respect to PG in the past and could exercise it again in the future, in the unlikely event it is necessary to do so.[75] In short, in light of the state and federal regulation and the various consent decrees and RCRA consent orders already in place and under negotiation, there are no more "gaps" to fill with respect to regulating PG to ensure adequate protection of human health and the environment.

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71 TFI's Opposition at 31-40.

72 *Id.* at 41-49.

73 *Id.* at 45-50.

74 *Id.* at 51-56.

75 *Id.* at 43, 49.

Conclusion

Like TFI, NMA urges EPA to deny the Petition seeking additional federal regulation of PG stacks and process wastewater. As demonstrated in TFI's Opposition, the phosphate manufacturing industry already complies with rigorous design, construction, and operating requirements through state and federal programs and enforceable agreements with the agency. RCRA Subtitle C requirements are simply unnecessary given modern-day practices and the stringent and comprehensive requirements applicable to today's operating facilities.

Congress carefully constructed the one-time Bevill Amendment process to determine the final regulatory status of Bevill wastes, including the PG and process wastewater generated by the phosphate manufacturing industry. EPA does not have the authority to reopen these Regulatory Determinations and reverse course. NMA urges the agency to seriously consider the legal ramifications of reopening Regulatory Determinations that industry has relied upon for decades, ignoring the statutorily-mandated process for evaluating Bevill-exempt wastes, and pursuing RCRA Subtitle C regulations on "high volume," "low risk" mineral processing waste streams that are already extensively regulated to prevent adverse effects on health and the environment from the disposal of such wastes.

If you have any questions regarding NMA's opposition to petitioners' requests, please contact me at tbridgeford@nma.org or (202) 463-2629.

Sincerely,

Tawny A Bridgeford

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CC: Barry Breen, Acting Assistant Administrator, Office of Land and Emergency Management