

Edison Electric Institute v. U.S. Environmental Protection Agency:
THE D.C. CIRCUIT ANALYZES THE TECHNOLOGY-FORCING ASPECTS
OF RCRA § 3004(j) AS APPLIED TO MIXED WASTES

On August 29, 1991, the Environmental Protection Agency (EPA or Agency) issued a statement of its enforcement policy with respect to the storage of mixed wastes.¹ The policy statement acknowledged previous EPA conclusions in which the storage of waste pending the development of treatment capacity was determined fundamentally different from storage to accumulate sufficient quantities to facilitate proper treatment or disposal. Acknowledging that the lack of available treatment and disposal options for mixed waste could create a situation in which generators would be tempted to store mixed waste in violation of the Resource Conservation and Recovery Act (RCRA), the Agency announced that it would consider such violations as reduced priorities among its potential civil enforcement actions.² However, the Agency did interpret the policy statement as applying only to those mixed waste facilities which generated no more than 1000 cubic feet per year of mixed wastes.³

1. See Policy on Enforcement of RCRA Section 3004(j) Storage Prohibition at Facilities Generating Mixed Radioactive/Hazardous Wastes, 56 Fed. Reg. 42,730 (1991) [hereinafter Section 3004(j) Enforcement Policy]. Mixed wastes are those that contain both a hazardous waste component regulated under RCRA and a radioactive component regulated under the Atomic Energy Act (AEA) of 1954. 55 Fed. Reg. 22,520 at 22,673 (1989). Previously in a 1986 notice, EPA had determined that such wastes would be subject to RCRA regulation.

2. Section 3004(j) Enforcement Policy, *supra* note 1, at 42,730. Factors to be considered in determining the civil enforcement priority of section 3004(j) storage violations at particular mixed waste generator facilities included whether the facility had:

- (1) assured compliance with all other applicable RCRA storage facility standards;
- (2) identified and kept records of its mixed wastes;
- (3) developed a mixed waste minimization plan or could demonstrate that one was not technically feasible;
- (4) documented that it had made good faith efforts to ascertain the availability of treatment capacity for its mixed wastes; and
- (5) provided complete and accurate information about its mixed wastes upon request.

Id.

3. *Id.* at 42,733. Although the 1000 cubic feet per year amount in the Enforcement Policy Statement encompassed about 95% of the total number of mixed waste generators, the

Edison Electric Institute, along with two other national electric utility associations and seventy-three individual power companies, petitioned the District of Columbia Circuit Court of Appeals for review of EPA's interpretation of section 3004(j) of RCRA as articulated in the Enforcement Policy Statement. Specifically, the petitioners complained that the language of the statute and its legislative history suggested that mixed waste could be stored pending the development of treatment capacity since such storage would ensure eventual treatment prior to disposal. The petitioners further contended that the real purpose behind section 3004(j) was to prevent the sham storage of waste prohibited from land disposal. Since mixed wastes currently have no treatment capacity, the petitioners believed that the storage of mixed wastes could not be construed to be the sham that lawmakers sought to prevent in enacting section 3004(j). The court held that EPA's interpretation, making it unlawful to store waste for an indefinite period pending the development of adequate treatment techniques for disposal capacity, was not only permissible, but further, was mandated by the terms of the statute. *Edison Electric Institute v. U.S. Environmental Protection Agency*, 996 F.2d 326 (D.C. Cir. 1993).

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA)⁴ to establish a comprehensive "cradle-to-grave" scheme for regulating and managing hazardous wastes.⁵ In 1984, Congress created an ambitious set of land disposal restrictions by modifying RCRA to include the Hazardous and Solid Waste Amendments.⁶ The restrictions prohibit disposal of some hazardous waste as of certain specified dates, unless disposal can be carried out in accordance with EPA regulations.⁷ Section 3004(m)(1) of RCRA

remaining 5% of generators may account for about 98% of the volume of LDRP prohibited mixed wastes. *Id.*

⁴. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-91 (1988 & Supp. III 1991).

⁵. See generally DAVID R. CASE, RESOURCE CONSERVATION AND RECOVERY ACT, *in* ENVIRONMENTAL LAW HANDBOOK 60 (12th ed. 1993).

⁶. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-991 (1988 & Supp. III 1991)).

⁷. See generally *Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2, 7-9 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1961 (1993). The restrictions "forbade the land disposal of hazardous wastes containing solvents and dioxins after November 8, 1986." *Id.* at 8.

requires EPA to promulgate regulations specifying levels or methods of treatment which substantially diminish the toxicity of certain wastes in order that they may safely be disposed of on land.⁸

Hazardous waste may be land disposed, provided that treatment is undertaken in accordance with the standards set forth in section 3004(m)(1).⁹ The storage of hazardous waste is limited by section 3004(j) of RCRA, which prohibits storage except for the “accumulation of such quantities . . . as are necessary to facilitate proper recovery, treatment, or disposal.”¹⁰ The section was enacted pursuant to Congress’ belief that “permitting storage of large quantities of waste as a means of forestalling required treatment would involve health threats equally serious to those posed by land disposal.”¹¹ Therefore, Congress opted for a “‘treat as you go’ regulatory regime.”¹²

In November 1986, EPA issued its regulations to implement section 3004(j).¹³ The regulations provided that generators would be able to store hazardous wastes, subject to restrictions, in “tanks or containers on-site,” if such storage was “solely for the purpose of the accumulation of such quantities of hazardous waste as necessary to

Other “California list” wastes were barred from land disposal after July 8, 1987. *Id.* “Finally, the Administrator was to rank all remaining hazardous wastes on the basis of their intrinsic hazard and the volume generated annually and to divide the list into three parts.” *Id.* Wastes in the last third of this list could not be land disposed if the Administrator had not promulgated regulations for them by May 8, 1990. *Id.*

^{8.} 42 U.S.C. § 6924(m)(1). In the alternative, this section requires the EPA to promulgate regulations to reduce the likelihood of migration of hazardous constituents.

^{9.} *Id.* § 6924(m)(2).

^{10.} *Id.* § 6924(j) provides:

In the case of any hazardous waste which is prohibited from one or more methods of land disposal under this section (or under regulations promulgated by the Administrator under any provision of this section) the storage of such hazardous waste is prohibited unless such storage is solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal.

Id.

^{11.} Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 357 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 849 (1990) [hereinafter HWTC III].

^{12.} *Id.*

^{13.} Hazardous Waste Management System; Land Disposal Restrictions, 51 Fed. Reg. 40,572 (1986) (codified at 40 C.F.R. §§ 260-65, 268, 270-71 (1992)).

facilitate proper recovery, treatment, or disposal”¹⁴ The regulations allowed storage for up to one year, unless the EPA Administrator (Administrator) could demonstrate that such storage was not solely for the purpose of accumulation “necessary to facilitate proper recovery, treatment or disposal.”¹⁵ When the storage exceeded the one-year maximum, the regulations shifted the burden of proof to the generator to prove the purpose of the storage.¹⁶

On November 22, 1989, EPA proposed disposal and treatment standards for wastes that fell into the last of three groups of wastes to be regulated under the Land Disposal Restrictions Program (LDRP).¹⁷ After assessing comments on its existing approach and possible alternatives for implementing 3004(j), EPA recognized that “some legitimate storage technically may be prohibited under the current approach.”¹⁸ It observed that the intent of RCRA 3004(j) and 40 C.F.R. 268.50 were to prohibit the practice of using long-term storage to circumvent treatment requirements imposed by the restrictions.¹⁹

The Agency explored the possibility of allowing the storage of prohibited wastes “in tanks or containers pending the utilization of proper treatment, recovery or disposal capacity.”²⁰ The EPA solicited comments regarding this alternative interpretation and other potential situations where the existing reading of the statute would have consequences which Congress did not intend.²¹ However, the

¹⁴. 40 C.F.R. § 268.50(a)(1) (1992).

¹⁵. *Id.*

¹⁶. 40 C.F.R. § 268.50(b)(c); *see also* *HWTC III*, 886 F.2d at 366-68 (upholding the 40 C.F.R. § 268.50(b) presumption that storage for less than one year is for permissible purposes).

¹⁷. Land Disposal Restrictions for Third Scheduled Wastes, 54 Fed. Reg. 48,372, at 48,496 (1989) (to be codified at 40 C.F.R. §§ 148, 261, 264-65, 268, 271 (1993)).

¹⁸. *Id.*

¹⁹. *Id.* (citing 129 CONG. REC. 27,666 (1983)).

²⁰. *Id.* Two examples of allowable storage under this alternative approach were:

- (1) Where a generator is storing wastes in tanks for six weeks because of a backup at an incinerator which the generator has a contract to use; or
- (2) Where a treatment facility treats a prohibited waste to a level that does not meet the treatment standard and then stores the waste before treating it again to meet the standard.

Id.

Agency believed that the storage prohibition would continue to apply to generators who failed to utilize existing treatment capacity, thereby seeking to evade a land disposal prohibition.²²

In the final rule issued on June 1, 1990, EPA decided not to pursue a reinterpretation of the storage provision, because the statute was “designed to prevent the use of storage as a means of avoiding a treatment standard.”²³ The Agency did, however, note the special problems that the final rule would cause generators of mixed wastes. The Agency stated that it would evaluate the legal consequences relevant to these wastes, including the lack of disposal or treatment capacity available, and issue a policy statement within the next ninety days.²⁴ Finally, EPA granted a two-year national capacity variance under section 3004(h)(2) for mixed wastes pending determination of the applicability of section 3004(j).²⁵

The *Edison Electric Institute* opinion is divided into two parts. First, the court examined whether it had jurisdiction to consider the petition and whether the matter was appropriate for judicial review.²⁶ Second, the court analyzed the merits of the case to determine whether EPA’s interpretation of section 3004(j) was reasonable. The court resolved the jurisdictional concern by determining that the petition was timely and that the case was ripe for review.²⁷ The court

^{21.} *Id.*

^{22.} *Id.*

^{23.} Land Disposal Restrictions for Third Scheduled Wastes, 55 Fed. Reg. 22,520, at 22,534 (1990) (codified at 40 C.F.R. §§ 148, 261-65, 268, 270-71, 302).

^{24.} *See id.* at 22,673; *see also supra* note 4. *See* State Authorization to Regulate the Hazardous Components of Radioactive Mixed Wastes Under the Resource Conservation and Recovery Act, 51 Fed. Reg. 24,504 (1986); *see also* *New Mexico v. Watkins*, 969 F.2d 1122, 1132 (D.C. Cir. 1992) (deferring to EPA’s conclusion that RCRA applies to mixed wastes).

^{25.} Land Disposal Restrictions for Third Scheduled Wastes, 55 Fed. Reg. 22,520, at 22,532 & 22,534 (1990). The effect of the national capacity variance was to extend the effective date of the prohibitions for these mixed wastes until May 8, 1992. *Id.* at 22,520.

^{26.} The EPA argued that the court was without jurisdiction to consider the petition for review because it was not filed within ninety days after promulgation of the storage prohibition section, as required under section 7006(a)(1) of RCRA. The Agency also contended that review should be denied on the grounds that enforcement decisions should be left to an agency’s absolute discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). Finally, EPA asserted that the case was not ripe for review.

^{27.} The court applied the “reopener doctrine” to the present dispute and determined that the period for seeking judicial review “ran anew” when EPA advanced and solicited

concluded that section 3004(j) clearly proscribed the indefinite storage of wastes pending the development of treatment and disposal capacity and that EPA's interpretation was therefore consistent with congressional intent.²⁸

In reaching its conclusion, the court applied the test of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*²⁹ and agreed with EPA that Congress had directly spoken to the precise issue of whether the storage of untreated mixed waste is allowed.³⁰ It found that "section 3004(j) [could not] be read to sanction the indefinite storage of potentially unlimited amounts of mixed wastes while treatment methods or disposal capacity is being developed."³¹ The court analyzed the statute while addressing the petitioners' contentions and made two conclusions. First, the court rejected the petitioners' inference that the language of the statute warrants the storage of untreatable waste pending the creation of treatment techniques. It reasoned that the linkage of the phrase "accumulation of such quantities" with the statement of purpose of "facilitating"

comments for a possible alternative interpretation of section 3004(j). *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 331-32 (D.C. Cir. 1993). The reopener doctrine creates the proposition that a period for seeking judicial review may be made to run anew when the agency in question by some promulgation creates the opportunity for renewed comment and objection. *See Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988); *Association of Am. R.R. v. ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988). It was significant in the court's analysis that EPA had explicitly, rather than implicitly, proposed reconsideration of section 3004(j) by inviting comments. The court refuted EPA's discretion claim by pointing out that the petitioner was not challenging EPA's enforcement discretion, but was challenging its interpretation of the substantive requirements of section 3004(j). *Edison Elec. Inst.*, 996 F.2d at 333. The court determined that the case was ripe for review by the fact that Congress affirmatively expressed a preference for prompt review of RCRA regulations by establishing the ninety-day window for filing challenges. The court indicated that no clear and significant benefits existed to be derived from postponing review and that, in fact, all of the relevant factors weighed in favor of immediate review. *Id.* The court held that it could not characterize the noted case as one in which resolution of the dispute was likely to prove unnecessary, since EPA's interpretation would likely be an issue in state enforcement efforts and in citizen suits. *Id.*

²⁸. *See infra* notes 29-47 and accompanying text.

²⁹. 467 U.S. 837, 842-45 (1984).

³⁰. *Id.* at 842-45. The first prong of the *Chevron* analysis asks "whether Congress has directly spoken to the precise question at issue." If the statute is "silent or ambiguous," the court will defer to the Agency's interpretation. The second prong requires that the Agency's interpretation represent a permissible construction of the statute. *Id.* at 842-43.

³¹. *Edison Elec. Inst.*, 996 F.2d at 334-35.

proper waste management” meant that Congress intended to authorize storage only when the purpose of storage was to build up an amount sufficient for treatment.³² Second, the court concluded that RCRA already included provisions specifically intended to deal with the problem of inadequate treatment techniques and disposal capabilities.³³ Thus, finding that Congress had explicitly provided for restriction variances to deal with such contingencies, the court rejected the petitioners’ inference.³⁴

The court also refuted the petitioners’ claim that Congress recognized a need to allow untreated mixed wastes to be stored pending the creation of new technologies. The court found that RCRA was intended by Congress to provide “draconian incentives . . . for the rapid development of adequate treatment and disposal capacity.”³⁵ The court determined that Congress envisioned a “treat as you go”³⁶ regulatory regime encouraging the quickest possible transition to treatment technologies.³⁷ Although the “treat as you go” storage interpretation might “entail massive disruption of the national economy” as applied to mixed waste, the court recognized Congress’ foresight that such technology-forcing aspects of the statute might be onerous on waste generators like the petitioners.³⁸

The court analyzed the legislative history of section 3004(j) and found that the purpose of its enactment was not only to prevent sham storage of wastes prohibited from land disposal, but also to prevent “[s]torage based only on some vague hope for a future development of appropriate treatment”³⁹ The court saw its inquiry to be complete when Congress unambiguously laid out the

32. *Id.* at 335.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 335-36 (quoting Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 357 (D.C. Cir. 1989)).

37. *Id.* at 335-36.

38. *Id.* at 336. The court explained that “it is more reasonable to adopt an *ex ante* view and ask whether, if sufficient resources were devoted to the problem, it was possible to develop the required treatment and disposal technologies between 1986, when it became clear that RCRA applied to mixed wastes, and the present.” *Id.*

39. *Id.* (quoting 129 CONG. REC. 27,669 (1983)).

terms of section 3004(j).⁴⁰ The court also rejected the petitioners' argument that EPA's interpretation of section 3004(j) contravened requirements for the promotion of nuclear power under the Atomic Energy Act of 1954.⁴¹ Although the court admitted that EPA's interpretation would impose additional burdens on nuclear power generators, it submitted that such burdens were expected in the dual scheme of regulation of mixed wastes that had already been sanctioned. The court stated that the "promotion of nuclear power [was] not to be accomplished at all costs."⁴²

Finally, the court addressed the petitioners' suggestion that EPA's consideration of an alternate approach to interpreting section 3004(j) indicated that the statute is ambiguous. Although the alternatives considered and implemented by EPA broadened the scope of the section by allowing methods of storage that normally would have been prohibited,⁴³ the court found that the alternatives were limited to storage "tightly linked to the ongoing or impending utilization of available treatment capacity."⁴⁴ Since both alternatives "sanction the storage of more than what might be considered the 'minimum quantity' of waste that is necessary to pursue treatment and disposal options," they cannot be interpreted to be so broad as to "contemplate the indefinite storage of potentially unlimited amounts

⁴⁰. *Id.*

⁴¹. 42 U.S.C. §§ 2011-2296 (1988 & Supp. III 1991). Section 1006(a) of RCRA provides that "nothing in this chapter shall be construed to apply to . . . any activity or substance which is subject to . . . the Atomic Energy Act of 1954 [42 U.S.C. §§ 2011-2296] except to the extent that such application . . . is not inconsistent with the requirements of such Act[]." The petitioners, however, could not point to any direct conflict between EPA's position and any specific provision of the AEA and were therefore relegated to the generalized claim that the storage prohibition interpretation created a hardship on nuclear power generators by stifling the production of mixed waste. Such an interpretation, it was claimed, was inconsistent with the AEA's "primary purpose" of the "promotion of nuclear power." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 221 (1983).

⁴². *Id.* at 337 (quoting *Pacific Gas & Elec. Co.*, 461 U.S. at 222); see *New Mexico v. Watkins*, 969 F.2d 1122, 1130-32 (D.C. Cir. 1992) (deferring to EPA's interpretation that section 1006(a) of RCRA contemplates a dual scheme of regulation under RCRA (covering the hazardous components of mixed waste) and the Atomic Energy Act (covering the radioactive components of mixed waste)).

⁴³. See *supra* note 16.

⁴⁴. *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 337 (D.C. Cir. 1993).

of wastes pending the development of adequate treatment and disposal capacity.”⁴⁵ The court concluded its analysis by emphasizing its sympathy for the petitioner, as the ruling would force it into the “unenviable position of having no choice but to violate the law.”⁴⁶ After restating the technology-forcing character of the statute, the court encouraged the petitioner to seek relief from Congress for “[its] present predicament.”⁴⁷ The court concluded its opinion by stating that the remedy lies with the lawmaking authority of Congress, not with the judicial nature of the courts, especially when “[l]aws enacted with good intention . . . turn out to be mischievous, absurd or otherwise objectionable.”⁴⁸

The *Edison Electric Institute* decision is consistent with Congress’ intention to prohibit the land disposal and storage of hazardous waste absent proper treatment capacity.⁴⁹ The court reasoned that section 3004(j) of RCRA only permits the accumulation of hazardous wastes as is necessary to facilitate proper treatment, disposal, or recovery of that waste.⁵⁰ The court determined that EPA’s interpretation of section 3004(j) would not allow generators to store mixed waste, because treatment techniques had not been developed for that waste. The court’s conclusion that Congress designed section 3004(j) to encourage the “quickest possible transition to [treatment technologies]”⁵¹ conforms to the workable concept of technology-forcing developed through prior jurisprudence.⁵²

The use of technology-forcing standards in environmental law statutes was a congressional response to failed federal efforts aimed at

45. *Id.*

46. *Id.* The court implied that hardship would occur to the petitioner since it would have to do something with its generated mixed waste. *Id.* Thus, the petitioner would violate the law by either disposing of it illegally or storing it in violation of section 3004(j). *Id.*

47. *Id.*

48. *Id.* (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

49. Section 3004(j) Enforcement Policy, *supra* note 1, at 42,731.

50. *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 335 (D.C. Cir. 1993).

51. *Id.* at 335-36.

52. *See Union Elec. Co. v. EPA*, 427 U.S. 246 (1976); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975).

controlling pollution through economic incentives.⁵³ Congress believed that statutes like RCRA, imposing “draconian” sanctions for violations, would provide effective incentives for a polluter to install needed pollution control equipment.⁵⁴ One commentator has argued that “[t]he polluter is likely to have far greater knowledge of the cause of the problem, the best ways to abate it, and the most efficient ways of integrating the potential solutions into normal business practices.”⁵⁵ Indeed, government-imposed sanctions sufficiently solve the dilemma of the competitive system, in which individual polluters are discouraged from voluntarily undertaking additional expenses, by forcing the existence of an attractive ready-made market for a pollution-control invention.⁵⁶ The technology-forcing effects of

⁵³. John E. Bonine, *The Evolution of Technology-Forcing in the Clean Air Act*, 6 Env't. Rep. (BNA) No. 21, at 2 (July 25, 1975). These economic incentives were created in two phases. The first phase involved the public funding of research and development projects. As it became realized that there was no natural incentive for an owner of a pollution source to install the abatement equipment created from public funding, federal legislation moved into the second phase requiring installation by federal enforcement. *Id.* The second phase still assumed that the federal government had the only legitimate role in developing pollution control technology. As resources soon became inadequate, however, the federal government realized a need to turn the burden of creating pollution control technology over to industry. *Id.* A third phase of economic incentives was therefore created in which the federal government began to strictly enforce emissions limits as a way to force industry to develop the needed abatement technology. *Id.*

⁵⁴. *Id.*

⁵⁵. *Id.*

⁵⁶. *Id.* The Clean Air Act of 1970 was the first statute intended to force control technology innovation to the level necessary to meet national air quality standards. *See* Union Elec. Co. v. EPA, 427 U.S. 246, 265-66 (1976), *reh'g denied*, 429 U.S. 873 (1976) (holding that a state implementation plan required by § 110 of the Clean Air Act not be rejected “on the ground that it is economically or technologically infeasible”); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 91 (1975). The approach has been criticized, however, as unrealistic and unsuccessful because the insistence on such health-based standards, which reject consideration of economic and technological feasibility, has sacrificed the smaller gains of a technology-based standard. D. Bruce La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771, 775 (1977). The fact that technological and economic feasibility has been considered by the EPA in fashioning lenient compliance orders, thereby encouraging delay through litigation, may lead one to conclude that a health-based standard will not require any significant level of technological innovation. *Id.* at 787-91. The author later points out that a compliance retreat is inevitable when society is confronted with specific instances of economic disruption through the shutdown of industry. *Id.* at 837.

government-imposed sanctions are best analyzed by looking at a statute's ability to stimulate private pilot and full-scale control technology demonstrations rather than by looking at the extent of industry compliance with existing standards.⁵⁷

Although the court's conclusion was consistent with the technology-forcing intent of section 3004(j), the decision fell short of fully supporting Congress' mandate. The court's sympathy for the petitioner in "having no choice but to violate the law"⁵⁸ is troublesome for several reasons. It appears that the court is hinting that the idea of technology-forcing might be a failure as it is applied to RCRA mixed wastes. The court's skepticism concerning agency enforcement of technology-forcing statutes may be justified when it encourages the petitioner to seek congressional relief. However, it seems inappropriate for the court to imply that section 3004(j) may be a law that turns out to be "mischievous, absurd or otherwise objectionable" because of the technology-forcing intent of Congress.⁵⁹

Valid criticisms of the 1984 Hazardous and Solid Waste Amendments lie in both internal and external mechanisms which have diluted the technology-forcing nature of the statute. First, the national capacity variances of sections 3004(h)(2) and 3004(h)(3) give EPA the opportunity to alleviate mixed waste generators of their storage problem by exempting mixed wastes from the land disposal restrictions.⁶⁰ Although Congress did explicitly provide this statutory mechanism to deal with the contingency of inadequate treatment or disposal capacity, the Senate indicated that the case-by-case extension

⁵⁷. Russell V. Randle, Note, *Forcing Technology: The Clean Air Act Experience*, 88 YALE L. J. 1713, 1719 (1979). The copper smelting industry conducted limited demonstrations of emission control devices for existing smelters' air pollution problems, and the electric power industry conducted scrubber demonstration programs in response to government-imposed State Implementation Plans (SIP) and New Source Performance Standards (NSPS). *Id.* at 1721-24.

⁵⁸. *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 337 (D.C. Cir. 1993).

⁵⁹. *Id.* (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

⁶⁰. Under § 3004(h)(2), EPA may grant a variance in which a particular waste will not be subject to the disposal restrictions for up to two years. 42 U.S.C. § 6924(h)(2). In addition, § 3004(h)(3) provides that EPA may grant further extensions "on a case-by-case basis" from an applicable restriction effective date for up to one year, and may review these extensions for an additional year. *Id.* § 6924(h)(3).

should be used “sparingly and only in cases of an extraordinary nature.”⁶¹

Second, dicta from *Union Electric* allows EPA to take infeasibility claims into account when determining a reasonable time for compliance with regulations.⁶² The conclusion from this is that EPA can issue the enforcement policy statement for mixed wastes and, due to the infeasibility of treatment technologies, consider violations of section 3004(j) as “reduced priorities among [its] potential civil enforcement actions.”⁶³ Such actions tend to diminish the technology-forcing aspects of the statute by striking a balance between health and feasibility considerations and “create an atmosphere in which industry can be reasonably confident that the standards will never be enforced.”⁶⁴

Despite these shortcomings, the court should have clarified the technology-forcing nature of section 3004(j) by illuminating how RCRA provides the incentives necessary through sufficient sanctions to “force” technology in the development of treatment capacity for mixed wastes. Section 3008(a)(3) of RCRA provides that any order issued by the Administrator assessing a penalty “shall take into account the seriousness of the violation, [as well as] any good faith efforts to comply with the applicable requirements.”⁶⁵ In October 1990, EPA issued the RCRA Civil Penalty Policy, in accordance with section 3004(a)(3), to ensure that RCRA civil penalties are assessed in a fair and consistent manner and to eliminate the economic incentives for noncompliance with RCRA requirements.⁶⁶ Congress believed that “[v]iolators should not be able to obtain an economic benefit vis-à-vis their competitors as a result of their noncompliance

⁶¹. S. REP. NO. 284, 98th Cong., 1st Sess. 19 (1983). Eventually, the House bill was passed instead of the Senate bill. See H.R. CONF. REP. NO. 1133, 98th Cong. 2d Sess. 79 (1984), reprinted in 1984 U.S.C.C.A.N. 5649.

⁶². La Pierre, *supra* note 56, at 788 (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 267-68 (1976)).

⁶³. Enforcement Policy, *supra* note 1, at § 3004(j).

⁶⁴. La Pierre, *supra* note 56, at 790-92.

⁶⁵. 42 U.S.C. § 6928(a)(3). RCRA § 3008(g) establishes civil liability up to \$25,000 per day for each violation. *Id.* § 6928(g).

⁶⁶. See RCRA Civil Penalty Policy, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 35,273, at 35,274 (Oct. 1990).

with environmental laws.”⁶⁷ The court should have emphasized the technology-forcing nature of the statute by describing how EPA’s imposition of the economic benefit of the noncompliance penalty component on a mixed waste generator who violates section 3004(j) would affect the benefits of mixed waste production.⁶⁸

The general penalty policy first determines a “preliminary deterrence amount by including any economic benefit which alleged violators receive by engaging in the prohibited activity” and a “gravity component” reflective of the seriousness of a violation.⁶⁹ It may be further adjusted to account for continuing violations which presumably occur after EPA shows that the violation is likely to have recurred past the date of notice.⁷⁰ The court should have reemphasized the technology-forcing nature of section 3004(j) by showing that shifting the burden in the penalty assessment phase would impose a higher premium on generators to quickly find a suitable treatment technology.

The court in *Edison Electric Institute* interpreted RCRA section 3004(j) consistently with its purpose by allowing EPA to prohibit the storage of untreatable mixed waste because storage would not be for the accumulation necessary to facilitate proper treatment as required under that section. However, the court may have missed an opportunity to herald the technology-forcing aspects of the section. Although EPA should relinquish obstruction of the full operation of technology-forcing environmental statutes, like RCRA, and pursue rigorous civil enforcement against violators, the courts should be

⁶⁷. 136 CONG. REC. S16,950, at S16,952 (daily ed. Oct. 27, 1990) (Chafee-Baucus Statement of Senate Managers, S.1630, The Clean Air Act Amendments of 1990).

⁶⁸. See Section 3004(j) Enforcement Policy, *supra* note 1, at 42,733 (describing mixed waste benefits as including monitoring of radioisotope levels, pharmaceutical manufacturing and testing, diagnostic testing, nuclear medicine, etc.). The penalty component would be computed by adding up the dollar figure profited through these benefits during violation of the storage prohibition. RCRA Civil Penalty Policy, *supra* note 65, at 35,279. The penalty would then be assessed to not only account for this profit, but also to include an additional figure which would suffice to penalize the generator for the illegal storage. *Id.* at 35,278.

⁶⁹. Jane Kravcik & Vickie O. Materman, *A Private Sector Perspective on Federal Environmental Enforcement*, C722 ALI-ABA 509, 518-19 (1992).

⁷⁰. See RCRA Civil Penalty Policy, *supra* note 66, at 35,279; Kravcik & Materman, *supra* note 69, at 520-22.

careful not to abdicate responsibility of scrutinizing the law, especially when it has been shown to work as Congress intended.

RONALD J. BOUNDS