ENVIRONMENTAL DEFENSE FUND v. CITY OF CHICAGO: LIMITING THE HOUSEHOLD WASTE EXCLUSION TO RENDER MUNICIPAL WASTE ASH HAZARDOUS

In 1971, the city of Chicago began operating a municipal incinerator that burned solid waste and recovered energy, leaving a residue of municipal waste combustion ash. In 1988, the Environmental Defense Fund filed a citizens' suit[1] against the city of Chicago, alleging that the ash generated from the incinerator constituted a hazardous waste,[2] and should be regulated accordingly under the Resource Conservation and Recovery Act (RCRA).[3] Chicago claimed that RCRA section 3001(i),[4] addressing household waste, excluded the ash from the burdensome requirements allocated to hazardous waste. The District Court agreed with Chicago, and found the ash to be exempt from hazardous waste regulation. The Seventh Circuit Court of Appeals reversed, concluding that the "ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA."[5] Chicago petitioned for writ of certiorari, and the United States Supreme Court asked the Solicitor General to present the views of the United States.[6] The Environmental Protection Agency (EPA) then issued a memorandum directing its regional administrators to treat municipal incinerator ash as exempt from hazardous waste regulation under Subtitle C of RCRA.[7] Subsequently, the Supreme Court granted certiorari to Chicago, vacated the decision, and remanded the case to the Seventh Circuit Court of

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1. Citizens may file suit against:

> any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . . in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur.

42 U.S.C. § 6972(a)(1)(A) (1988).

2. *See infra* note 14 and accompanying text.
3. 42 U.S.C. §§ 6901-6992k (1988).
4. 42 U.S.C. § 6921(i) (1988).
5. Environmental Defense Fund v. City of Chicago, 948 F.2d 345, 352 (7th Cir. 1991).
6. Environmental Defense Fund v. City of Chicago, ___ U.S. ___, 112 S. Ct. 1932 (1992).
7. 42 U.S.C. §§ 6921-6924 (1988).

Appeals for further consideration in light of the memorandum.[8] On remand, the Court of Appeals reinstated its previous decision, holding that because the statute's plain language is dispositive, the EPA memorandum did not affect its analysis.[9] Thereafter, the Supreme Court echoed the Court of Appeals, holding that ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA. *City of Chicago v. Environmental Defense Fund*, ___ U.S. ___, 114 S. Ct. 1588 (1994).

In 1976, Congress enacted RCRA to treat, store, or dispose of waste "so as to minimize the present and future threat to human health and the environment."[10] In 1984, Congress passed the Hazardous and Solid Waste Amendments,[11] which greatly expanded the complexity of Subtitle C, the federal program for the regulation of hazardous wastes. The Subtitle D program, which is a separate program for state regulation of nonhazardous waste, operates in a much simpler and less expensive manner than its hazardous waste Subtitle C counterpart.[12] Therefore, a facility operator must know if the handled waste is hazardous or nonhazardous in order to follow the appropriate regulatory program.

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8. City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 113 S. Ct. 486, 487 (1992).

9. Environmental Defense Fund v. City of Chicago, 985 F.2d 303, 304 (7th Cir. 1993).

10. 42 U.S.C. § 6902(b) (1988). RCRA states that it is "the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible." *Id.*

The objectives of RCRA are "to promote the protection of health and the environment and to conserve valuable material and energy resources." *Id.* § 6902(a). Congress hopes to achieve this goal through, *inter alia,* technical assistance to local governments, training grants in the operation and maintenance of solid waste disposal systems, converting existing dangerous dumps to safe facilities, requiring that hazardous waste be managed properly in the first instance, minimizing the creation of hazardous waste, and establishing a Federal-State program to carry out the goals of RCRA. *Id.*

For additional background on RCRA, see Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,254 (1991).

11. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

12. The Subtitle C program is sometimes referred to as a "cradle to grave" program, because hazardous waste is regulated from its creation through disposal including all relevant times in between. *See* RCRA §§ 3002-3004, 42 U.S.C. §§ 6921-6924. However, the Subtitle D program is state regulated, with many fewer regulations and treatment standards rendering this nonhazardous waste less expensive to manage than hazardous waste. *See* RCRA §§ 1008, 4004, 42 U.S.C. §§ 6907, 6944.

Prior to making a hazardous versus nonhazardous distinction, it is first necessary to determine whether the handled material is a "solid waste."[13] This determination is necessary because the definition of hazardous waste incorporates the term "solid waste."[14] Moreover, it is necessary to overcome discrepancies in interpretation of words even within the definition of solid waste itself. Part of the definition of solid waste includes the heavily debated term "discarded." For the purposes of the statute[15] EPA defined "discarded material" as any material that is abandoned, recycled, or inherently wastelike.[16] Included in the definition of "abandoned" are materials that are incinerated.[17] Hence, incinerated materials fit the definition of solid waste.

Once the operator of a facility determines the material is a solid waste, the next step is to determine if the waste is hazardous. In 1980, EPA promulgated regulations which specified criteria for determining hazardous waste characteristics and for listing wastes as hazardous.[18] EPA accordingly developed two categories of hazardous wastes:

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13. The term "solid waste" is defined as: "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." The definition then excludes certain materials like discharges under a permit in addition to other exceptions. 42 U.S.C. § 6903(27).

14. The term "hazardous waste" is defined as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. 6903(5) (1988) (emphasis added).

15. *See* American Mineral Congress v. United States EPA, 824 F.2d 1177, 1193 (D.C. Cir. 1987) (on-site recycled materials are not discarded materials); Chemical Waste Mgt. v. United States EPA, 869 F.2d 1526 (D.C. Cir. 1989) (on-site recycled materials not immediately reused in the production process are discarded materials); American Petroleum Inst. v. EPA, 906 F.2d 729, 741 (D.C. Cir. 1990) (material later reclaimed in original production process is discarded if not part of ongoing process).

16. 40 C.F.R. § 261.2 (1989).

17. *Id.* This definition goes on to include materials that are disposed of or accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated. *Id.*

The only recycled materials which are regulated are those used in a manner constituting disposal, burned for energy recovery, reclaimed, or speculatively accumulated. *Id*.

18. 40 C.F.R. § 261.10-11.

characteristic wastes, and listed wastes.[19] Listed wastes are hazardous because EPA designated those wastes as hazardous through rulemaking.[20] As part of this process, Congress and EPA also exempted specific classes of solid waste from hazardous waste status, such as household hazardous waste.[21] The household waste exemption is known as a "waste stream" exemption, because RCRA exempts household hazardous waste from regulation beginning with its generation and throughout its treatment to final disposal of the residue.[22]

Characteristic wastes are hazardous because their inherent properties meet one or more of the tests EPA developed for evaluating solid wastes.[23] Additionally, a solid waste may become a hazardous waste under the "mixture and derived-from rule."[24] This rule provides, *inter alia,* when a solid waste is mixed with a listed or characteristic hazardous waste, and the resulting mixture exhibits a hazardous characteristic, then the entire mixture is a hazardous waste.[25]

The United States District Court for the District of Colorado addressed the issue of whether an exempted waste, when mixed with a

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19. *Id.*

20. RCRA required EPA to "develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, . . . taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." 42 U.S.C. § 6921(a) (1988). EPA then promulgated regulations as required by RCRA which identify the characteristics of hazardous waste, and the listing of hazardous waste. 42 U.S.C. § 6921(a).

21. 40 C.F.R. § 261.4(b)(1). EPA defines "household wastes" as "any material (including garbage, trash, and sanitary wastes in septic tanks) derived from households." "Households" include hotels and recreation centers. 42 U.S.C. § 6921(i)(1)(A)(i). Other exempted wastes include: "special wastes," which are low volume high toxicity wastes, 42 U.S.C. § 6921(b)(2); oil and gas industry wastes, *id.*; mineral extraction and benefication wastes. 42 U.S.C. § 6921(b)(3).

22. City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 114 S. Ct. 1588, 1591 (1994).

23. EPA developed four tests for determining if a waste is hazardous: ignitability, corrosivity, reactivity, and toxicity. 40 C.F.R. § 261.21-24 (1989).

24. EPA issued the "mixture and derived from" rule on May 19, 1980. 45 Fed. Reg. 33,066 (1980) (to be codified at 40 C.F.R. § 260). However, the United States Court of Appeals for the District of Columbia ruled that EPA failed to give sufficient notice and opportunity for comment in promulgating the rule. Shell Oil Co. v. EPA, 950 F.2d 741, 765 (D.C. Cir. 1991). Thereupon, EPA simultaneously removed and reissued the same "mixture and derived from" rule as an interim rule under § 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. § 551-559. The final rule is due in October, 1994.

25. 40 C.F.R. 261.3(b)-(c). For additional background on the mixture and derived from rule, *see* Hill, *supra* note 10, at 10,259. For additional background on the status of household waste mixed with other nonwaste or waste materials, *see* JOHN-MARK STENSVAAG, HAZARDOUS WASTE LAW AND PRACTICE §§ 6.24-6.30 (1986).

solid waste, became a hazardous waste in *Sierra Club v. United States Department of Energy*.[26] In *Sierra Club*, the Department of Energy mixed plutonium, an exempted waste, with trash and other waste and then burned the mixture.[27] The Court held that although the mixture contained a waste specifically exempted from hazardous waste regulation, the mixture would be regulated as hazardous if it displayed a characteristic under Subtitle C.[28]

The Court of Appeals for the D.C. Circuit addressed the issue of whether the ash residue derived from the incineration of exempted "Bevill" wastes[29] along with other hazardous wastes in a "boiler and industrial furnace"[30] were subject to Subtitle C regulation in *Horsehead Resource Development Co. v. Browner*.[31] The Court upheld EPA's determination that Bevill wastes which were not "significantly affected" would not be subject to Subtitle C regulation.[32] The Court reasoned that

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26. 734 F. Supp. 946 (D. Colo. 1990).

27. *Id*. at 948.

28. *Id.* at 952.

29. Bevill wastes are wastes not subject to Subtitle C regulation but are subject to other State and Federal provisions under Subtitle D. *See supra* note 12 and accompanying text. These wastes include:

> (i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.
> (ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.
> (iii) Cement kiln dust waste.

42 U.S.C. § 6921(b)(3)(A) (1988).

30. The Boiler and Industrial Furnace (BIF) rule controls air emissions from these furnaces which burn hazardous waste as fuel as well as subjects owners of BIFs to Subtitle C standards for the owning and operating of BIFs. 56 Fed. Reg. 7134 (1991) (codified as amended at 40 C.F.R. §§ 260, 261, 264, 265, 266, 270, 271 (1992)).

31. 16 F.3d 1246 (D.C. Cir. 1994).

32. If the "significantly affected" test is met, then the Bevill waste ash will be regulated under Subtitle C. This test provides:

> owners and operators [of BIFs] must determine on a site-specific basis whether the co-combustion of hazardous waste has significantly affected the character of the residue. The residue is considered to be significantly affected if both: (1) oncentrations of toxic (appendix VIII, part 261) compounds in the waste-derived residue are significantly higher then in normal (i.e., without burning/processing hazardous waste) residue; and (2) oxic compounds are present in the waste-derived at levels that could pose significant risk to human health.

56 Fed. Reg. 7134, 7196 (1991).

because EPA exempted Bevill wastes which were not "significantly affected," then the ash residue from these wastes would also be exempt.[33]

The United States Court of Appeals for the Second Circuit addressed the issue of whether the ash from the incineration of a mixture of exempt waste with nonexempt waste would be regulated under Subtitle C in *Environmental Defense Fund v. Wheelabrator Technologies*.[34] In that case, Wheelabrator Technologies accepted Subtitle D solid waste for incineration in its facility.[35] Among this waste was household hazardous waste which is specifically excluded from Subtitle C regulation.[36] In reaching its decision, the Court of Appeals interpreted section 3001(i) of RCRA[37] to exclude the residue ash derived from the incineration of municipal solid waste.[38]

In the noted case, the issue before the Supreme Court was whether the ash residue derived from the incineration of municipal solid waste would be regulated as hazardous under Subtitle C of RCRA.[39] Chicago conceded that it did not follow any regulations of Subtitle C, because of its belief that section 3001(i) of RCRA exempted the

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33. *Horsehead Resource Dev. Co.*, 16 F.3d at 1261.

34. 931 F.2d 211 (2d Cir. 1991).

35. *Id.* at 212.

36. *Id. See supra* note 21 and accompanying text.

37. 42 U.S.C. § 6921(i) (1988). An incinerator is exempt from most regulations under Subtitle C if it only burns household waste and municipal solid waste:

> A resource recovery facility recovering energy from [incineration] of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if-
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> (1) such facility-
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> (A) receives and burns only-
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> (I) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
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> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
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> (B) does not accept hazardous wastes identified or listed under this section, and
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> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

Id.

38. *Wheelabrator Tech., Inc.,* 931 F.2d at 213.

39. City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 114 S. Ct. 1588, 1589 (1994).

municipal solid waste ash.[40] Hence, the Court focused its attention on this section of RCRA.[41] The Court reasoned that an incinerator which exclusively burned household hazardous waste would be exempt from Subtitle C regulation under section 3001 of RCRA.[42] In reaching this conclusion, the Court scrutinized the 1980 regulations defining household waste.[43] Quoting these regulations, the Court stated that "'[h]ousehold waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused' is not hazardous waste."[44] Then, looking at the preamble to the regulations, the Court stated "'residues remaining after treatment (e.g., incineration, thermal treatment) [of household waste] are not subject to regulation as a hazardous waste.'"[45] Hence, the Court determined that an incinerator which burned only household waste would not be considered a Subtitle C Treatment Storage and Disposal Facility (TSDF),[46] because all the waste it processed would be nonhazardous.[47] The Court accordingly found the household hazardous waste exemption to be a

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40. *Id.*

41. *Id.* at 1591.

42. *Id.*

43. 45 Fed. Reg. 33,084 at 33,120 (1980) (codified as amended at 40 C.F.R. § 261.4(b)(1)(1992)); *City of Chicago*, 114 S. Ct. at 1590-91.

44. *Id.* (quoting 45 Fed. Reg. at 33,120 (1980)) (alteration in original).

45. *Id.* at 1591. (quoting 45 Fed. Reg. at 33,099 (1980)) (alteration in original).

46. A TSDF must comply with section 3004 of RCRA, which includes, *inter alia*, permit, recordkeeping, manifest, operating, location, design, financial, and contingency planning requirements. 42 U.S.C. § 6924 (1988). There are six major types of hazardous waste facilities:

> 1) "waste transfer centers," in which wastes are examined, identified and differentiated for further processing or transport to other facilities; 2) "liquid organics recovery facilities where liquid organic wastes" are examined for the existence of possible recyclable components; 3) "solidification, stabilization, and other specialized treatment facilities," which change liquids into solids, make wastes less threatening to ground water and destroy the wastes' harmful ingredients; 4) water treatment facilities that convert otherwise contaminated water to drinkable water; 5) "incineration facilities where non-reclaimable, combustible organic liquids and solids are broken down into their basic elements;" and 6) impregnable landfills where non-recoverable wastes are permanently stored.
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> [TSDFs] either render hazardous wastes nonhazardous through some neutralizing process or contain the wastes.

Rodolfo Mata, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENVTL. L.J. 375, 375-76 (1994) (citing Celeste P. Duffy, *State Hazardous Waste Facility Siting: Easing the Process Through Local Cooperation and Preemption*, 11 B.C. ENVTL. AFF. L. REV. 755, 768 (1984)) (footnote omitted).

For a discussion on TSDF requirements, see Hill, *supra* note 10, at 10,263.

47. *City of Chicago,* 114 S. Ct. at 1591.

"waste stream" exemption, "i.e. an exemption covering that category of waste from generation through treatment to final disposal of residues."[48]

The Court then scrutinized the "Clarification of Household Waste Exclusion"[49] under the Hazardous and Solid Waste Amendments of 1984.[50] The Court found that this exemption excludes an incinerator, "as a facility that treats, stores, disposes of, or manages hazardous waste," from Subtitle C regulation as long as it incinerates only municipal solid waste or household waste.[51] The Court concluded, however, that this exemption does not apply to the ash derived from this waste.[52] Moreover, the Court clarified its finding by noting that if an incinerator burned anything in addition to household waste, then the ash would not be exempt.[53] The Court concluded that the incinerator would be regulated as a Subtitle C generator[54] of hazardous waste if the ash it produced met the characteristic toxicity test.[55] However, the facility would still not qualify as a Subtitle C TSDF, because it only received nonhazardous waste.[56]

The Court noted several problems with Chicago's contention that if the facility is exempted from treating, storing, or disposing of hazardous waste, then the ash must also be exempt.[57] First, the Court stated that the exemption expressly applies only to the facility and not to the ash.[58] Secondly, the Supreme Court agreed with the Court of Appeals that the statutory language does not exempt the facility as a

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48. *Id*. *See supra* note 22 and accompanying text.
49. Pub. L. No. 98-616, § 223, 98 Stat. 3221 (1984).
50. *City of Chicago*, 114 S. Ct. at 1591.
51. *Id.*
52. *Id*.
53. *Id*.
54. A "generator" of hazardous waste is defined as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 . . . or whose act first causes hazardous waste to become subject to regulation." 40 C.F.R. § 260.10 (1989); generators of hazardous waste must comply with the requirements of § 3002 of RCRA, which includes, *inter alia,* recordkeeping, labeling, and manifest requirements. For a discussion of generator duties under RCRA, see Hill, *supra* note 10, at 10,261.
55. *City of Chicago*, 114 S. Ct. at 1592.
56. *Id*. at 1591. The Court explained how ash can be hazardous while the product that generated it is not, because "in the new medium the contaminants are more concentrated and more readily leachable." *Id. See* 40 C.F.R. §§ 261.3,261.24, 261 (1993).
57. *City of Chicago*, 114 S. Ct. at 1592.
58. *Id.*

generator of hazardous waste.[59] Hence, the Court concluded that Chicago would be considered a "generator" of hazardous waste and, therefore, subject to Subtitle C regulation.[60]

The Court likewise dismissed Chicago's reliance on the Senate Committee Report behind section 3001(i) of RCRA, which stated that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion."[61] The Court stated that the "statute, and not the Committee Report, . . . is the authoritative expression of the law, and the statute prominently omits reference to generation."[62] Next, the Court compared section 3001(i) of RCRA to the Superfund Amendments and Reauthorization Act of 1986,[63] which unlike section 3001(i) of RCRA, provided for a complete exemption by including "generating" as an excluded activity.[64] Finding that Congress acts intentionally and purposely when it writes statutes, the Court found no mistake when Congress included "generation" in the Superfund Amendments and excluded "generation" in Section 3001(i) of RCRA.[65] The Court then rejected Chicago's contention that not exempting the incinerator would go against Section 3001(i) "intended purpose of promoting household/nonhazardous-industrial resource recovery facilities," by adding the expense of having to manage ash as a hazardous waste.[66] Because a "generator" is not necessarily a "manager" of hazardous waste

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59. *Id.* RCRA defines generation as "the act or process of producing hazardous waste." 42 U.S.C. § 6903(6) (1988). The Court states "[t]here can be no question that the creation of ash by incinerating municipal waste constitutes 'generation' of hazardous waste (assuming . . . that the ash qualifies as hazardous under 42 U.S.C. § 6921 and its implementing regulations, 40 CFR pt. 261 (1993))." *City of Chicago*, 114 S. Ct. at 1592.

60. *Id.*

61. S. Rep. No. 284, 98th Cong., 1st Sess. at 61 (1983).

62. *City of Chicago*, 114 S. Ct. at 1593. The Court quoted the Court of Appeals, "'Why should we . . . rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't.'" *Id.* (quoting Environmental Defense Fund v. City of Chicago, 948 F.2d 345, 351 (7th Cir. 1991)).

63. Pub. L. No. 499, § 124(b), 100 Stat. 1689 (1986).

64. *City of Chicago*, 114 S. Ct. at 1593.

65. *Id.* "[W]here Congress includes particular language in one section of a statute but omits it in another section, of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972). *See* Keene Corp. v. United States, ___ U.S. ___, 113 S. Ct. 2035, 2040 (1993), Russello v. United States, 464 U.S. 16, 23 (5th Cir. 1983), North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982), United States v. Naftalin, 441 U.S. 768 (1979), United States v. Wooten, 688 F.2d 941, 950 (4th Cir. 1982).

66. *City of Chicago*, 114 S. Ct. at 1593.

under RCRA, the Court found that facilities that do not manage hazardous waste will avoid the full onslaught of RCRA Subtitle C regulation.[67]

Finally, the Court dismissed arguments in favor of deference to EPA's interpretation of the statute.[68] Despite finding a direct conflict in the statute between the goals of encouraging resource recovery and of preventing contamination, the Court felt the enacted text to be the unambiguous determining factor.[69]

The Court found that Section 3001(i) of RCRA only exempts the ash from an incinerator if all the waste received consists solely of household waste.[70] Because virtually no municipal incinerator receives only household waste,[71] most municipal incinerators will now have to handle their ash residue in compliance with Subtitle C. The decision raises the probability that the cost of waste disposal will rise significantly as incinerators will have to spend more money to dispose of their ash in a Subtitle C facility.[72] Even if facilities only accept household waste, there will be an additional cost resulting from the expense of creating special facilities for this purpose. Another possibility is that more communities

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67. *Id.* at 1593-94.

68. *Id.*

69. *Id.* The Supreme Court, in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., held that Courts should defer to the agency's interpretation of an ambiguous statute. 467 U.S. 837, 843-44 (1984). Here, the Court concluded that no ambiguity existed despite a conflict in policies between the two interpretations. *City of Chicago*, 114 S. Ct. at 1594. Accordingly, the Court applied § 3001(i) of RCRA as written which the Court believed expressly did not contain the waste stream exemption for the ash derived from municipal solid waste. *Id.*

70. *Id.* at 1594. In fact, the Court stated "an incinerator that burned only household waste would not be considered a Subtitle C TSDF, since it processed only nonhazardous . . . waste, and . . . it would be free to dispose of its ash in a Subtitle D landfill." *Id.* at 1591.

71. A municipal incinerator or a municipal solid waste incinerator is defined as "[a] distinct operating unit of any facility which combusts any *solid waste* material from commercial or industrial establishments or the general public . . . ." H.R. REP. NO. 3254, 102d Cong., 1st Sess., § 4011(e)(1), at 9 (1991) (emphasis supplied).

Although it is conceivable that a municipal solid waste incinerator could burn only household waste, by definition, these facilities receive general solid waste in the same manner as a municipal landfill. *See supra* note 21.

72. *See supra* note 37 and accompanying text. Under the Court's decision, municipal waste incinerators will now be liable as generators under RCRA and will have to comply with the expensive and cumbersome manifest requirements. Furthermore, the incinerators will have to dispose of the waste in special Subtitle D landfills and may be liable under CERCLA cleanups as this waste is no longer exempt.

will charge households a per-weight charge to haul away their trash.[73] However, the Court's decision comports with RCRA's purpose of "assur[ing] that hazardous waste management practices are conducted in a manner which protects human health and the environment . . . [and of] requir[ing] that hazardous waste be properly managed in the first instance, thereby reducing the need for corrective action at a future date."[74]

The Court's decision is also consistent with the mixture and derived from rule as interpreted in *Sierra Club v. Environmental Protection Agency*.[75] Like *Sierra Club,* the noted case involves the ash derived from the mixture of an exempted waste, namely household waste, and other nonexempted wastes.[76] Under the mixture and derived from rule, ash containing an exempted waste mixed with nonexempt waste would be a hazardous waste if it exhibits any hazardous characteristic.[77] The Court's conclusion that the ash is not an exempt waste promotes the objectives of maintaining the proper disposal of waste that poses a threat to the environment.[78]

The effect of the Court's decision is to help protect the environment from the dangers of household waste.[79] However, the economic and practical purposes behind the exemption are thwarted. Congress presumably promulgated the exemption due to economic, administrative and practical difficulties in managing household waste under RCRA.[80] The United States produced more than 180 million tons

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73. Seattle, Washington, charges "each household $13.50 to dispose of its first garbage can of household waste each week, and $9.00 for each additional can." Holly McCann, Comment, *The Civil War of Waste*, 32 DUQ. L. REV. 285, 298 n.94 (1994).

74. 42 U.S.C. § 6902 (1988).

75. *See supra* notes 26, 27 and accompanying text.

76. *See supra* note 26 and accompanying text.

77. *See supra* note 28 and accompanying text.

78. *See supra* note 52 and accompanying text.

79. Although household waste is exempt from Subtitle C regulation, it contains many chemicals that are regulated under Subtitle C as hazardous.

80. EPA based the household waste exclusion on a single sentence in the Senate Report accompanying RCRA's 1976 enactment which states that the RCRA hazardous waste program "is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." 45 Fed. Reg. 33099 (1980) (quoting S. Rep. No. 94-988, 94th Cong., 2d Sess. at 16 (1976)). Household waste was excluded for many practical reasons. For example, if there were no household waste exclusion then homeowners would need to comply with the Subtitle C generator requirements when they take the trash out to the curb. *See supra* note 41 and accompanying text.

of just nonhazardous solid waste in 1989.[81] Eighty percent of all of this trash went to landfills.[82] In New York City, it is expected that all landfill space will run out between the years 2003-2011.[83] Accordingly, EPA adopted the view that Congress promulgated the household waste exemption not because such materials lack hazardous properties, but rather because the Subtitle C program would be too overburdened to manage these materials.[84] While an incinerator will not be regulated as a receiver of hazardous waste on the front end, it will be regulated as a generator of hazardous ash on the back end. This added burden will cause a significant increase in the cost of disposal of municipal waste. Higher costs should reduce the attractiveness of incineration in comparison to land disposal alternatives. Therefore, the Court's decision may be a step backward for the environment, by encouraging more land disposal instead of incineration. What may be a small victory for the quality of the air may result in a greater loss to the land and water resources.

Advocates of the cost-saving aspect of exclusions for municipal waste ash may argue that this decision contravenes congressional intent by forcing facilities to bear a higher cost for waste disposal. The Court's ruling, however, does not preclude congressional changes to modify the interpretation of Section 3001(i) that the Court rendered in its decision. However, "[b]ecause Congress infrequently [changes] a judicial misinterpretation of a statute, it [may be] preferable for the Court to defer to" the interpretation of Congress and that of EPA, rather than risk misinterpreting the statute's intended purpose.[85]

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81. Daniel M. Weisberg, *Taking Out the Trash--Where Will We Put All This Garbage?*, 10 PACE ENVTL. L. REV. 925, 925 (1993).

82. *Id.*

83. Marylou Scofield, *RCRA Reauthorization: Moving the Incineration Issue to the Front Burner*, 3 FORDHAM ENVTL. L. REP. 183, 185 (1992) (footnote omitted).

84. STENSVAAG, *supra* note 25, at § 6.24. "[T]here are no limits to the *quantities* of excluded hazardous materials that a household might dispose of . . . [and] a household never generates a nonexcluded hazardous waste[,]" even though these wastes could be a listed hazardous waste or a waste that exhibits one or more of the hazardous waste characteristics. *Id*. § 6.25;

Additionally, "Congress appears to have approved the interpretation that would exempt from regulation under Subtitle C ash produced by municipal solid waste incinerators burning [household waste and municipal solid waste]." Benjamin Hershkowitz, *Analysis of the Household Waste Exclusion for Municipal Solid Waste Incinerator Ash—42 U.S.C. § 6921(i)*, 2 N.Y.U. ENVTL. L.J. 84, 95 (1993).

85. Alan M. Fish, Note, *Arkansas v. Oklahoma: Formalizing EPA Authority to Mandate Compliance with an Affected State's Water Quality Standards*. 6 TUL. ENVTL. L.J. 439, 447 (1993) (footnote omitted). *See also*, Thomas R. Marshall, *Policy Making and the Modern Court: When*

Interestingly, the Court does not discuss the *Environmental Defense Fund v. Wheelabrator Technologies* case which came to the opposite conclusion with similar factual circumstances.[86] The Court implicitly overrules this case's conclusion that ash derived from municipal solid waste fell within the waste stream exclusion.[87] Proponents of the *Environmental Defense Fund v. Wheelabrator Technologies* interpretation of the household waste exclusion may argue that the Supreme Court's decision goes against the fundamental cost-saving and administrative policies behind the household waste exclusion. Additionally, the Court had evidence of the intent of this law in light of the memorandum EPA issued directing its regional administrators to treat municipal waste ash as exempt under Section 3001(i) of RCRA.[88] While a court has discretion to look beyond the text of a statute in interpreting the law, it may choose to read the statute exclusively. However, it is not the court's role to second guess Congress. Read this way, this statute excludes incineration only, and not the ash left behind.[89]

In conclusion, the Court properly reversed the Court of Appeals by holding that the household waste exemption of Section 3001(i) of RCRA does not apply to the ash derived from incineration. The Court's "by-the-book" approach, by applying the statute word for word, prevents any misinterpretation of the law.[90] The Court's holding helps promote the goals of RCRA by safeguarding the environment from hazardous ash derived from the treatment of exempted wastes.[91] Conversely, the Court's decision contradicts RCRA's goal of encouraging resource recovery in a cost-efficient manner for municipal solid waste. By protecting the environment from possible contamination from hazardous ash, the Court promotes the underlying purpose of RCRA.

ETHAN KOTTLER

Do Supreme Court Rulings Prevail?, 42 W. POL. Q. 493 (1989); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 589, 609 (1983); Richard A. Paschal, Note, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143-51 (1991).

86. *See supra* note 34 and accompanying text.

87. *See supra* note 38 and accompanying text.

88. City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 114 S. Ct. 1588, 1590 (1994).

89. *See supra* note 37 and accompanying text.

90. The author uses the term "by the book" to refer to the Court's strict adherence to the exact letter of the statute despite evidence that the statute stood for the contrary position.

91. *See supra* note 69 and accompanying text.