



Winter 1991

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Kirsten Engel

### **Recommended Citation**

Kirsten Engel, *Environmental Standards as Regulatory Common Law: Toward Consistency in Solid Waste Regulation*, 21 N.M. L. Rev. 13 (1991).

Available at: <https://digitalrepository.unm.edu/nmlr/vol21/iss1/3>

# ENVIRONMENTAL STANDARDS AS REGULATORY COMMON LAW: TOWARD CONSISTENCY IN SOLID WASTE REGULATION

KIRSTEN ENGEL\*

## I. INTRODUCTION

As the scope of environmental regulation expands, government is asked to control newly discovered hazards posing health and environmental threats similar to those currently regulated. Contrary to one's expectations, similar threats are not always subject to similar standards. Exploiting differences or ambiguities in statutory mandates, regulators often promulgate inconsistent environmental standards to account for disparities in the size or wealth of the regulated entities or their perceived importance to society.

Using the development of municipal solid waste regulations under Subtitle D of the Resource Conservation and Recovery Act of 1976 ("RCRA") as a case study, this article examines how best to ensure consistency in environmental regulation.<sup>1</sup> Under the 1984 amendments to the RCRA,<sup>2</sup> Congress mandated that the United States Environmental Protection Agency ("EPA") promulgate revised management standards for landfills that accept household hazardous waste and small quantity generator waste. These wastes are currently exempted from regulation as hazardous waste.<sup>3</sup> Thus, they may be disposed of in municipal landfills rather than in special hazardous waste landfills, which are subject to the EPA's hazardous waste regulations under Subtitle C of the RCRA. Under the presumption that all municipal solid waste landfills accept household hazardous waste and small quantity generator waste, the EPA proposed revised management regulations for all such landfills in August of 1988.<sup>4</sup> The promulgation of these regulations is expected in the near future.<sup>5</sup>

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\* J.D., Northwestern University School of Law; Attorney, Sierra Club Legal Defense Fund, Washington, D.C., 1990-present; Attorney, Solid and Hazardous Waste Division, Office of General Counsel, United States Environmental Protection Agency, Washington, D.C., 1987-1990.

1. 42 U.S.C. §§ 6901-6992K (1988).

2. Hazardous and Solid Waste Amendments of 1984, P.L. 98-616, 98 Stat. 3221 (1984).

3. See 42 U.S.C. § 6921 (1988).

4. 53 Fed. Reg. 33,314 (1988) (to be codified at 40 C.F.R. §§ 257-58).

5. While this article was in production, the EPA promulgated the long overdue revised Subtitle D regulations. 56 Fed. Reg. 50978 (signed by EPA Administrator William Reilly Sept. 6, 1991). Issuance of the final rule was prompted by a deadline suit filed against the EPA by three environmental organizations. *Natural Resources Defense Council v. Reilly*, Civ. Action No. 91-1105 (D.D.C. filed May 15, 1991). Section 4010(c) of RCRA, 42 U.S.C. § 6949(c) (1988), required that the revised criteria be promulgated by March 31, 1988.

The final rule retains many of the differences between the proposed revised criteria and the

The proposed municipal landfill regulations are an example of inconsistent environmental regulations. Available data shows a rough equivalence between the health and environmental threats posed by these landfills and those posed by hazardous waste landfills. Nevertheless, the standards being proposed for municipal landfills are significantly less stringent than those currently applied to their hazardous waste twins under Subtitle C of the RCRA.

This article analyzes the legality of an agency's dissimilar treatment of facilities posing similar threats, as exemplified in the proposed Subtitle D regulations, from two legal approaches. It will be shown that, under the statutory interpretation approach traditionally used by reviewing courts, environmental regulatory consistency cannot be assured. Given the judicial deference accorded an agency's interpretation of issues about which a statute is silent or ambiguous, agencies have broad discretion to promulgate inconsistent regulations. Consequently, because of the ambiguity in Congress' mandate to promulgate revised municipal landfill regulations, this article concludes that the EPA's promulgation of inconsistent RCRA standards could conceivably survive judicial review.

This traditional approach will be contrasted with an alternative legal perspective, coined here as the "regulatory common law" approach. Under this approach, environmental standards form a body of principles that must be applied in similar regulatory contexts even if a statute is silent or ambiguous on the exact standard mandated. This article concludes that if the EPA's discretion was thus restricted, inconsistencies with Subtitle C regulations would likely not survive judicial scrutiny.

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RCRA Subtitle C standards discussed herein and, in fact, adds a few more. As a consequence, EPA's issuance of the final rule does not affect this article's analysis, which is based on the proposal. For example, the final rule retains the provision allowing the placement of groundwater monitoring wells up to 150 meters from the landfill unit. 40 C.F.R. § 258.40(d). *See infra* text accompanying note 43. The rule also retains the requirement that no financial assurance for cleanup of spills is necessary until *after* the leak has occurred. 40 C.F.R. § 258.73. *See infra* text accompanying notes 53-61. Finally, the final rule retains the distinction between new and existing facilities that exempts existing landfills from certain location restrictions (such as locating in a wetland), the design requirement, and (for up to five years from the effective date in certain localities), the groundwater monitoring requirements. 40 C.F.R. §§ 258.12-.14 (location), 258.40 (design), 258.50 (groundwater monitoring). *See infra* text accompanying notes 62-70.

The final design standard is the only significant standard changed by the EPA in the final rule to more closely resemble the Subtitle C standard. 40 C.F.R. § 258.40. *See infra* text accompanying notes 38-46. The final design standard requires that owners and operators in states without approved programs install a composite liner (the liner required under Subtitle C) unless they petition EPA directly for permission to follow a more lenient design. Landfill owners and operators in states *with* approved programs, however, may install any design that allows them to meet maximum contaminant levels at the point of compliance, which, as mentioned above, may be as far from the unit boundary as 150 meters.

The final rule includes two significant departures from the Subtitle C standards not present in the proposed rule. These are an exemption for "small communities" from the most important requirements (design standards, groundwater monitoring and corrective action), 40 C.F.R. § 258.1(f), and a provision allowing the requirements to be "self-implementing," or effective without governmental oversight. *Compare* 40 C.F.R. § 264.90 *et seq.* (agency supervised groundwater monitoring requirements under Subtitle C) *with* § 258.50 (self-implementing groundwater monitoring requirements under Subtitle D).

## II. THE PROBLEM

### A. *The Environmental Threat of Municipal Solid Waste Landfills*

Of the 850 sites listed on the Superfund National Priorities List in May of 1986, twenty-two percent were municipal solid waste landfills.<sup>6</sup> This one alarming statistic best summarizes the environmental threat posed by such facilities. Considering that state census data estimates the existence of over 6,000 landfills, most of which are concentrated near populated areas, the potential health and environmental impacts from landfills are significant.

The risk data concerning municipal landfills is hardly more encouraging. While careful to qualify the numbers as loose estimates, the EPA has stated that "for landfills located within one mile of a drinking water well" (forty-six percent of all municipal landfills), "fourteen percent pose risks exceeding  $1 \times 10^{-5}$ , and nearly forty percent pose risks greater than  $1 \times 10^{-6}$ ." This means that at fourteen out of one hundred municipal landfills, an exposed individual has a greater than a one in 100,000 chance of contracting cancer in his or her lifetime.<sup>8</sup> Of the eight constituents monitored in this study, the three most important contributors to these risk numbers are vinyl chloride, 1,1,2,2-tetrachloroethane, and dichloromethane.<sup>9</sup>

The EPA also reported in 1988 that 500 municipal landfills violated state groundwater protection standards, 845 violated state air standards, and 660 were cited for having contaminated surface water.<sup>10</sup> Out of 163 documented case studies, 146 landfills were contaminating groundwater and 73 were contaminating surface water.<sup>11</sup> In 1986, the EPA estimated that only fifteen percent of all municipal solid waste landfills had liners, only five percent had leachate collection systems, and only twenty-five to thirty percent had groundwater monitoring systems.<sup>12</sup>

More disturbing than the risk data, however, is the data that indicates municipal solid waste landfills are nearly as toxic as hazardous waste landfills. Comparisons of the concentration of hazardous constituents in the leachates from municipal landfills as opposed to the leachates from hazardous waste landfills are not significantly different.<sup>13</sup> For example, when comparing the median concentrations of forty constituents common to both types of landfills, the EPA found the concentrations to be roughly

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6. 53 Fed. Reg. 33,319 (1988). Statistics also show that older landfills pose the greatest environmental threat. Most of the landfills on the national priorities list were in operation before 1980. *Id.*

7. *Id.* at 33,320.

8. *Id.*

9. *Id.*

10. *Id.* at 33,319.

11. *Id.*

12. *Id.*

13. "Leachate" is defined by EPA regulation as "any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste." 40 C.F.R. § 260.10 (1990).

similar, with only a "weak indication that the hazardous waste leachate had higher concentrations of hazardous constituents" than the municipal landfill leachate.<sup>14</sup>

Significantly, even municipal solid waste landfills constructed *after* 1980 have leachates similar in toxicity to leachates from hazardous waste landfills. Were this similarity limited to municipal landfills in operation *before* 1980, the results would not be so alarming. EPA regulations requiring the disposal of hazardous waste at designated hazardous waste facilities became effective November 19, 1980. Prior to this date, hazardous waste of all types was routinely disposed of in municipal landfills. Thus, while municipal landfills in operation prior to November of 1980 are expected to have fairly toxic leachate, those constructed after 1980 are not. Nevertheless, in a comparison of the median concentrations of pre-1980 and post-1980 municipal landfill leachates, the EPA found "little evidence of a difference based on starting date."<sup>15</sup>

Once it is understood that much hazardous waste may legally be disposed of in municipal landfills, these specific results are less mysterious. Two significant exceptions exist to the general rule that all hazardous waste must be disposed of in special hazardous waste disposal facilities: (1) household hazardous waste; and (2) small quantity generator waste. Congress specifically exempted these wastes from RCRA Subtitle C hazardous waste regulation.<sup>16</sup> Thus, even after the EPA promulgated hazardous waste disposal regulations in 1980, these specific hazardous wastes could continue to be disposed of in ordinary municipal landfills. While the data is by no means conclusive, household hazardous waste and small quantity generator wastes may be responsible for the similarities between the toxicity of municipal solid waste landfill leachates and hazardous waste landfill leachates.

## B. Municipal Solid Waste Landfill Regulation

### 1. Pre-1984 RCRA Amendments

Congress' concern over precisely this loophole in the nation's hazardous waste regulations resulted in a requirement in the 1984 amendments to the RCRA for new comprehensive management regulations for municipal solid waste landfills.<sup>17</sup> Existing federal regulation of municipal landfills

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14. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE, SUMMARY OF DATA ON MUNICIPAL SOLID WASTE LANDFILL LEACHATE CHARACTERISTICS—CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS (40 C.F.R. PART 258)—SUBTITLE D OF THE RESOURCE CONSERVATION AND RECOVERY ACT at 4-7 (1988) (Draft). The EPA performed this comparison by creating ratios of the concentrations of the forty constituents at hazardous waste landfills versus the concentrations at post-1980 municipal solid waste landfills. The agency found that about one-half of the ratios were near the value of one. The number above this increment was about twice that below the increment, providing only a "weak" indication that hazardous waste landfills had higher concentrations of hazardous constituents. *Id.*

15. *Id.* at 4-5.

16. 42 U.S.C. §§ 6921(d), 6921(i) (1988).

17. *Id.* § 6921.

had, by that time, been largely discredited as wholly inadequate. Relying on state and local government initiatives, the success of RCRA Subtitle D had faltered on a combination of state and local government reluctance to impose the necessary environmental controls, weak federal regulation, and an ineffective enforcement scheme.

The centerpiece of the 1976 RCRA solid waste program was the "state plan."<sup>18</sup> Section 4003 of the RCRA identified the minimum requirements for state plans: (1) resource conservation and recovery; (2) prohibiting the opening of new "open dumps"; (3) closure of all existing "open dumps"; and (4) disposal of all solid waste in a "sanitary landfill" or in an environmentally sound manner.<sup>19</sup> Section 4002(a) of the RCRA required the EPA to promulgate guidelines for the development of such plans.<sup>20</sup> A state that both prepared a plan containing the statutory minimums specified under section 4003 and promulgated regulations that complied with the federal guidelines (as required under section 4006) was eligible for federal financial assistance.<sup>21</sup>

The 1976 RCRA statute also called for direct federal regulation of solid waste facilities. Section 4004(a) directed the EPA to promulgate criteria for disposal of solid waste which would assure "no reasonable probability of adverse effects on health or the environment."<sup>22</sup> A facility which meets these criteria is considered a "sanitary landfill" rather than an "open dump."<sup>23</sup> Under section 4004, effective within six months of the promulgation of the federal criteria, each state plan was required to prohibit the establishment of new open dumps and to require the disposal of nonhazardous solid waste in sanitary landfills. Under section 4005, the RCRA directly prohibited any act of "open dumping." In addition, under section 1008(a), the EPA was required to issue minimum criteria establishing what solid waste management practices constitute "open dumping."<sup>24</sup> Under section 4005, all open dumps were to be upgraded or closed.<sup>25</sup> The upgrading or closing of open dumps was to be accomplished by states with the help of an inventory of all open dumps published by the EPA. Finally, section 4005(a) directly prohibited the act of open dumping.<sup>26</sup>

A number of factors coalesced to render these provisions wholly inadequate to address contamination from municipal landfills. First, with the elimination of federal financial aid under section 4007 of the Act,

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18. *Id.* §§ 6941-6949a.

19. *Id.* § 6943.

20. *Id.* § 6942(b).

21. *Id.* § 6947.

22. *Id.* § 6944(a).

23. *Id.*

24. *Id.* §§ 6907, 6944(a). The EPA satisfied the statutory mandates of both sections by promulgating the Criteria for Classification of Solid Waste Disposal Facilities and Practices, 40 C.F.R. § 257 (1990).

25. 42 U.S.C. § 6945(a) (1988).

26. *Id.*

the major incentive for states to develop such plans disappeared.<sup>27</sup> By late 1987, the EPA had fully approved only twenty-five state plans and partially approved only six others.<sup>28</sup> Thus, open dumps, constituting both aesthetic blights and health and environmental hazards, continued to exist far beyond the closure dates anticipated by Congress.<sup>29</sup>

Second, the EPA's criteria for sanitary landfills lacked certain key provisions necessary to prevent future contamination and to remediate existing contamination. The criteria, which addressed the areas of floodplains, endangered species, surface water and groundwater, disease, and safety, generally consisted of broadly-worded performance standards.<sup>30</sup> No monitoring of any kind was required. As a result, there was no assurance that contamination could be checked before significant degradation had already occurred. Another significant gap was the lack of any requirement to clean up contamination once detected. Finally, the criteria did not require protective measures after the landfill was closed. According to a 1987 survey, only the regulatory programs of some states included provisions to fill these critical gaps in the federal criteria.<sup>31</sup>

## 2. Post-1984 RCRA Amendments

When Congress amended the RCRA in 1984, it made Subtitle D a prime target. Congress realized that because the exemption of some hazardous wastes from Subtitle C regulation, many municipal waste landfills were really pseudo-hazardous waste landfills. The legislative history of the Solid and Hazardous Waste Amendments of 1984 demonstrates Congress' awareness that while municipal landfills are the "recipients of unknown quantities of hazardous waste," the "construction, siting, and monitoring standards for these facilities are either nonexistent or far less restrictive than those governing hazardous waste disposal facilities."<sup>32</sup>

The new amendments required that the EPA revise its existing federal regulatory criteria for all solid waste facilities that receive hazardous household wastes or hazardous wastes from small quantity generators. The revisions were to be "those necessary to protect human health and the environment," although they "may" consider the "practicable capability" of such facilities.<sup>33</sup> At a minimum, Congress specified that the criteria must require the same environmental controls found in the Subtitle C regulations, namely, groundwater monitoring, location requirements for new and existing facilities, and corrective action.<sup>34</sup> Finally, Congress abandoned the state plan concept and required that states apply for

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27. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SOLID WASTE DISPOSAL IN THE UNITED STATES, REPORT TO CONGRESS, at 1-2 (1988).

28. *Id.* at 1-3.

29. 42 U.S.C. § 6945 (1988).

30. 40 C.F.R. § 257.3 (1990).

31. See 53 Fed. Reg. 33,314, 33,320-21 (1988).

32. H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5649, 5688.

33. 42 U.S.C. § 6949a (1988).

34. *Id.*

federal approval to administer a permit-type program which implemented the new federal regulations.<sup>35</sup>

### 3. A Comparison of RCRA Subtitles C and D Standards

In its 1984 amendments, Congress intended to close the gap between those standards applicable to landfills that are designated to receive hazardous waste and those solid waste landfills that happen to receive exempted hazardous wastes. The language of the statutory mandates for the EPA's regulations for the two types of facilities are now nearly identical. Under Subtitle C, the EPA is required to promulgate standards for the treatment, storage, or disposal of hazardous waste "as may be necessary to protect human health and the environment."<sup>36</sup> With the exception of the express authorization to consider "practical capabilities," the EPA's Subtitle D regulations must also be those "necessary to protect human health and the environment. . . ."<sup>37</sup> This similarity in the statutory standards makes sense. As noted above, available data shows a similar health and environmental threat posed by the two types of facilities regulated under the two subtitles.

According to the EPA's proposed Subtitle D regulations, however, the agency's conception of what is "necessary to protect" health and the environment at municipal landfills radically differs from what it considers necessary to ensure the same level of protection at hazardous waste facilities. Although the categories of environmental controls proposed in the revised Subtitle D criteria—location, design, groundwater monitoring, corrective action, closure, and financial responsibility—mirror those found in the EPA's Subtitle C standards, the substance of these controls are generally much less stringent. In fact, the use of similar categories of environmental controls in the two sets of standards masks very real and important distinctions.

The following are actual examples of how the proposed municipal landfill regulations differ in their standard of protectiveness from hazardous waste landfill regulations. For simplicity, the discussion is limited to major differences.

#### a. Design Standards

Under RCRA Subtitle C, the design of a hazardous waste landfill is largely dictated by statute. Under two provisions added to the RCRA by the 1984 amendments, Congress itself specified the landfill design "necessary to protect human health and the environment" under the broad regulatory mandate of section 3004(a).<sup>38</sup> According to the amend-

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35. *Id.* § 6926.

36. *Id.* § 6924.

37. *Id.* § 6949a(c).

38. That Congress was fulfilling the standard of section 3004(a) in specifying these technological requirements is evident from the language of section 3004(o)(1) which states, "[t]he regulations under subsection (a) of this section shall be revised from time to time to take into account improvements in the technology of control and measurement. At a minimum, such regulations shall require [installation of a double liner and leachate collection system]." 42 U.S.C. § 6924(o)(1) (1988).



ments, virtually any landfill must install a double liner and a leachate collection system consisting of two liners that prevent the migration of constituents, the lower of which consists of three feet of clay with a permeability of not more than  $1 \times 10^{-7}$  centimeters per second.<sup>39</sup> The EPA has not exercised the discretion provided by the statute to alter this design. Rather, the agency has codified section 3004(a)'s requirement to "protect human health and the environment" and stated that the statutory design standard may be used to satisfy this requirement.<sup>40</sup>

Rather than Subtitle C's technological design standard, the EPA proposed a performance standard for Subtitle D. Under the proposed rule, new municipal landfills must be designed with liners, a leachate collection system, and a final cover as necessary to meet an overall individual cancer risk from exposure to groundwater in the range of  $1 \times 10^{-4}$  to  $1 \times 10^{-7}$ .<sup>41</sup> The risk posed by any given landfill is to be measured by combining the risks posed by all hazardous constituents found in the groundwater at the landfill's "point of compliance."<sup>42</sup>

A comparison of the stringency of the Subtitles C and D design standards is hindered by the fact the former is a technological standard and the latter is a performance standard. Because the EPA has never determined the risk level achieved by its Subtitle C design standard, it is not possible to conclusively determine whether the Subtitle D performance standard will require a more stringent design than the double liner and leachate collection system required under Subtitle C. Nevertheless, because the cancer risk posed by the landfill dictates the landfill's design, and this risk is measured at a point up to 150 meters from the landfill edge,<sup>43</sup> it is likely that the design will be less protective. The EPA has conceded that placement of the point of compliance at a distance from the landfill edge "allows contaminant concentrations to diminish (due to degradation, dispersion, and attenuation) over distance and, thus, potentially decrease[s] the stringency of design criteria needed to meet the design goal."<sup>44</sup>

Furthermore, because of the authorization of a 150 meter compliance point, the Subtitle D performance standard is inherently less protective than that required under Subtitle C. The Subtitle D standard allows the contamination of the groundwater aquifer, as well as soil and surface water lying within a 150 meter radius of the landfill edge.

Another major difference between the two sets of standards is the restriction of the design criteria under Subtitle D to new facilities.<sup>45</sup>

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39. *Id.* § 6924(o)(1)(A)(i).

40. EPA's use of the term "may" demonstrates that, although it believes the statutory design standards meet the requirement of protecting "human health and the environment," they may not be "necessary" to meet this requirement.

41. 53 Fed. Reg. 33,314, 33,351-52 (1988) (to be codified at 40 C.F.R. § 258.40).

42. *Id.* at 33,351-52. The point of compliance is either the edge of the landfill unit or an alternative boundary established by the state up to 150 meters from the landfill edge. *Id.* at 33,352.

43. *Id.* at 33,410-11 (to be codified at 40 C.F.R. § 258.40).

44. *Id.* at 33,352.

45. *Id.* at 33,325.

Existing municipal landfills, which are likely to pose the greatest health and environmental threats because they may have received all types of hazardous wastes prior to 1980, are not required to retrofit with liners and a leachate collection system. Only fifteen percent of existing municipal landfills have any liner at all, natural or synthetic.<sup>46</sup>

#### b. Groundwater Monitoring and Corrective Action

The routines mandated by the groundwater monitoring requirements in effect under Subtitle C and proposed under Subtitle D are similar. Both require the monitoring of lists of indicator parameters or hazardous constituents which, if detected in sufficient concentrations, trigger a requirement for additional monitoring or the cleanup of the contamination.<sup>47</sup> Nevertheless, significant differences exist between the two regimens.

One difference, the distance between the boundary of the landfill and the designated point of compliance, has already been mentioned.<sup>48</sup> Under Subtitle C, the point of compliance, and hence the place where groundwater monitoring wells are installed,<sup>49</sup> must be located at the hydraulically downgradient edge of the landfill unit.<sup>50</sup> This assures the earliest possible detection of a leak from the unit as contaminants cannot disperse prior to being detected at the compliance monitoring wells. On the other hand, the EPA's proposal to allow states to designate a point of compliance for municipal landfills up to 150 meters from the landfill unit boundary reduces the instances where contamination will actually be detected. This distinction is not merely academic. Groundwater monitoring is the linchpin of the cleanup or corrective action program, dictating if and when corrective action must be conducted.

Placement of the point of compliance beyond the landfill boundary will also reduce the extent of whatever corrective action is conducted. Under both Subtitle C and proposed Subtitle D, only contamination leaking beyond the point of compliance must be remediated. By allowing any distance between the landfill boundary and the point of compliance, the EPA is basically writing off that area to contamination as, at least under the RCRA, it will never have to be cleaned up. The Subtitle D standard, which may forever destroy the pristine nature of a large land area surrounding a municipal landfill, cannot be deemed as environmentally protective as Subtitle C, if protective at all.

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46. *Id.* at 33,319.

47. Compare 40 C.F.R. § 264.90-101 (Subtitle C standards for permitted facilities) and 40 C.F.R. § 265.90-.94 (Subtitle C standards for unpermitted facilities) with 53 Fed. Reg. 33,411-15 (to be codified at 40 C.F.R. § 258.50).

48. See *supra* notes 42-45 and accompanying text.

49. See proposed 40 C.F.R. § 258.51(a) (referring to the point of compliance established under proposed § 258.40); 53 Fed. Reg. 33,314, 33,411 (1988).

50. EPA regulations state that the point of compliance is the hydraulically downgradient limit of the "waste management area. . ." 40 C.F.R. § 264.95(a) (1990). The waste management area, in turn, is the horizontal plane where waste is placed during the active life of the unit. *Id.* § 264.95(b). If the facility contains more than one unit, the waste management area is described by drawing an imaginary line around all the landfill units. *Id.* § 264.95(b)(2).

As to human health, the protectiveness of the Subtitle D standard will depend upon the current and future use of the area surrounding the landfill. Assuming that the land is forever used for waste disposal and the contamination never strays from these artificial man-made boundaries, two very large assumptions, the potential human health threat may be minor. However, if the facility is one day used for another purpose, such as residential development, or if the sitting contamination finds its way into connected aquifers or simply eludes groundwater monitoring wells placed 150 meters from the landfill boundary, the threat to human health may be significant.

How much of the environment must be cleaned up once corrective action is triggered is another significant difference between the Subtitle C and proposed Subtitle D regulations. While Subtitle C requires the clean up of all environmental media, including soil, surface water, and air,<sup>51</sup> the EPA is proposing to require only the cleanup of groundwater contamination under Subtitle D.<sup>52</sup> The result at Subtitle D facilities will be that the soil underlying contaminated areas subject to corrective action outside the point of compliance will continue to harbor contaminants even after the contaminants are removed from the groundwater.

### c. Financial Responsibility

The Subtitle C and proposed Subtitle D financial responsibility requirements demonstrate obvious inconsistencies. Financial responsibility refers to insurance policies, bonds, guarantees, or other instruments that must be secured to finance the known or potential costs of operating a landfill. While they do not themselves govern how wastes are managed at a landfill, financial responsibility requirements are widely regarded as environmental standards because they assure the funds necessary to implement health and environmental controls or to pay for the clean up of contamination.<sup>53</sup> In recent years, Congress has consistently required that financial responsibility regulations be a component of regulatory schemes designed to protect human health and the environment.<sup>54</sup>

Under Subtitle C, owners and operators of hazardous waste landfills must obtain financial assurance for the costs of closure, post-closure care, and bodily injury and property damage to third parties resulting from accidental occurrences or contamination releases at a landfill.<sup>55</sup> The

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51. 42 U.S.C. § 6924(u) (1988); 40 C.F.R. § 264.101(a) (1990); *see also* EPA's proposed Subtitle C corrective action regulations, 55 Fed. Reg. 30,798 (1990).

52. *See generally* 53 Fed. Reg. 33,314 (1988).

53. The contrary view that the owner or operator will still be subject to the operating and corrective action requirements regardless of whether he or she obtains financial responsibility is generally discredited by the existence of the option of declaring bankruptcy. Moreover, in one sense, financial responsibility requirements *can* be said to govern the management of wastes. For example, insurers often require compliance with certain management standards prior to issuing policies.

54. *See, e.g.*, 42 U.S.C. § 6924(a) (1988) (hazardous waste); *id.* § 6991(b) (underground storage tanks).

55. 40 C.F.R. §§ 264.140-151 (permitted facilities), 265.140-265.150 (interim status facilities) (1990).

assurance must be in the form of an insurance policy or other financial instrument, the exact wording of which is specified by regulation.<sup>56</sup> A specified minimum amount of assurance is required for liability costs where engineering estimates are impossible.<sup>57</sup> Subtitle C requires that financial assurance be secured prior to the receipt of hazardous waste at the landfill if the facility is new, or prior to the issuance of a permit if the facility was in operation before the effective date of the regulations.<sup>58</sup> Thus, the financial responsibility requirements at Subtitle C landfills are characterized by comprehensive coverage of all aspects of landfill operation, prescriptive regulation of financial instruments, and the securing of financial responsibility prior to permitted operation.

The proposed Subtitle D financial responsibility requirements are different on all three of these fronts. First, the scope of the contingencies for which an owner or operator must have financial assurance is more limited. For instance, the EPA is proposing to require only assurance for the cleanup of releases, not for third party bodily injury or property damage.<sup>59</sup> Furthermore, no financial responsibility need be obtained unless the release is "known" or has been discovered.<sup>60</sup> This allows the construction and operation of landfills which may not have sufficient financial resources to cover the costs of cleaning up a future release. Finally, the proposed requirements are phrased as performance standards. In contrast to the current Subtitle C standards, the wording of the financial instruments is not specified by regulation.<sup>61</sup>

#### d. New Versus Existing Facilities

Significant discrepancies exist between the rigor of the standards applied under Subtitle C and proposed Subtitle D standards with respect to new and existing facilities.<sup>62</sup> While the standards for existing Subtitle C landfills are, as a rule, less stringent than those applied to new landfills, Subtitle D lacks certain requirements for existing Subtitle D landfills. Moreover, while existing Subtitle C landfills must eventually comply with the more stringent requirements applied to new facilities, Subtitle D landfills may never be subject to regulation. These distinctions are all the more significant when it is remembered that older municipal solid waste landfills have been determined to pose the greatest health and environmental threat.<sup>63</sup>

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56. *See, e.g., id.* § 264.151(e).

57. *Id.* § 264.143.

58. *See, e.g., id.* § 264.143(a)(3)(i).

59. 53 Fed. Reg. 33,409-10 (1988) (to be codified at 40 C.F.R. § 258.32).

60. *Id.*

61. *Id.*

62. In this discussion and under RCRA regulations generally, a "new" facility refers to a facility that begins operation after the effective date of the regulations. Correspondingly, an "existing" facility refers to one in operation as of the effective date of the regulations. *See* 40 C.F.R. § 260.10 (1990).

63. 53 Fed. Reg. 33,314, 33,319 (1988).

The distinctions between new and existing landfills under Subtitle C are largely the result of accommodating the statutory prohibition of hazardous waste disposal without a permit.<sup>64</sup> Acknowledging that the wait for a permit might be lengthy, the EPA allowed such facilities to continue operation so long as they had applied for a permit and complied with minimum standards in each category for which the EPA had promulgated a permitted standard.<sup>65</sup> While generally subject to less stringent requirements, the "interim status" landfills are at least subject to some type of health and environmental control standards. These standards are often strict. For instance, most interim status landfills must retrofit to install the same double liner and leachate collection system required at a new facility.<sup>66</sup> If contamination is detected, interim status landfills may be required to follow the same stringent corrective action regimen applied to new landfills. Interim status provides, at most, a temporary break from the full Subtitle C requirements applied to new landfills. If they do not close down first, interim status landfills are eventually required to comply with the more stringent requirements applied to new landfills once it is time for them to obtain a permit.

In contrast, under the proposed Subtitle D standards, existing landfills are forever relieved of complying with most of the requirements applicable to new municipal landfills. For instance, most location restrictions are applicable only to new units.<sup>67</sup> In addition, existing units are not required to be retrofitted with liners or a leachate collection system.<sup>68</sup> Finally, the EPA has proposed a delay of up to five years for the installation of groundwater monitoring wells at existing municipal landfills.<sup>69</sup> Unlike existing Subtitle C landfills accorded interim status, not even cursory groundwater monitoring is required at these facilities during this delay.<sup>70</sup>

#### e. "Practicable Capability"

As discussed above, the statutory mandates under Subtitle C and Subtitle D are identical with the exception that, under Subtitle D, the EPA is allowed to consider the "practicable capabilities" of municipal landfills. Therefore, the manifold discrepancies between the Subtitle C and proposed Subtitle D standards must be attributed to the "practicable capabilities" of municipal landfills, if attributed to anything at all. Indeed, the EPA's proposed rule does justify many of the Subtitle D standards on this basis, although in a most general fashion. Most discrepancies are left totally unexplained.

In the proposed rule, the EPA interprets "practicable capability" to encompass both a technical component, as in the availability of particular

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64. 42 U.S.C. § 6925(a) (1988).

65. 40 C.F.R. § 265 (1990).

66. 42 U.S.C. § 6936(b) (1988).

67. 53 Fed. Reg. 33,314, 33,325 (1988).

68. *Id.*

69. *Id.* at 33,326.

70. *Id.*

technology to address a particular problem, and an economic component, as in the economic resources available to implement the standards.<sup>71</sup> Without explaining its criteria, the EPA has identified two classes of municipal landfills particularly susceptible to technical difficulties or economic hardship: existing and small landfills.<sup>72</sup> As a result, the requirements for new versus existing landfills are varied, applying most location restrictions and the design standards only to new landfills.<sup>73</sup> Finally, the agency justifies its phase-in of groundwater monitoring requirements and its eighteen-month effective date for the entire regulation upon the resource demands placed by the requirements upon states and owners and operators.<sup>74</sup>

The EPA's attempt to justify its less stringent proposed Subtitle D regulations is, at best, incomplete. The agency makes no attempt to explain the majority of the differences between the design, groundwater monitoring, corrective action, or financial responsibility regulations under the two subtitles. Moreover, the agency never explains how economic and technical difficulties were considered in varying the proposed Subtitle D standards. For instance, how much of an impact was considered sufficient to ease a standard, and by how much? The proposed rule simply fails to address these issues.

### III. ANALYSIS

Whether the inconsistencies between the Subtitle C and proposed Subtitle D standards are legally justified largely depends upon the legal approach applied under judicial review. The following discussion analyzes these RCRA inconsistencies under both traditional statutory analysis and a new "regulatory common law" approach. This article concludes that while it may be possible to justify such inconsistencies under the former approach, such differences could not be justified under the latter approach.

#### A. *Traditional Statutory Analysis*

##### 1. The Case for Inconsistent Regulations

Section 706(2)(A) of the Administrative Procedure Act governs judicial review of informal rulemaking such as EPA's Subtitle D regulations. Under this provision, a rule will be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>75</sup> Application of this standard must be consistent with the leading case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>76</sup> under which an agency's statutory interpretations will generally be upheld

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71. *Id.* at 33,325.

72. *Id.*

73. *Id.*

74. *Id.*

75. 5 U.S.C. § 706(2)(A) (1982).

76. 467 U.S. 837 (1984).

if "reasonable." Beloved by agency attorneys and loathed by their opposing counsel, the *Chevron* case sets forth a two-step framework for reviewing agency interpretations of law. Under the first step, a court must determine whether "Congress has directly spoken to the precise question at issue."<sup>77</sup> If Congress has, the court must "give effect to the unambiguously expressed intent of Congress."<sup>78</sup> If Congress was silent on the issue, or its intent ambiguous, the second step requires courts to defer to the agency's legal interpretation so long as it is a "permissible" or "reasonable" one.<sup>79</sup>

Applying this analysis to the EPA's Subtitle D regulations, a court's review would be limited to the deferential "reasonableness" test of *Chevron's* second-prong. Given the EPA's broad mandate to issue Subtitle D regulations "necessary to protect human health and the environment" with reference to "practicable capability,"<sup>80</sup> Congress may not have spoken to the "precise question at issue," *i.e.*, the standard of protection to be achieved by Subtitle D standards and the relationship between that standard and the standard achieved by current Subtitle C regulations.

First, RCRA contains no statutory language explicitly addressing the issue of consistency between Subtitle C and Subtitle D regulations. Rather, as discussed above, the regulatory mandates under the two are similar, but not identical, because of the reference in Subtitle D to "practicable capability."<sup>81</sup> Nowhere does the statute define this term. Thus, it is impossible to determine from just the statutory language whether Congress intended the EPA to promulgate standards under Subtitle D assuring the same level of health and environmental protection assured under Subtitle C.

Nor is the legislative history much more illuminating. Although replete with references to the Subtitle C regulations, the legislative history never explicitly states that the EPA must adopt the Subtitle C regulations for those Subtitle D facilities that receive hazardous waste. On the one hand, the Senate Report on an earlier bill states that the Subtitle D groundwater monitoring requirements "can obtain the flexibility currently provided in the Subtitle C regulations."<sup>82</sup> This appears to indicate that Congress intended the EPA to promulgate Subtitle C-like standards for municipal

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77. *Id.* at 842-43.

78. *Id.*

79. *Id.* At issue in *Chevron* was EPA's interpretation of the term "stationary source" in the 1977 Clean Air Act Amendments to refer to all pollution-emitting devices within a single plant as if they were encased within a "bubble." Under the bubble concept, a plant could install or modify one piece of equipment and not trigger the requirement to install expensive control technology at each pollution-emitting device so long as the alteration did not increase total plant emissions. *Id.* at 840. Because the Court found that Congress had *not* spoken on the precise definition of the term "source," the Court upheld EPA's interpretation as a permissible construction of the statute. *Id.* at 866. *Chevron's* two-step analysis has been widely followed. A few of the Court's significant environmental decisions following the *Chevron* analysis are: *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116 (1985).

80. See *supra* notes 36-37 and accompanying text.

81. See *supra* text accompanying notes 32-33.

82. S. REP. NO. 98-284, 98th Cong., 1st Sess. 50 (1983).

landfills, taking advantage of the flexibility the agency built into its Subtitle C groundwater requirements. On the other hand, the Senate Report also states that the multiple liner-leachate collection system requirements applicable to Subtitle C facilities "are not to be automatically incorporated" in the revised criteria.<sup>83</sup> Similarly, a co-sponsor of the 1984 RCRA amendments stated during floor debate that the "underlying standard . . . to Subtitle D remains protection of human health and the environment. Requirements imposed on facilities may vary from those for Subtitle C facilities, however, and still meet this standard."<sup>84</sup> The senator cited as an example the phase-in of the Subtitle D standards "to take account of the practicable capability of the facilities covered."<sup>85</sup>

The "reasonableness" of the EPA's argument that many of the inconsistencies are justified on the basis of the "practicable capability" of certain types of landfills would appear to depend upon equating this term with cost considerations. The legislative history does provide some support for this view. For example, Senator Randolph stated on the Senate floor that by allowing the EPA to consider the "practicable capability" of facilities, Congress had expressed its intent that the agency "avert serious disruptions of the solid waste disposal industry."<sup>86</sup> Support for Subtitle C and proposed Subtitle D inconsistencies may also be found in section 1008(a)(3) of RCRA, which is explicitly referred to in the revised criteria mandate.<sup>87</sup> This provision states that the EPA's criteria for sanitary landfills must assure that there is "no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility."<sup>88</sup>

Case law exists to justify using the term "reasonable" to refer to a balancing of cost and environmental protection. For instance, in *American Textile Manufacturers Institute, Inc. v. Donovan*,<sup>89</sup> the United States Supreme Court stated in dicta that similar language under the Occupational Health and Safety Act "might be construed to contemplate some balancing of the costs and benefits of a standard."<sup>90</sup>

The same interpretation was made by a lower court when interpreting an EPA-administered statute. In *City of New York v. United States Environmental Protection Agency*,<sup>91</sup> the court interpreted the term "unreasonable" in the Marine Protection, Research and Sanctuaries Act's ("MPRSA") statutory prohibition against permitting ocean dumping which may "unreasonably degrade or endanger" human health or the maritime

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83. *Id.*

84. 130 CONG. REC. S13,814 (daily ed. Oct. 5, 1984) (statement of Sen. Randolph).

85. *Id.*

86. *Id.*

87. 42 U.S.C. § 6949(c) (1988). This provision explicitly states that the Administrator is to "promulgate revisions of the criteria promulgated under paragraph (1) of section 4004(a) [42 U.S.C. § 6944(a)] and under section 1008(a)(3) [42 U.S.C. § 6907(a)(3)]. . . ." (emphasis added).

88. 42 U.S.C. § 6944(a) (1988).

89. 452 U.S. 490 (1981).

90. *Id.* at 512.

91. 543 F. Supp. 1084 (S.D.N.Y. 1981).



environment.<sup>92</sup> The court held that the term inherently denoted a weighing of the listed statutory factors, one of which was "the need for the proposed dumping," a factor found by the court to permit consideration of costs.<sup>93</sup>

## 2. The Case for Regulatory Consistency

Even within the framework of *Chevron* a strong argument can be made that the Subtitle D and C standards must be consistent. The strongest argument is, of course, that Congress, speaking directly to this "precise question," mandated similar standards. Such a claim rests first upon the distinction in Congress' Subtitle D mandate to promulgate standards necessary to protect human health and the environment on the one hand and its mandate to consider "practicable capability" on the other. While Congress stated that the Administrator "shall" do the former, it stated only that he "may" do the latter.<sup>94</sup>

Congress' intent would thus appear to be that EPA's foremost priority is to issue standards necessary to protect health and the environment. Only *after* this standard has been achieved may the agency vary the requirements based upon the practicable capabilities of individual owners and operators. Assuming that EPA's Subtitle C requirements are those standards the agency believes are "necessary to protect human health and the environment"<sup>95</sup> from the type of threat posed by municipal landfills, this interpretation of the revised criteria would mandate EPA's promulgation of standards under Subtitle D that are similar to those effective under Subtitle C.

Support for this interpretation may be found in the legislative history of the 1984 RCRA amendments. During floor debate, one senator emphasized the precedence of health and environmental protection, stating: "[t]he underlying standard for facilities subject to this amendment to Subtitle D remains protection of human health and the environment."<sup>96</sup> Other legislative history appears to limit the agency's discretion to promulgate less stringent Subtitle D standards on anything more than a temporary basis. Statements by legislators, also made during floor debate, state that EPA may phase in the Subtitle D regulations as a means of accommodating the "practicable capability" of owners and operators.<sup>97</sup>

92. 33 U.S.C. § 1412(a) (1988).

93. 543 F. Supp. at 1104.

94. 42 U.S.C. § 6949a(c) (1988).

95. See *supra* notes 36-37 and accompanying text.

96. 130 CONG. REC. S13,814 (daily ed. Oct. 5, 1984) (statement of Sen. Randolph).

97. Referring to the revised criteria, Senator Randolph stated:

They may be phased in over time, as the Administrator deems appropriate, to take account of the practicable capability of the facilities covered . . . . The Administrator could phase in new requirements other than groundwater monitoring and corrective action over time. Phasing may be tailored to the characteristics of broad categories of facilities. Such phasing might include, for example, imposing requirements first on large facilities which have the greatest potential for affecting human health and the environment in the absence of added regulatory controls. Phasing also might

This would indicate that while Congress authorized less stringent standards during a temporary "phase-in" period to accommodate economic constraints, the "necessary" long-term protection of human health and the environment was not to be compromised.

Yet even if the above statutory mandate is not considered sufficiently "precise" to prevent a court from venturing to the second step of the *Chevron* analysis, it can always be argued that the promulgation of inconsistent standards is patently "unreasonable." First, according to the EPA's own data, the health and environmental threat posed by hazardous waste facilities subject to Subtitle C standards is similar to that posed by municipal solid waste facilities subject to Subtitle D. Thus, it is patently *unreasonable* to apply dissimilar standards to these demonstrably similar health and environmental threats.

Second, inconsistent standards *within* RCRA cannot be reasonable given Congress' intent that RCRA standards be consistent with standards promulgated under other environmental laws. Section 1005(b) of the Act directs the EPA to integrate its RCRA regulations "to [the] maximum extent practicable, with appropriate provisions" of several listed Acts, as well as "such other Acts of Congress as grant regulatory authority to the Administrator."<sup>98</sup> While the provision fails to specify that the EPA integrate its regulations under RCRA's own subtitles, it would be plainly illogical to mandate the integration of regulations promulgated under several different statutes and not those promulgated under the same statute.

Whatever the outcome of a hypothetical legal challenge to an EPA determination to promulgate inconsistent Subtitle D and C standards, it is obvious that the existing structure of judicial review under *Chevron* will not necessarily further the goal of consistent environmental regulation of similar harms. Under the *Chevron* analysis, regulatory consistency, arguably an inherent value in environmental law, will be achieved only in those instances when Congress expressly mandates such consistency or the agency chooses on its own initiative to require it.

### *B. Regulatory Common Law Approach*

An alternative approach to *Chevron* which would assure consistency is that of "regulatory common law." Under this approach, an agency's

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include imposing some requirements immediately on existing units but giving time to meet other requirements so that facilities are not faced with all major new requirements at once.

*Id.*

98. 42 U.S.C. § 6905(b) (1988). The Acts specifically mentioned are: the Clean Air Act, the Federal Water Pollution Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Safe Drinking Water Act, and the Marine Protection Research and Sanctuaries Act of 1972. *See also* Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 2022(a) (1982) (requiring that the EPA's environmental standards for control of uranium mill tailings be consistent, to the maximum extent practicable, with requirements under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-91).

discretion in developing new environmental standards is limited by the requirement that such standards be consistent with existing regulatory determinations under a similar congressional mandate. As a consequence, congressional silence or ambiguity with respect to particular regulatory controls would not function as *carte blanche* for the promulgation of inconsistent regulatory standards. Rather, even in the face of such silence or ambiguity, agencies would be bound by their prior regulatory determinations. Essentially, agency health and environmental determinations are elevated under this approach to the status of regulatory common law.<sup>99</sup> Once promulgated, health and environmental standards would function as precedents binding upon the agency unless distinguished in subsequent regulatory effort.

Placed within the context of evolving standards of judicial review of agency decisionmaking, the regulatory common law approach would most accurately be described as a selectively-applied "ultra-hard look doctrine." The "hard look doctrine" is the name given the more rigorous scrutiny applied to agency decisionmaking by courts beginning in the 1970s.<sup>100</sup> In its earliest formulation, the doctrine elaborated upon the Administrative Procedure Act's ("APA") requirement that a rule include a "concise general statement of [its] basis and purpose."<sup>101</sup> To ensure that agencies had adequately considered the relevant issues, courts required that agencies explain their reasoning process, but were generally unconcerned with the substantive result.<sup>102</sup> As subsequently developed in cases such as *Overton Park v. Volpe*,<sup>103</sup> however, the doctrine relied on the APA's section 706(2)(A) "arbitrary and capricious" standard to engage in a substantive review of the agency decision itself. This was openly demonstrated in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*.<sup>104</sup> The *State Farm* Court reversed the

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99. "Regulatory common law" is a term coined by the author. It is being used here because it best conveys the concept of a growing body of law consisting of agency health determinations. The author recognizes that because the traditional domain of common law is the decrees and judgments of the judiciary, the term "common law" may seem inappropriate in the administrative law context. Nevertheless, the present use of "common law" is true to the term's basic definition: "principles, usage and rules of action . . . which do not rest for their authority upon any express and positive declaration of the will of the legislature." BLACK'S LAW DICTIONARY 251 (5th ed. 1979). See also Aman, *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1144 (1988) (stating that the procedural version of the "hard look doctrine," under which a reviewing court required the agency to articulate its reasoning process, "had strong overtones of evolutionary common law methodology").

100. See Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 525 n.102 (1985), according to which the origin of the term can be traced to a series of cases by Judge Leventhal: *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1968), *cert. denied*, 395 U.S. 979 (1969); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

101. 5 U.S.C. § 553 (1982).

102. E.g., *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*); see also Garland, *supra* note 100, at 525-26; Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 417-22.

103. 401 U.S. 402 (1971).

104. 463 U.S. 29 (1983).

Department of Transportation's rescission of a safety standard because the Department failed to adequately justify its action.<sup>105</sup> The Court described the agency's burden in *State Farm* as one of articulating a "rational connection between the facts found and the choice made."<sup>106</sup>

Like the hard look doctrine, the regulatory common law approach would require that an agency give a reasoned explanation for its decision to impose a particular level of health and environmental protection. The common law approach would go *beyond* the hard look doctrine, however, by insisting that the agency explain its reasons for any subsequent variation of those standards when regulating a similar health and environmental threat.

Such rigorous scrutiny would not be required every time a court reviewed an agency's health and environmental protection standards. An agency's initial determination of the level of protection required by a statutory mandate would not be held to a higher standard of review than would otherwise apply under *Chevron*. Rather, consistent with the doctrine of *stare decisis*, the more exacting standard of review would apply only to successive agency efforts to define the requisite level of protection from a similar harm.

This selective application of a strict level of scrutiny is fully consistent with the theoretical justification for deferential review. Deference to agency decisions is generally justified on the basis of progressive, as opposed to liberal, values in American government.<sup>107</sup> While the former favors the rational, scientific solutions of trained government experts, the latter favors individual initiative and rigid adherence to separation of powers.<sup>108</sup> Under the progressive model, deference is accorded to agency decisions because they are presumed to be the products of rational decisionmaking. Deference is not warranted under this model where the decision constitutes an abrupt policy reversal, or where the agency fails to give a rational explanation for its action.<sup>109</sup>

Certainly the presumption of rationality, and thus the theoretical justification for agency deference, is destroyed when an agency applies drastically different standards to similar health and environmental threats

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105. *Id.* at 46-49.

106. *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

107. See Shapiro & Levy, *supra* note 102, at 391.

108. *Id.* at 391-94.

109. See, e.g., *State Farm*, 463 U.S. at 38; *General Elec. Co. v. Gilbert*, 429 U.S. 125, 144-45 (1976) (refusing to accord deference to EEOC guideline that conflicted with earlier pronouncements of same agency); *National Labor Relations Board v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 289 (1974) (refusing to uphold new agency construction of statutory term that conflicted with longstanding interpretation).

The Court's decision in *State Farm* is an excellent example of judicial review based upon the progressive model. In rescinding the requirement that car manufacturers install passive restraints, the new administration in the Department of Transportation reversed a prior agency position. *State Farm*, 463 U.S. at 38. The Court held that the agency had failed to articulate a rational justification for its action. *Id.* at 57. Obviously sensing undue influence by newly-appointed agency officials, the Court abandoned a deferential standard of review and studied the agency's rationale for the earmarks of a "reasoned analysis." Finding none, the Court reversed the agency's decision. *Id.*

and fails to explain the basis for the distinction. Such dissimilar treatment can be likened to the Department of Transportation's rescission of the passive restraint requirement struck down for lack of adequate justification in *State Farm*.<sup>110</sup> Thus, the application of heightened scrutiny to inconsistent standards is in keeping with the progressive understanding of the agency role in government.

The regulatory common law approach also finds support outside the administrative law context in the doctrine of statutory common law. This doctrine may be summarized as a recognition of legislative enactments as sources of legal principles applicable to problems beyond those directly subject to a statute's provisions. Legislative enactments have traditionally been used as sources of common law principles.<sup>111</sup> The doctrine of "equity of the statute" is itself a means of treating legal principles distilled from statutory law as common law within the context of traditional statutory construction. Under this doctrine, a court may apply a particular statutory provision to cases that are neither expressly named nor excluded by the law, but which are clearly within its spirit and meaning. Treatment of statutes as sources of common law recognizes that, however particular may be their stated application, statutes are based upon principles with undeniable application to a variety of circumstances, not all of which fall within the letter of the statute.

Although environmental regulations implement statutory directives, it is unrealistic to believe they are not a source of principles and values independent of the statute they implement. For example, a regulation that prohibits a facility from contaminating groundwater above a  $1 \times 10^{-7}$  level of individual lifetime cancer risk under a statutory mandate to promulgate regulations "necessary to protect human health and the environment" is setting forth a very real value judgment that exposed persons and the surrounding environment are "protected" or safe even where they have a 1 out of 10,000 chance of contracting cancer as a result of that exposure. This judgment was not made by the legislature; the legislature merely mandated the protection of human health and the environment. Likewise, regulations under a similar statutory mandate requiring installation of features designed to strengthen structures containing contaminated materials, such as liners and leachate collection systems at landfills, embody the principle that preventative measures, as opposed to solely corrective measures, such as requiring the cleanup of contamination once it has leaked, are "necessary" to adequately protect health and the environment.

Just as it is naive to ignore the existence of these principles and values in regulatory determinations, it is foolish to overlook their applicability outside the particular statute they implement. For instance, the principle

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110. See *supra* notes 104-06 and accompanying text.

111. Landis, *Statutes and the Sources of Law*, HARV. LEGAL ESSAYS (1934) reprinted in 2 HARV. J. ON LEGIS. 7 (1965) (citing as examples the Statute of Frauds and the Statute of Limitations); see also Page, *Statutes as Common Law Principles*, 1944 WISC. L. REV. 175; Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

that health and the environment are protected by preventing contamination before it occurs rather than cleaning it up afterward applies to virtually all regulatory efforts concerning a contamination threat.

The broad applicability of environmental regulatory determinations, in particular, is also explained by an agency's reference to a common pool of scientific data when promulgating regulations under different statutory mandates. For instance, the maximum contaminant levels for certain substances promulgated by the EPA are used as a basis for a host of regulatory determinations under the RCRA and Superfund. Where the data used to implement one mandate to "protect human health and the environment" is the same as that used to implement another mandate "to protect human health and the environment," the relevance of the regulatory determinations of the former to the latter is obvious. Thus, because environmental regulations, like statutory law, contain values and judgments of general applicability and are often based upon a common pool of scientific data, these principles can be treated as a form of common law.<sup>112</sup>

Such treatment, moreover, would have many benefits. Distillation of regulations currently scattered throughout the *Code of Federal Regulations* into a coherent body of regulatory common law would facilitate public understanding of the principles underlying these regulations, as well as efforts to change them. Take, for example, the hypothetical regulation mentioned above that prohibits groundwater contamination above a  $1 \times 10^{-4}$  individual lifetime risk of cancer under a mandate to issue regulations "necessary to protect human health and the environment." If an agency is required to apply this same requirement under similar mandates with regard to similar threats, there is an increased likelihood that the public will be cognizant of the principle underlying it—that human health and the environment are "protected" at a  $1 \times 10^{-4}$  risk of individual cancer. This knowledge facilitates any effort to change the standard through legislative, judicial or regulatory means. Furthermore, such a change will have implications beyond the particular regulation at issue because a successful challenge to a particular regulation based upon the underlying standard that it embodies will effectively discredit use of the standard in other contexts.

The application of the regulatory common law approach can be inferred from at least one federal case. In *Natural Resources Defense Council v. United States Environmental Protection Agency*,<sup>113</sup> the United States Court of Appeals for the First Circuit invalidated certain EPA standards promulgated under the Nuclear Waste Policy Act ("NWPA")<sup>114</sup> because of

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112. See, e.g., 42 U.S.C. § 9621(d) (1988) (requiring that Superfund cleanups remediate contamination to levels acceptable under the standards and criteria found in the Toxic Substances Control Act, the Safe Drinking Water Act, the Clean Air Act, the Clean Water Act, the Marine Protection, Research and Sanctuaries Act, the Solid Waste Disposal Act or any other "legally applicable or relevant and appropriate standard, requirement, criteria or limitation").

113. 824 F.2d 1258 (1st Cir. 1987).

114. 42 U.S.C. §§ 10101-10270 (1988).

their inconsistency with regulations promulgated by the Agency under the Safe Drinking Water Act ("SDWA").<sup>115</sup> The NWPA standards, applied to the long-term disposal of high-level radioactive waste in underground depositories, included an individual protection requirement limiting the annual exposure from the disposal system to any individual member of the public for the first 1,000 years to no more than 25 millirems.<sup>116</sup> This level, however, was well in excess of primary drinking water standards established under the SDWA. Pursuant to the SDWA, the EPA is obligated to assure that underground sources of drinking water are not endangered by any underground injection.<sup>117</sup> "Endanger" is defined by the SDWA as any injection that "may" cause a public water system to exceed national primary drinking water standards,<sup>118</sup> which for man-made radionuclides the EPA established level is four millirems.<sup>119</sup> The Natural Resources Defense Council had challenged the NWPA standards as arbitrary and capricious because they allowed levels of radionuclides in groundwater far in excess of allowable levels under the agency's own standards under the SDWA.

In the absence of an obvious congressional policy to override the SDWA's endangerment policy, the court found that the inconsistency between the EPA's NWPA and SDWA standards rendered the NWPA standards patently arbitrary.<sup>120</sup> The SDWA standards were the EPA's first effort at defining the appropriate level of health and environmental protection from the threats posed by radionuclides. Accordingly, the court interpreted the SDWA standards as the agency's best thinking on the issue, and flatly rejected the agency's argument that the SDWA standards had no impact upon standard-setting under any other statute absent an explicit consistency provision. "It is puzzling to say the least," the court stated, "when the same agency now endorses a significantly lower standard—and does so entirely without explanation. Either the SDWA standard is much too stringent or the present standard is inadequate."<sup>121</sup>

As under the regulatory common law approach, the court's cure for the inconsistent standards was a reasoned explanation. Because the agency failed to provide one, the court invalidated the NWPA standards.<sup>122</sup>

In *Natural Resources Defense Council*, the First Circuit treated the SDWA standards as regulatory common law by giving them precedential effect in the agency's development of regulations under a statutory del-

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115. *Id.* §§ 300f-300j.

116. *Natural Resources Defense Council*, 824 F.2d at 1274.

117. 42 U.S.C. § 300h(b)(3)(C) (1988).

118. *Id.* § 300h(d)(2).

119. *Natural Resources Defense Council*, 824 F.2d at 1266.

120. *Id.* at 1280.

121. *Id.*

122. *Id.* at 1282 (stating that reversal was the court's only alternative when "the Agency has never even acknowledged the interrelationship of the two statutes in respect to the [SDWA standards], and it has presented no reasoned explanation for the divergence between the level of contamination allowed by the [NWPA] rules and the permissible levels of radiation contamination under the SDWA").

egation under a different statute, namely the NWPA. Moreover, the court applied the reasoned analysis requirement. Where the agency decided not to follow pre-existing standards for the same environmental harm, the court directed that the agency give a "reasoned explanation" for this departure.

Critics are bound to attack the regulatory common law approach on several fronts. Those suspicious of agency action will regard the approach as an easily manipulated limitation upon agency discretion. The question of what new situations are sufficiently "similar" to require application of an existing regulatory determination is obviously subject to debate and potential abuse.<sup>123</sup> On the other hand, advocates of maximum flexibility in agency decisionmaking may complain that the approach unnecessarily limits an agency's discretion, preventing an agency from developing creative strategies to grapple with the inherent difficulties that attend its duty to regulate a diverse public. While the common law approach increases the significance of administrative determinations on environmental health and safety, it is undeniable that it also reduces an agency's discretion in making those determinations.

Critics might also attack the approach for generating far-reaching, unwanted impacts on statutory environmental law. For example, in mandating regulations to implement a particular statutory directive, Congress would no longer be writing on a clean slate. Rather, unless Congress specifically disavows the application of existing analogous regulatory determinations or expressly distinguishes their relevance, such determinations will automatically apply under the common law approach. Thus, regulatory common law may stifle congressional attempts to foster regulatory innovation.

The regulatory common law approach may also cause agencies to promulgate weak health and environmental protection standards. Fearing that it may later be forced to apply the strict standards to a recalcitrant sector of the regulated public, an agency may veer toward promulgation of the least stringent standards possible in the first instance. The common law approach might thus set off a "race to the bottom" in health and environmental protection standards.

#### IV. CONCLUSION

It is not clear that the regulatory common law approach would require the EPA to promulgate regulatory standards for municipal solid waste landfills that are completely consistent with the regulatory standards currently applicable to the agency's hazardous waste landfills. Despite the similarity in the directives under the statutory mandates for the two types of landfills,<sup>124</sup> Congress expressly authorized the EPA to consider

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123. See Landis, *supra* note 111, at 10 ("Enabling judges to distill from a statute its basic purpose, they could then employ it to slough off the archaisms in their own legal structure.").

124. See *supra* notes 36-37 and accompanying text.



the "practicable capability" of Subtitle D facilities.<sup>125</sup> This distinction provides a basis for distinguishing the regulatory controls developed under Subtitle D.

Nevertheless, application of the regulatory common law approach will still require a greater degree of consistency than achieved under the traditional statutory interpretation approach. Because of the scientifically demonstrated similarity in the health and environmental threat posed by municipal and hazardous waste landfills, and Congress' identical mandate to promulgate standards "necessary to protect human health and the environment," the EPA would have to justify inconsistent regulations on the basis of "practicable capability." The common law approach would require that the EPA define this ambiguous statutory phrase with some particularity and explain how it permits different levels of health and environmental protection mandated under the two Subtitles and why the particular differences were chosen. Certainly, the EPA's vague definition of "practicable capability" as encompassing both "economic and technical considerations" would not suffice under the common law approach.

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125. See *supra* note 33 and accompanying text.