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EPA'S PROBLEMATIC ENFORCEMENT POLICY FOR THE
RCRA SECTION 3004(j) STORAGE PROHIBITION AS
APPLIED TO MIXED WASTES: *EDISON
ELECTRIC INSTITUTE V. EPA*

I. INTRODUCTION

The Resource Conservation and Recovery Act ("RCRA")¹ directs the United States Environmental Protection Agency ("EPA") to promulgate rules and treatment standards for the safe land disposal² of particular hazardous wastes.³ Congress established a series of Land Disposal Restrictions ("LDRs") to insure that hazardous wastes would be adequately treated before land disposal could be employed.⁴ The LDRs mandate that if, after a period of time determined by Congress, EPA fails to establish treatment stan-

1. Resource Conservation and Recovery Act of 1976 ("RCRA") §§ 3001-5006, 42 U.S.C. §§ 6921-56 (1988 & Supp. V 1993). Congress added RCRA as an amendment to the Solid Waste Disposal Act of 1965 ("SWDA"), 42 U.S.C. §§ 6901-92k (1988 & Supp. V 1993). Congress enacted RCRA in an effort to establish a complete program for the regulation of hazardous waste. Barbara A. Finamore, *Regulating Hazardous and Mixed Waste at Department of Energy Nuclear Weapons Facilities: Reversing Decades of Environmental Neglect*, 9 HARV. ENVTL. L. REV. 83, 92 (1985). Former congressman and governor of New Jersey James Florio described the statute:

RCRA created a 'cradle to grave' regulatory system for hazardous waste, requiring generators, transporters, and disposers to maintain written records of waste transfers, and establishing standards, procedures, and permit requirements for disposal

. . . . Key provisions required EPA to develop standards for facilities handling hazardous waste, to establish a system of permits for such facilities, and to determine the technology appropriate for the disposal of particular wastes.

James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351, 353, 358 (1986) (citations omitted); see also James O. Neet, Jr., *Hazardous Waste Regulation in the United States: A Mind-Numbing Journey*, J. KAN. B. ASS'N, Jan. 1992, at 31.

2. The RCRA definition of "land disposal" includes, but is not limited to "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, or underground mine or cave." RCRA § 3004(k), 42 U.S.C. § 6924(k).

3. A wastes is considered "hazardous" if it possesses one of four characteristics: ignitability, corrosivity, reactivity and toxicity, or if it has been deemed "hazardous" through EPA regulations. *Chemical Waste Management v. United States Envtl. Protection Agency*, 976 F.2d 2, 8 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1961 (1993); 40 C.F.R. § 261.3 (1993).

4. For a discussion of Land Disposal Restrictions ("LDRs"), see LISA K. FRIEDMAN ET AL., *SUPERFUND LDR GUIDES* 163, 165 (1990).

dards for a particular type of waste, land disposal of that waste is forbidden.⁵ In addition, RCRA section 3004(j) forbids storage of wastes prohibited from land disposal, unless such storage is solely for the purpose of accumulating sufficient amounts of waste for proper recovery, treatment or disposal.⁶ Thus, waste handlers may be put in quite a predicament: if their wastes are prohibited from land disposal by LDRs due to a lack of treatment options, then storage of those wastes would also be illegal.

When EPA fails to establish treatment standards for LDR waste because of a lack of treatment capacity or technology, the Agency is presented with an enforcement policy problem. On the one hand, storage is expressly forbidden by RCRA.⁷ On the other hand, lack of treatment technology or capacity makes storage the only available option for most generators and storers of restricted wastes.⁸ Clearly, when both disposal and storage of existing wastes are forbidden under RCRA, EPA must try to strike a balance between the statutory language and the interests of handlers of the prohibited wastes.

In 1991, EPA addressed the problem of section 3004(j)'s application to "mixed wastes,"⁹ in a statement titled Policy on Enforcement of RCRA Section 3004(j) Storage Prohibition at Facilities Generating Mixed Radioactive/Hazardous Wastes ("Section 3004(j) Enforcement Policy Statement").¹⁰ In this statement, EPA announced that the storage of mixed wastes, pending development of

5. RCRA § 3004(g)(6)(A)-(C), 42 U.S.C. § 6924(g)(6)(A)-(C).

6. RCRA § 3004(j) provides:

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

Id. § 3004(j), 42 U.S.C. § 6924(j).

7. *Id.*

8. See Section 3004(j) Enforcement Policy Statement, *infra* note 10, at 42,732 (discussing difficulty of enforcing ban on storage of wastes for which disposal technology or capacity has not yet been developed).

9. "Mixed wastes" are wastes containing both a hazardous waste component regulated under RCRA and a radioactive waste component regulated under the Atomic Energy Act ("AEA"). *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 329 (D.C. Cir. 1993). EPA maintains that under RCRA, the land disposal and indefinite storage of insufficiently treated mixed wastes is forbidden. See generally Section 3004(j) Enforcement Policy Statement, *infra* note 10, at 42,730.

10. See Policy on Enforcement of RCRA Section 3004(j) Storage Prohibition at Facilities Generating Mixed Radioactive/Hazardous Wastes, 56 Fed. Reg. 42,730 (1991) [hereinafter Section 3004(j) Enforcement Policy Statement].

sufficient treatment or disposal capacity, was not permitted under RCRA section 3004(j).¹¹ As a result, EPA recognized that the lack of available treatment and disposal options made it impossible for generators and storers of mixed wastes to comply with the storage prohibition of section 3004(j).¹² Keeping in mind that the prohibition on both treatment and storage forced mixed waste generators to break the law, EPA announced its enforcement policy for the section 3004(j) storage prohibition: for those mixed waste handlers who store "relatively small volumes" of mixed waste in an "environmentally responsible manner," violations of section 3004(j) would be considered "reduced priorities among EPA's potential civil enforcement actions."¹³ EPA originally indicated that its section 3004(j) Enforcement Policy would expire on December 31, 1993.¹⁴ However, on April 20, 1994, EPA renewed its original policy, with some modifications, for an additional two years.¹⁵

In *Edison Electric Institute v. United States Environmental Protection Agency*,¹⁶ a group of utilities and power companies ("the Institute") petitioned for review of EPA's interpretation of the section 3004(j) storage prohibition. The Institute contended that EPA's Section 3004(j) Enforcement Policy Statement, which outlined how the Agency would enforce the storage prohibition against generators and storers of mixed wastes, was impossible to comply with and inconsistent with the statute.¹⁷ EPA first responded with several arguments against the Institute's standing to bring suit.¹⁸ EPA then argued that its interpretation of section 3004(j) was consistent with congressional intent.¹⁹ The District of Columbia Circuit Court of

11. *Id.* at 42,732; see also RCRA § 3004(j), 42 U.S.C. § 6924(j).

12. Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,732.

13. *Id.* at 42,731. A "relatively small volume" is defined in the Section 3004(j) Enforcement Policy Statement as less than 1000 cubic feet per year of mixed wastes. *Id.* EPA indicated that its primary enforcement concern would be with larger generators (greater than 1000 cubic feet per year): "EPA believes that the 1,000 cubic feet/yr amount will exclude from this policy only about 5% of the total number of mixed waste generators. However, the large generator facilities excluded by this amount may account for about 96% of the volume of LDR prohibited mixed wastes." *Id.* at 42,733.

14. *Id.* at 42,731.

15. Extension of the Policy on Enforcement of RCRA Section 3004(J) Storage Prohibition at Facilities Generating Mixed Radioactive/Hazardous Waste, 59 Fed. Reg. 18,813 (1994) [hereinafter Extension of Section 3004(j) Enforcement Policy Statement].

16. 996 F.2d 326 (D.C. Cir. 1993).

17. *Edison Elec.*, 996 F.2d at 328.

18. For a discussion of the court's analysis of preliminary issues raised by EPA, see *infra* note 76.

19. *Edison Elec.*, 996 F.2d at 331-37.

Appeals held that EPA's interpretation of section 3004(j) was not only correct, but mandated by the statute, and that the Enforcement Policy was within EPA's power to effectuate.²⁰

This Note will examine the legal precedents and regulatory efforts of EPA with respect to section 3004(j). It will also analyze the District of Columbia Circuit's discussion of the merits of the Institute's claims, focusing on the court's analysis of the arguments that EPA's interpretation of section 3004(j) and its section 3004(j) Enforcement Policy Statement are impossible to comply with and inconsistent with the statute. Finally, this Note will suggest that, while the court was correct in its analysis and conclusions, EPA should consider altering its "hands off" enforcement policy²¹ because it leaves a conditional storage option open to generators and storsers of mixed wastes,²² and is inadequate to accomplish Congress' objectives in enacting section 3004(j).²³

II. BACKGROUND

A. Analytical Framework and Applicable Precedents

In *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*,²⁴ the United States Supreme Court held that when a court reviews an executive agency's interpretation of a statute which it is charged with administering, the court must undertake a two-part analysis.²⁵ First, the court must determine whether Congress has directly addressed the precise question at issue.²⁶ To answer this question, the court should look to the plain meaning of the relevant statutory language, as well as the structure of the statute as a whole.²⁷ If the court can clearly discern Congress' intent from the statute, the analysis is complete.²⁸ The court and administering agency "must give effect to the unambiguously expressed intent of

20. *Id.* at 335-37.

21. For an explanation of this "hands-off" policy, see *infra* notes 66-74 and accompanying text.

22. For an examination of this conditional storage option and the criteria used by EPA in determining whether to enforce § 3004(j) against a facility operator, see *infra* notes 71-73 and accompanying text.

23. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 357 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 849 (1990). For a discussion of Congress' goals in enacting RCRA § 3004(j), see *supra* notes 39-45 and accompanying text.

24. 467 U.S. 837 (1984).

25. *Id.* at 842-43.

26. *Id.* at 842.

27. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

28. *Id.*

Congress.”²⁹ In a case where the court determines that Congress has not clearly expressed its intent, the court must undertake step two of the analysis. Instead of simply adopting its own interpretation of the statute, the court must determine whether the agency’s interpretation is “based on a permissible construction of the statute.”³⁰

The Court noted that considerable weight should be accorded to an administering agency’s interpretation of a statute it is entrusted with enforcing.³¹ Specifically, the *Chevron* Court held that where an agency’s interpretation “represents a reasonable accommodation of conflicting policies” advanced by the statute, courts should not disturb that interpretation unless it appears, from legislative history or the statute itself, “that the accommodation is not one that Congress would have sanctioned.”³²

In *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*,³³ the Supreme Court held that lower courts should follow the “elementary canon” of statutory construction that a statute should not be interpreted in a way which renders one part inoperative.³⁴ However, the Court has also held that interpretations of a statute which produce absurd or impossible results should be avoided, provided that an alternative interpretation is available that would be consistent with legislative intent.³⁵

In interpreting ambiguous statutes, courts have often looked to legislative history for guidance. Even so, in *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*,³⁶ the Supreme Court held that while legislative history is a valuable guide to statutory interpretation, the language of a statute governs unless there is a clearly expressed legislative intention to the contrary.³⁷ Thus, in the absence

29. *Chevron*, 467 U.S. at 842.

30. *Id.* at 842-43.

31. *Id.* at 843-44. This degree of deference is accorded to administrative interpretations because of their unique expertise and experience. *Id.* at 844-45.

32. *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

33. 472 U.S. 237 (1985).

34. *Id.* at 249.

35. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Despite the Supreme Court’s policy, where the intent of Congress is clear from the language of the statute, the Court has not avoided potentially absurd interpretations. In *Commissioner of Internal Revenue v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987), the Court held that “[j]udicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.”

36. 481 U.S. 454 (1987).

37. *Id.* at 461.

of extraordinary circumstances, if a court finds “the terms of a statute unambiguous, judicial inquiry is complete.”³⁸

B. The RCRA Section 3004(j) Storage Prohibition

In 1984, Congress passed the Hazardous and Solid Waste Amendments (“HSWA”) to RCRA.³⁹ The HSWA provisions give EPA significant authority to regulate the land disposal of hazardous wastes.⁴⁰ The HSWA storage prohibition, RCRA section 3004(j), limits the storage of wastes barred from land disposal.⁴¹ This section provides that where land disposal is prohibited for a particular hazardous waste under the LDRs, storage of that waste is prohibited unless such storage is solely for the purpose of accumulating sufficient quantities of hazardous waste to facilitate proper recovery, treatment or disposal.⁴²

In *Hazardous Waste Treatment Council v. EPA*,⁴³ the District of Columbia Circuit Court of Appeals noted that Congress enacted RCRA section 3004(j) because it believed that storage of hazardous waste “as a means of forestalling required treatment” created health threats as serious as those posed by land disposal itself.⁴⁴ Thus, in enacting RCRA, Congress instituted a regulatory scheme whereby generators and storers of hazardous wastes would be forced to properly treat their wastes rather than employ indefinite storage.⁴⁵

Beginning in 1986, EPA was required to promulgate regulations which would phase out the land disposal of various wastes

38. *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

39. Hazardous and Solid Waste Amendments of 1984 (“HSWA”), Pub. L. No. 98-616, 98 Stat. 3221 (1984) (codified as amended in scattered sections of 42 U.S.C.); see generally *Chemical Waste Management v. United States Env'tl. Protection Agency*, 976 F.2d 2, 8 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1961 (1993). For purposes of this Note, references to RCRA include HSWA.

40. “The statute expressed a general policy preference that ‘reliance on land disposal should be minimized or eliminated.’” *Chemical Waste Management*, 976 F.2d at 8 (quoting SWDA § 1002(b)(7), 42 U.S.C. § 6901(b)(7)). Through the Amendments, Congress sought to minimize potential harm to human health and the environment by requiring the treatment of hazardous wastes before their land disposal. See Judith M. Nixon, Comment, *The Problem with RCRA — Do the Financial Responsibility Provisions Really Work?*, 36 Am. U. L. Rev. 133, 141-43 (1986).

41. RCRA § 3004(j), 42 U.S.C. § 6924(j). For the text of RCRA § 3004(j), see *supra* note 6.

42. RCRA § 3004(j), 42 U.S.C. § 6924(j).

43. 886 F.2d 355 (D.C. Cir. 1989).

44. *Id.* at 357. Congress wanted to remove the availability of a storage option which might allow generators or storers to avoid restrictions on land disposal by means of indefinite storage. *Id.*

45. *Id.*

based on a schedule contained in HSWA.⁴⁶ The land disposal of hazardous wastes containing solvents and dioxins was prohibited after November 8, 1986.⁴⁷ Additionally, another group of hazardous wastes ("California list" wastes) were barred from land disposal after July 8, 1987.⁴⁸ EPA ranked the remaining wastes based on their potential hazards, and divided them into three groups: First-Third, Second-Third and Third-Third.⁴⁹ EPA was then charged with promulgating final disposal regulations for each group.⁵⁰

Mixed wastes were included in the Third-Third of EPA's rankings.⁵¹ Congress prohibited the land disposal of Third-Third wastes unless EPA promulgated treatment regulations for them by May 8, 1990.⁵²

46. *Chemical Waste Management v. United States Env'tl. Protection Agency*, 976 F.2d 2, 8 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1961 (1993).

47. *Id.*; see RCRA § 3004(e)(1), 42 U.S.C. § 6924(e)(1).

48. *Chemical Waste Management*, 976 F.2d at 8; see RCRA § 3004(d), 42 U.S.C. § 6924(d). "California list" wastes are so named because the State of California developed regulations restricting the land disposal of wastes containing certain ingredients, including: "free cyanides, certain metals, corrosive wastes, PCBs, and HOCs. (HOCs are compounds containing carbon and a halogen, such as fluorine, chlorine, bromine, iodine, and astatine, in their molecular formula)." FRIEDMAN ET AL., *supra* note 4, at 169.

49. *Chemical Waste Management*, 976 F.2d at 8. The wastes with the highest toxicity and volume were placed in the First-Third. FRIEDMAN ET AL., *supra* note 4, at 166.

50. Under RCRA, the Administrator must:

promulgate regulations specifying those levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.

RCRA § 3004(m)(1), 42 U.S.C. § 6924(m)(1). A generator/storer who complied with EPA treatment standards would then be allowed to employ land disposal of the wastes. *Id.* § 3004(m)(2), 42 U.S.C. § 6924(m)(2). To permit land disposal of hazardous wastes under HSWA, EPA's treatment regulations must:

prohibit[] one or more methods of land disposal of the hazardous wastes listed . . . except for methods of land disposal which the Administrator determines will be protective of human health and the environment for as long as the waste remains hazardous. . . . For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment . . . unless . . . it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

Id. § 3004(g)(5), 42 U.S.C. § 6924(g)(5).

51. Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,732. For a definition of mixed wastes, see *supra* note 9.

52. *Chemical Waste Management*, 976 F.2d at 8; see RCRA § 3004(g), 42 U.S.C. § 6924(g).

C. Regulatory Action Regarding the RCRA Section 3004(j)
Storage Prohibition as Applied to Mixed Wastes

The series of EPA regulations dealing with the implementation of RCRA section 3004(j) began in 1986.⁵³ These initial regulations, closely following the statutory language, provided that generators were only permitted to employ on-site storage of LDR hazardous waste to accumulate such quantities of waste as necessary to facilitate proper recovery, treatment or disposal.⁵⁴ Under these regulations, EPA used a temporal test to determine whether storage was proper.⁵⁵ Generally, if storage of LDR hazardous waste was utilized for more than one year, EPA placed the burden on the owner/operator of the facility to prove that such storage was necessary to facilitate proper recovery, treatment or disposal.⁵⁶

In November 1989, EPA invited comments on its section 3004(j) regulatory scheme.⁵⁷ While noting that the section was intended to prohibit use of long-term storage to avoid treatment requirements imposed by the LDRs, EPA recognized that "[v]irtually no storage except that undertaken to promote under-utilized proper management capacity would satisfy [a] literal reading of" section 3004(j).⁵⁸ Thus, EPA sought comments to determine

53. *Edison Elec.*, 996 F.2d at 329; see Hazardous Waste Management System; Land Disposal Restrictions, 51 Fed. Reg. 40,572, 40,579, 40,642-43 (1986). RCRA § 3004(j) presents a number of problems not only to generators and storsers of mixed wastes, but also to federal regulatory agencies. The hybrid nature of mixed wastes, part radioactive and part hazardous, has led to confusion over which federal agencies have regulatory power over them. In *New Mexico v. Watkins*, 969 F.2d 1122, 1132 (D.C. Cir. 1992), the D.C. Circuit Court of Appeals upheld EPA's determination that its RCRA regulations applied to mixed wastes. See State Authorization To Regulate the Hazardous Components of Radioactive Mixed Wastes Under the Resource Conservation and Recovery Act, 51 Fed. Reg. 24,504 (1986) (announcing that "EPA has now determined that wastes containing both hazardous waste and radioactive waste are subject to . . . RCRA regulation"). For a general background of the early conflict between EPA and the Department of Energy over whether EPA could regulate mixed wastes, see Finamore, *supra* note 1.

54. *Edison Elec.*, 996 F.2d at 329 (citing 40 C.F.R. § 268.50(a)(1) (1992)).

55. *Id.*

56. This scheme allowed storage for up to one year unless EPA could demonstrate that such storage was not solely for proper recovery, treatment or disposal of the waste. *Id.* (citing 40 C.F.R. § 286.50(b)). After one year of storage, the burden shifted to the owner/operator of the facility to prove that such storage was necessary to facilitate proper recovery, treatment or disposal. *Id.* (citing 40 C.F.R. § 286.50(c)). This burden-shifting scheme was upheld in *Hazardous Waste Treatment Council*, 886 F.2d at 366-68.

57. See Land Disposal Restrictions for Third Scheduled Wastes, 54 Fed. Reg. 48,372, 48,496 (1989) (to be codified at 40 C.F.R. pts. 148, 261, 264, 265, 268, 271) (proposed Nov. 22, 1989) [hereinafter Proposed Third-Third LDRs].

58. *Id.*

whether a literal reading of section 3004(j) would prohibit legitimate storage or have other unintended consequences.⁵⁹

On June 1, 1990, EPA announced that it had decided not to reinterpret the section 3004(j) storage provision.⁶⁰ At the same time, EPA issued final disposal regulations for Third-Third wastes.⁶¹ However, due to the lack of available treatment technology and capacity for mixed wastes, such wastes were still effectively prohibited from land disposal.⁶² Thus, EPA took the position that through operation of section 3004(j), the storage of inadequately treated mixed wastes also remained prohibited.⁶³

While EPA rejected a comprehensive revision of its regulations, it recognized the difficulties faced by generators of mixed wastes because of the lack of available disposal or treatment capacity.⁶⁴

59. *Edison Elec.*, 996 F.2d at 330; Proposed Third-Third LDRs, *supra* note 57, at 48,496.

60. *Edison Elec.*, 996 F.2d at 330; see Land Disposal Restrictions for Third Third Scheduled Wastes, 55 Fed. Reg. 22,520, 22,534 (1990) [hereinafter Third-Third LDRs]. In announcing its determination not to revise 40 C.F.R. § 286.50, EPA announced that "[t]he Agency continues to believe . . . that the statutory prohibition was designed to prevent the use of storage as a means of avoiding a treatment standard, and will continue to enforce the storage prohibition with that intention in mind." Third-Third LDRs, *supra*, at 22,534.

61. See Third-Third LDRs, *supra* note 60, at 22,534.

62. *Edison Elec.*, 996 F.2d at 330-31; see also Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,732. As of April 20, 1994, EPA knew of only four companies that possessed the technology to treat mixed wastes: Diversified Scientific Services, Inc., NSSI Recovery Services, Inc., Quadrex Corp., and RAMP Industries. At the same time, EPA could only identify one company, Envirocare of Utah, Inc., that provided disposal capacity for certain types of commercially generated mixed waste. Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,813-14.

63. See Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,731-33.

64. Third-Third LDRs, *supra* note 60, at 22,534. "EPA is aware of the difficulties posed by the applicability of the section 3004(j) storage prohibition to mixed (radioactive/hazardous) wastes, as there is little disposal or treatment capacity available." *Id.* Mixed wastes are generated by a number of facilities crucial to modern life, including nuclear power plants, universities, hospitals and industrial facilities. *Edison Elec.*, 996 F.2d at 329. Electric utilities generate about 10% of the 140,000 cubic feet of mixed wastes produced in the U.S. each year. Mary O'Driscoll, *Court Backs EPA In RCRA Dispute With EEI*, ENERGY DAILY, June 28, 1993. In its Section 3004(j) Enforcement Policy Statement, EPA noted that strict enforcement of the RCRA land disposal and storage prohibitions "could result in the cessation of such activities as facility and environmental monitoring with radioisotope levels, pharmaceutical manufacturing and testing, diagnostic testing, nuclear medicine, and the manufacture of the sealed sources and radioisotope formulation used in connection with the aforementioned activities." Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,733. Thus, strict enforcement of the section 3004(j) storage prohibition would not just affect industrial waste handlers, but might also affect important consumer services such as health care and energy production.

EPA stated that it would further investigate the legal, policy and factual issues relevant to mixed wastes and would later issue an enforcement policy addressing the mixed waste problem.⁶⁵

D. EPA's Section 3004(j) Enforcement Policy Statement

On August 29, 1991, EPA issued its section 3004(j) Enforcement Policy Statement regarding the storage of mixed wastes.⁶⁶ In its statement, EPA observed that the specific problem with commercially generated mixed wastes was that there were no facilities in the United States providing disposal capacity.⁶⁷ In addition, there were limited treatment options for most commercially-generated mixed wastes.⁶⁸ As a result, EPA acknowledged that commercial mixed waste generators' only option, short of ceasing operations or engaging in illegal disposal, was to violate the storage prohibition.⁶⁹ EPA recognized the implications of strict enforcement of section 3004(j), noting that it might "result in the cessation of such activities as facility and environmental monitoring . . . pharmaceutical manufacturing and testing, diagnostic testing, nuclear medicine," and the manufacture of other items used in these activities.⁷⁰ With these considerations in mind, EPA issued its enforcement policy:

For those mixed waste generators who are operating their storage facilities in an environmentally responsible manner as described in this policy, EPA considers the violations of section 3004(j) involving relatively small volumes of waste to be reduced priorities among EPA's potential civil enforcement actions. Any enforcement activity arising from violations of section 3004(j) at these facilities will generally focus on determining whether these generators are managing their mixed wastes in an environmentally responsible manner.⁷¹

EPA also indicated what factors it would weigh in determining whether a facility was operating "in an environmentally responsible

65. Third-Third LDRs, *supra* note 60, at 22,534. The result of EPA's further evaluation of the issues surrounding mixed wastes was the Section 3004(j) Enforcement Policy Statement, *supra* note 10. For a discussion of this enforcement policy, see *infra* notes 66-74 and accompanying text.

66. Section 3004(j) Enforcement Policy Statement, *supra* note 10.

67. *Id.* at 42,732.

68. *Id.*

69. *Id.* at 42,733.

70. Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,733.

71. *Id.* at 42,731.

manner."⁷² The Agency would look to whether the generator maintained proper inventory records and identification of mixed wastes, whether a facility had developed a waste minimization plan, whether the generator had made a good faith attempt at compliance with RCRA and whether the generator cooperated with EPA information-gathering efforts.⁷³

While EPA maintained that violations of section 3004(j) by mixed waste handlers would receive reduced enforcement priority, the Agency stressed that it would attach a higher enforcement priority if facility inspections turned up significant RCRA violations, (other than section 3004(j) violations), or a pattern of violations which showed disregard for compliance with RCRA hazardous waste regulations.⁷⁴

III. THE DISTRICT OF COLUMBIA CIRCUIT'S ANALYSIS OF EPA'S INTERPRETATION OF RCRA SECTION 3004(J)

The issue in *Edison Electric* was whether the RCRA section 3004(j) storage restriction permitted the indefinite storage of mixed wastes pending development of sufficient treatment and disposal capacity.⁷⁵ After rejecting EPA's procedural challenges to the

72. *Id.*

73. *Id.* at 42,733-34. EPA outlined the manner in which it would examine these factors:

EPA will consider a variety of indicators of environmentally responsible operation in determining the civil enforcement priority of section 3004(j) storage violations at particular mixed waste generator facilities. These indicators include, but are not limited to:

-Whether the facility has conducted an inventory of its mixed waste storage areas to assess and assure its compliance with all other applicable RCRA storage facility standards,

-Whether the facility has identified and kept records of its mixed wastes, including sources, waste codes, generation rates and volumes in storage,

-Whether the facility has developed a mixed waste minimization plan, or can demonstrate (through documentation) that waste minimization is not technically feasible for its wastes,

-Whether the facility can document periodically that it has made good faith efforts to ascertain the availability of treatment capacity for its mixed wastes,

-Whether the facility (if contacted in connection with the ongoing joint EPA/NRC profile of mixed waste generators) has cooperated with the Agencies in providing complete and accurate information about their mixed wastes upon request.

Id. at 42,731.

74. Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,731.

75. *Edison Elec.*, 996 F.2d at 328.

Institute's action,⁷⁶ the court examined the merits of the Institute's claim that EPA's interpretation of RCRA 3004(j) and its Section 3004(j) Enforcement Policy Statement were impossible to comply with and inconsistent with the statute.⁷⁷ The court began its analy-

76. Before addressing the merits, the court examined and rejected several procedural arguments raised by EPA in seeking to have the petition for review dismissed. *Edison Elec.*, 996 F.2d at 331-34.

EPA first argued that the court lacked jurisdiction because the Institute failed to file a petition for review within 90 days of the original 1986 regulations. *Id.* at 331; see also *supra* notes 46-52 and accompanying text for a discussion of the 1986 regulations. In support of this proposition, EPA relied on *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595 (D.C. Cir. 1981). In *Natural Resources*, the court held that a statutory 60-day period for seeking judicial review, similar to the 90-day period provided by RCRA, was jurisdictional in nature and could not be altered by the courts. *Id.* at 602. The *Edison Electric* court rejected this argument, relying instead upon the "reopener doctrine" articulated in *Association of American Railroads v. Interstate Commerce Commission*, 846 F.2d 1465 (D.C. Cir. 1988), and *Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988). In *Ohio*, the court held that "the period for seeking judicial review may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection." 838 F.2d at 1328. In *Edison Electric*, EPA had previously sought comment on alternative enforcement schemes for RCRA § 3004(j) in 1989. Thus, the court held that "[b]y soliciting comments on the existing section 3004(j) regulations . . . EPA clearly provided the type of 'opportunity for renewed comment and objection' that suffices to restart the statutory period for seeking review." *Edison Elec.*, 996 F.2d at 332.

Secondly, EPA argued that its Section 3004(j) Enforcement Policy Statement was immune from review under *Heckler v. Chaney*, 470 U.S. 821 (1985). In *Heckler*, the Supreme Court reaffirmed its view that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. Thus, the Court held that such decisions are "presumptively unreviewable" under the Administrative Procedures Act. *Id.* at 832-33. The *Edison Electric* court rejected EPA's *Heckler* argument, noting that the Institute was challenging EPA's interpretation of § 3004(j) and its implementing regulations, not the priority which was being placed upon enforcement. *Edison Elec.*, 996 F.2d at 333. The court observed that the Section 3004(j) Enforcement Policy Statement deals with "the substantive requirements of the law; it is not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review." *Edison Elec.*, 996 F.2d at 333.

Finally, the court also rejected EPA's argument that the dispute was not ripe for review, utilizing the two-part "ripeness" test of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). In *Abbott Labs*, the Supreme Court held that in determining whether an issue was ripe for review, courts must evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. In *Edison Electric*, the court found the first prong of this test satisfied because the Institute was making a wholly legal challenge to EPA's Section 3004(j) Enforcement Policy Statement, which would apply to a large number of mixed waste handlers, "all of whom share a common problem — a severe shortage of adequate treatment and disposal capacity." *Edison Elec.*, 996 F.2d at 333-34. The court decided that since the petition for review was timely and there were no institutional interests leaning against review, it was unnecessary to inquire further as to ripeness. *Id.* at 334.

77. *Edison Elec.*, 996 F.2d at 334-37.

sis of EPA's interpretation of section 3004(j) under the two-part test of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷⁸ Under *Chevron*, a reviewing court must determine whether Congress has directly addressed the precise question at issue.⁷⁹ The D.C. Circuit recognized that even if it found ambiguity in section 3004(j), the court would have to uphold EPA's interpretation as long as it was a permissible construction of the statute.⁸⁰

The court agreed with EPA that Congress had spoken to the precise question at issue, and held that section 3004(j) could not be read to sanction the indefinite storage of mixed wastes while treatment methods or disposal capacity were developed.⁸¹ The court explained that section 3004(j) "authorizes storage only when it is intended to build up an amount of waste that can be readily transported, treated, or disposed — as, for example, when storage is used to meet minimum volume requirements imposed by waste transporters or treatment facilities."⁸² In arriving at its conclusion, the court rejected each of the Institute's arguments that section 3004(j) authorized the indefinite storage of mixed wastes.

A. Statutory Purpose

The first argument rejected by the court was the Institute's alternative reading of section 3004(j), which suggested that Congress meant to allow storage where adequate treatment or disposal methods do not exist, because the real purpose of RCRA was to "prevent land disposal of untreated wastes."⁸³ In rejecting this argument the court looked to the overall design and purpose of RCRA.⁸⁴ First, the court noted that RCRA's purpose was not only to proscribe land disposal of untreated wastes, but also to promote a "treat as you go" regulatory regime.⁸⁵ Second, the *Edison* court observed that RCRA includes explicit provisions giving EPA the power to grant national capacity variances, which can delay the implementation of LDRs for up to two years, to deal with the problem of inadequate treatment facilities for certain wastes.⁸⁶ The court observed that this "weighs

78. *Id.* at 334 (citing *Chevron*, 467 U.S. at 842-45). For a discussion of the *Chevron* test, see *supra* notes 24-32 and accompanying text.

79. *Edison Elec.*, 996 F.2d at 334 (citing *Chevron*, 467 U.S. at 842).

80. *Id.*

81. *Id.* at 334-35.

82. *Id.* at 335.

83. *Edison Elec.*, 996 F.2d at 335.

84. *Id.*

85. *Id.* at 335-36 (quoting *Hazardous Waste Treatment Council*, 886 F.2d at 357).

86. *Id.* See RCRA § 3004(h)(2),(3), 42 U.S.C. § 6924(h)(2),(3).

heavily against a reading of section 3004(j) that would permit storage to become an alternative avenue for dealing with such shortages.⁸⁷ Finally, the court viewed EPA's interpretation of section 3004(j) to be consistent with RCRA's purpose as a "highly prescriptive, technology-forcing statute."⁸⁸ The court noted that RCRA was designed to provide "draconian" incentives to speed the development of alternative treatment and disposal technology.⁸⁹ The court recognized that these incentives would be significantly diminished if generators could rely on indefinite storage in the event that capacity had not developed to treat or dispose of particular wastes.⁹⁰ Thus, the D.C. Circuit held that EPA's interpretation of section 3004(j) was consistent with Congress' intent in enacting RCRA.⁹¹

B. Impossibility

The Institute argued that EPA's interpretation of section 3004(j) imposed requirements that were impossible to meet, and that statutory constructions which lead to impossible results should be avoided.⁹² However, the court rejected the Institute's impossibility argument on two grounds.⁹³ First, addressing the statute's technology-advancing purpose, the court suggested that the reason treatment was presently impossible was that sufficient resources were not directed towards developing required treatment methods beginning in 1986, when it was held that RCRA applied to mixed wastes.⁹⁴ Second, even if sufficient efforts had not produced technological advances and proper treatment remained impossible, "courts have not shrunk from adopting onerous interpretations of statutory provisions where required by the clear intent of Congress."⁹⁵

87. *Edison Elec.*, 996 F.2d at 335.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Edison Elec.*, 996 F.2d at 337.

92. *Id.* at 336. The Institute argued that even if mixed waste generators ceased all operations (which would cause major economic disruptions) they would still be in violation of section 3004(j) due to mixed wastes already generated, and those that would be generated in the shutdown process. *Id.*

93. *Id.*

94. *Id.* See *New Mexico v. Watkins*, 969 F.2d at 1132 (deferring to EPA's determination that RCRA storage/disposal regulations apply to mixed wastes).

95. *Edison Elec.*, 996 F.2d at 336. The court highlighted two cases in which the Supreme Court affirmed "absurd" interpretations of statutes on the basis that the interpretations were mandated by congressional intent. *Id.* (citing *Commissioner of Internal Revenue v. Asphalt Products*, 482 U.S. 117, 121 (1987); *Griffin v.*

C. Legislative History

The Institute also argued that the legislative history of section 3004(j) indicated that the section was only intended to prevent “sham” storage, used only to avoid the prohibition on land disposal.⁹⁶ The Institute cited language from congressional floor debates to support this interpretation.⁹⁷ However, in addition to finding persuasive legislative history to the contrary,⁹⁸ the court applied the principle of *Burlington Northern*⁹⁹ and stated that unless exceptional circumstances demand otherwise, when the terms employed by a statute are unambiguous, “judicial inquiry is complete.”¹⁰⁰ The court ruled that the Institute’s “lone snippet” from the bill’s floor debates hardly constituted an “exceptional circumstance.”¹⁰¹

D. Conflict with the Atomic Energy Act

The Institute also argued that EPA’s interpretation of section 3004(j) directly conflicted with RCRA section 1006(a), which prevents giving effect to RCRA sections in a way that is inconsistent with the requirements of the Atomic Energy Act (“AEA”).¹⁰² Generally, the Institute argued that EPA’s interpretation of section 3004(j) interfered with the AEA’s primary purpose of promoting the use and development of nuclear power.¹⁰³ In rejecting this ar-

Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982)). Accordingly, the court in *Edison Electric* held that because Congress’ intent in enacting § 3004(j) was clear, the court was obligated to enforce the statute, no matter how onerous the burden it created. *Edison Elec.*, 996 F.2d at 336.

96. *Id.*

97. *Id.* The Institute specifically relied upon the statement of Representative Breaux, a sponsor of what became RCRA § 3004(j):

The purpose of this amendment is to avoid the potential problem of waste generators, handlers or disposers utilizing “sham” storage to avoid a prohibition on the disposal of a particular waste from one or more methods of land disposal.

129 CONG. REC. 27,660, 27,666 (1983) (statement of Rep. Breaux).

98. The court noted the statement of Representative Forsythe, who worked closely with Representative Breaux on the bill: “Storage based only on some vague hope for a future development of appropriate treatment is no longer acceptable.” 129 CONG. REC. 27,669 (1983) (statement of Rep. Forsythe).

99. For a discussion of *Burlington Northern*, see *supra* notes 36-38 and accompanying text.

100. *Edison Elec.*, 996 F.2d at 336 (quoting *Burlington Northern*, 481 U.S. at 461; *Rubin*, 449 U.S. at 430).

101. *Id.*

102. *Id.* at 337. RCRA § 1006(a) states, in relevant part: “Nothing in this chapter shall be construed to apply to . . . any activity or substance which is subject to . . . the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.] except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act[].” RCRA § 1006(a), 42 U.S.C. § 6405(a).

103. *Edison Elec.*, 996 F.2d at 337.

gument, the D.C. Circuit Court of Appeals agreed with the Supreme Court's warning that "the promotion of nuclear power is not to be accomplished 'at all costs.'"¹⁰⁴ Furthermore, the court recognized that burdens such as the ones imposed on mixed waste generators by section 3004(j) are to be expected in the multi-faceted regulatory scheme which controls mixed wastes.¹⁰⁵

E. Ambiguity

The Institute's final argument focused on EPA's 1989 request for commentary on the enforcement of section 3004(j).¹⁰⁶ The Institute alleged that because EPA offered to consider alternative interpretations of section 3004(j), the Agency implicitly acknowledged that the statute was ambiguous.¹⁰⁷ The court held that while EPA had solicited comments on alternative enforcement schemes, the Agency never contemplated allowing indefinite storage of mixed wastes pending development of adequate treatment capacity or disposal technology.¹⁰⁸ The court maintained that EPA's goal was merely to elicit a sampling of alternative enforcement proposals.¹⁰⁹

F. The D.C. Circuit's Holding

After rejecting all of the Institute's arguments, the court denied its petition for review of EPA's interpretation of section 3004(j).¹¹⁰ The court held that, on its face, section 3004(j) clearly forbids the indefinite storage of land-disposal restricted wastes pending development of adequate treatment and disposal technology, thus satisfying the first step of the *Chevron* test.¹¹¹

In issuing its holding, the court expressed its sympathy for mixed waste generators, who would have no choice but to violate section 3004(j) and face potential liability. Even so, the court stated:

104. *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 222 (1983), *modified on other grounds*, *English v. General Elec. Co.*, 496 U.S. 72 (1990)).

105. *Id.*

106. *Id.* For a discussion of EPA's request for comments on its interpretation of § 3004(j), see *supra* notes 57-63 and accompanying text.

107. *Edison Elec.*, 996 F.2d at 337.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Edison Elec.*, 996 F.2d at 337. For a discussion of the U.S. Supreme Court's *Chevron* test, see *supra* notes 24-32 and accompanying text.

[T]he possibility that such hardships will occur is inherent in statutes such as RCRA that are expressly designed to force technology by threatening extreme sanctions. Moreover, the fact that technology may not be able to keep up with timetables established by Congress does not mean that courts are at liberty to ignore them, however burdensome the resulting enforcement. Accordingly, if petitioners are to obtain relief from their present predicament, that relief must come from Congress.¹¹²

IV. CRITICAL ANALYSIS

It is difficult to criticize the District of Columbia Circuit Court of Appeals for denying the Institute's petition for review. The court had to determine the validity of EPA's interpretation of section 3004(j) and its implementing regulations. This only required the application of well-settled principles of administrative law and statutory construction. On the other hand, the Institute's challenge to EPA's interpretation of section 3004(j) was certainly not frivolous. The fact that there are few legal treatment or disposal options for mixed waste handlers gives credence to the Institute's claim that EPA's interpretation was unreasonable.¹¹³ Even so, the court properly concluded that EPA's interpretation of the storage provision was consistent with congressional intent, thereby satisfying the first step of the *Chevron* test.¹¹⁴

Under the Supreme Court's *Chevron* test, if the reviewing court finds that congressional intent is clear from the statute, both the court and the enforcing agency are bound to give effect to that intent.¹¹⁵ In *Edison Electric*, the court properly held that the language of section 3004(j), the structure of RCRA as a whole, and the legislative history of the section all showed that Congress clearly intended to eradicate the storage of wastes prohibited from land

112. *Edison Elec.*, 996 F.2d at 337. Here, the court concluded by quoting Justice George Sutherland in *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930): "Laws enacted with good intention, when put to the test, frequently . . . turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Edison Elec.*, 996 F.2d at 337.

113. *Edison Elec.*, 996 F.2d at 328.

114. *Id.* at 336. For a discussion of the congressional intent behind RCRA § 3004(j), see *supra* notes 39-45 and accompanying text.

115. *Chevron*, 467 U.S. at 842. For a discussion of *Chevron*, see *supra* notes 24-32 and accompanying text.

disposal.¹¹⁶ As the court observed, RCRA was designed in part to provide “draconian” incentives to foster the development of new treatment technology and capacity.¹¹⁷

The language of section 3004(j) acts as a stringent prohibition on the indefinite storage of wastes banned from land disposal, and has been interpreted as such by EPA since 1986.¹¹⁸ Viewing the statute as a whole, RCRA provides for national capacity variances designed to remedy situations where EPA has failed to promulgate treatment standards or where capacity does not yet exist.¹¹⁹ As the court noted, the fact that Congress has provided a separate statutory mechanism for dealing with the problem of inadequate treatment capacity weighs heavily against any reading of section 3004(j) that would permit storage as an alternative to dealing with treatment capacity shortages.¹²⁰

Further, the court accurately examined the Institute’s legislative history argument. The Institute argued that legislative history indicated section 3004(j) was designed only to prevent “sham storage.”¹²¹ The court answered this contention with the well-settled principle that where the terms of a statute are unambiguous, judicial inquiry is complete.¹²²

Even if the court had determined that Congress did not speak to the precise question at issue (thus not fulfilling the first part of the *Chevron* test), the result would certainly have been the same. The court would have continued its analysis to the second part of the *Chevron* test to determine whether EPA’s interpretation represented “a permissible construction of the statute.”¹²³ Under this more forgiving standard, an analysis of the same factors that led the court to its ultimate conclusions would have rendered the same result: that EPA’s interpretation of section 3004(j) was consistent with congressional intent.

116. For the language of RCRA § 3004(j), see *supra* note 6. For a discussion of the purpose of RCRA, see generally Florio, *supra* note 1.

117. *Edison Elec.*, 996 F.2d at 335; see generally Florio, *supra* note 1.

118. For the language of RCRA § 3004(j), see *supra* note 6. For EPA’s past regulatory efforts in enforcing the § 3004(j) storage prohibition, see *supra* notes 53-65 and accompanying text.

119. See *Edison Elec.*, 996 F.2d at 335; Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,732.

120. *Edison Elec.*, 996 F.2d at 335.

121. *Id.* at 336; see also *supra* notes 96-101 and accompanying text, which discusses the Institute’s claim that the legislative history of § 3004(j) indicates that the section was designed to prevent only “sham” storage.

122. *Edison Elec.*, 996 F.2d at 336; see also *K Mart*, 486 U.S. at 291.

123. *Edison Elec.*, 996 F.2d at 334 (quoting *Chevron*, 467 U.S. at 843).

V. IMPACT OF EPA'S ENFORCEMENT POLICY

Clearly, the problem that *Edison Electric* presents does not lie in the court's analysis of the validity of EPA's interpretation of section 3004(j). Rather, the problem lies in the enforcement policy EPA has adopted to fulfill the congressional intent behind the section as applied to mixed waste handlers.

In formulating its Section 3004(j) Enforcement Policy Statement, EPA had to strike a balance between the prohibition of mixed waste storage called for by RCRA section 3004(j) and the virtual impossibility of compliance by mixed waste handlers due to the lack of treatment capacity.¹²⁴ Unfortunately, in trying to strike this balance, EPA adopted a policy that is simply not a sufficient mechanism to fulfill Congress' intent as stated in section 3004(j).¹²⁵

The most glaring problem with EPA's Section 3004(j) Enforcement Policy Statement is that it creates an inconsistent system for enforcing the storage prohibition. At first glance, it would appear that generators would favor EPA's enforcement policy, because of the low priority it attaches to civil enforcement of RCRA.¹²⁶ However, the policy only applies to "small" (less than 1000 cubic feet per year) generators of mixed waste.¹²⁷ Thus, the policy leaves large-scale generators of mixed waste exposed to the possibility of stricter enforcement. In addition, the policy leaves both large and small generators exposed to potential private actions by citizens, and to

124. For a discussion of the difficulties surrounding the treatment or disposal of mixed wastes, see *supra* notes 62, 64.

125. EPA has chosen to pursue an enforcement mechanism similar to that used in most states' "seat belt" laws. In the "seat belt" law enforcement approach, authorities generally will not enforce laws which require automobile drivers and passengers to wear seat belts unless another violation of the state's motor vehicle code occurs. O'Driscoll, *supra* note 64. EPA's enforcement approach for section 3004(j) is similar, in that only if inspections reveal another RCRA violation (other than a violation of section 3004(j)), or a pattern of violations that evince a disregard for compliance with EPA regulations, will EPA attach a greater enforcement priority to that facility. Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,731.

126. As the court in *Edison Electric* noted: "EPA has declared, in effect, that it does not intend to enforce its interpretation of section 3004(j) against mixed waste generators." *Edison Elec.*, 996 F.2d at 334; see also Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,731 (stating that violations of section 3004(j) involving relatively small volumes of mixed waste will receive a reduced civil enforcement priority).

127. "[T]he policy does not apply to any facility that generated more than 1,000 cubic feet of prohibited mixed wastes during the calendar year 1994, or that does so during any succeeding calendar year that this policy is in effect." Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,815.

stricter enforcement by state environmental agencies.¹²⁸ Taking a “hands-off” approach to smaller generators of mixed waste may subject them to state regulatory action that may differ greatly from one jurisdiction to another.¹²⁹ While omitting low-volume handlers from strict enforcement of section 3004(j) may allow EPA to more effectively concentrate its enforcement efforts on larger generators, EPA’s intentions for enforcing the storage prohibition against larger generators are not articulated in its policy.¹³⁰ This could lead to confusion among EPA, generators/storers and state regulators over the best ways to handle the problem of mixed-waste storage and enforcement of RCRA section 3004(j).

Another problem with EPA’s Section 3004(j) Enforcement Policy Statement is that it does not apply to Department of Energy (“DOE”) facilities.¹³¹ This is because the Federal Facilities Compliance Act (“FFCA”) temporarily forbids the waiver of sovereign immunity by certain executive branch facilities, including DOE facilities.¹³² Thus, the FFCA protects DOE from section 3004(j) liability. This could hinder development of treatment capacity, because the FFCA provisions have the effect of shifting the cost of developing new treatment capacity onto commercial mixed waste

128. *Edison Elec.*, 996 F.2d at 334; see generally Section 3004(j) Enforcement Policy Statement, *supra* note 10, at 42,731. RCRA permits private actions by individuals for damages resulting from RCRA violations. RCRA § 7002(a), 42 U.S.C. § 6972(a).

129. [The Section 3004(j) Enforcement Policy Statement]

is not applicable in States where mixed waste is not regulated under RCRA, i.e., in authorized States which lack specific EPA approval of mixed waste regulatory programs. In those States where the State, as well as EPA, has authority to enforce the LDRs, this policy affects only the EPA enforcement programs.

Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,815.

130. See generally Section 3004(j) Enforcement Policy Statement, *supra* note 10.

131. See Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,815.

132. See Federal Facility Compliance Act of 1992 (“FFCA”), Pub. L. No. 102-386, 106 Stat. 1505 (amending RCRA and codified in scattered sections of 42 U.S.C.); see also Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,815. The FFCA’s primary purpose is to insure that federal facilities are treated the same as private parties with regard to compliance with RCRA. See Federal Facility Compliance Act; Enforcement Authorities Implementation, 58 Fed. Reg. 49,044 (1993). However, the FFCA “delays the waiver of sovereign immunity with respect to fines and penalties for violations of RCRA section 3004(j) involving storage of mixed waste for three years from October, 1992, so long as the waste is managed in compliance with all other applicable requirements.” Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,815.

handlers, and away from DOE, which is currently the single largest mixed waste handler in the United States.¹³³

Finally, it appears that the Section 3004(j) Enforcement Policy has not been effective. EPA has indicated that under its policy, fines have not been levied "to any significant extent" in enforcing the mixed waste storage ban.¹³⁴ Such enforcement does not act as a sufficient inducement to compel generators to develop the technology necessary for the safe treatment or disposal of mixed wastes.

In enacting RCRA section 3004(j), Congress intended to completely eradicate storage of LDR hazardous wastes.¹³⁵ The faults outlined above indicate that EPA's Section 3004(j) Enforcement Policy may not fulfill Congress' goals. In order to fulfill Congress' express intent, EPA will have to implement a much more aggressive enforcement policy. There is legislative history which supports a more stringent enforcement approach. During congressional debate preceding the enactment of RCRA, Representative Forsythe indicated in his floor statement the need for a more stringent enforcement approach: "Hazardous waste generators must understand that if there is no ultimate, acceptable disposal technique available for the hazardous wastes which they generate, they should not generate them."¹³⁶ Such legislative history is one more indication that EPA should consider a more aggressive enforcement approach for section 3004(j). Arguably, unless and until a stronger enforcement approach is adopted, the type of incentives needed to induce the development of adequate treatment or disposal technology will be lacking. Thus, the current situation — indefinite storage of mixed wastes in violation of RCRA — will only continue.

VI. CONCLUSION

In *Edison Electric*, the Court of Appeals for the District of Columbia Circuit denied the Edison Electric Institute's petition for review of EPA's interpretation of RCRA section 3004(j) and its implementing regulations. The court upheld EPA's interpretation

133. Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,814. "[T]he prospects for new mixed waste treatment capacity are driven largely by the treatment needs identified by the DOE, since DOE's waste volumes dwarf those of the commercial sector." *Id.*

134. Telephone Interview with Richard LaShier of the U.S. Environmental Protection Agency's Office of Solid Waste, State and Regional Programs Branch (Sept. 16, 1994).

135. For a discussion of the congressional intent behind the enactment of § 3004(j), see *supra* notes 39-45 and accompanying text.

136. 129 CONG. REC. 27,660, 27,669.

of the section and its enforcement policy, holding that section 3004(j) prohibited the indefinite storage of mixed wastes pending the development of adequate treatment techniques or disposal capacity.¹³⁷

EPA's Section 3004(j) Enforcement Policy Statement is scheduled to terminate on April 20, 1996.¹³⁸ EPA has indicated that until that time, it will continue to evaluate its policy in light of new information on the generation and treatment of mixed wastes.¹³⁹ In examining its policy for section 3004(j), EPA should consider whether the congressional intent behind the storage prohibition demands a more stringent enforcement approach than that of EPA's Section 3004(j) Enforcement Policy Statement.¹⁴⁰ While a more stringent approach might prove difficult to implement, Congress' clearly expressed purpose in enacting the technology-forcing RCRA may demand just such an approach.

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137. *Edison Elec.*, 996 F.2d at 328.

138. Extension of Section 3004(j) Enforcement Policy Statement, *supra* note 15, at 18,815.

139. *Id.*

140. For a discussion of EPA's Section 3004(j) Enforcement Policy Statement, see *supra* notes 66-74 and accompanying text.