



Volume 4 | Issue 1

Article 9

1993

Regulating the Disposal of Municipal Solid Waste Incinerator Ash: The Companion Cases of *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.* and *Environmental Defense Fund, Inc. v. City of Chicago*

Kathleen J. Rutt

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Environmental Law Commons](#)

Recommended Citation

Kathleen J. Rutt, *Regulating the Disposal of Municipal Solid Waste Incinerator Ash: The Companion Cases of Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc. and Environmental Defense Fund, Inc. v. City of Chicago*, 4 Vill. Evtl. L.J. 207 (1993).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol4/iss1/9>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1993]

REGULATING THE DISPOSAL OF MUNICIPAL SOLID WASTE INCINERATOR ASH: THE COMPANION CASES OF *ENVIRONMENTAL DEFENSE FUND, INC. v. WHEELABRATOR TECHNOLOGIES, INC.* AND *ENVIRONMENTAL DEFENSE FUND, INC. v. CITY OF CHICAGO*

I. AN INTRODUCTION TO INCINERATION

The United States is in the midst of a waste disposal crisis. More than 160 million tons of municipal solid waste are produced in the United States every year.¹ In the United States, landfilling is the primary method of solid waste disposal.² However, the practice of landfilling has backfired as landfills are closed because they have reached capacity,³ or are identified as environmental hazards.⁴ The amount of solid waste produced each year continues to rise,⁵ but new landfills are not being sited to meet the growing demand.⁶

The current alternatives to landfilling for the disposal of municipal solid waste are source reduction, recycling, and incineration.⁷ The waste disposal crisis demands an immediate and large-

1. Senator John H. Chafee, *Foreword* to *RECYCLING & INCINERATION EVALUATING THE CHOICES* at xix, xix (Richard A. Denison & John Ruston eds., Island Press 1990).

2. *RECYCLING & INCINERATION EVALUATING THE CHOICES* 4 (Richard A. Denison & John Ruston eds., Island Press 1990) [hereinafter *RECYCLING & INCINERATION*].

3. The Environmental Protection Agency (EPA) estimated in 1988 that more than 45% of existing landfills would close by 1993 for lack of space. ALYCE M. UJIHARA & MICHAEL GOUGH, *RESOURCES FOR THE FUTURE, MANAGING ASH FROM MUNICIPAL WASTE INCINERATORS: A REPORT 7* (1989) [hereinafter *MANAGING ASH*].

4. Ford Fessenden, *Landfills Head for the Scrap Heap*, in *RUSH TO BURN* 43, 43 (Island Press 1989). A 1987 *Newsday* survey found that "more than 2,000 landfills have closed since 1982 for environmental reasons, and another 700 have closed because of lack of space. Hundreds of the remaining landfills do not have operating permits; at least 350 more are under orders to close." *Id.* at 44.

5. Richard Firstman, *High-Stake Risk on Incinerators*, in *RUSH TO BURN*, *supra* note 4, at 3, 21. "Not only are the weight and volume of waste expected to grow with the population, but per capita waste production is expected to increase as well." *MANAGING ASH*, *supra* note 3, at 7. One author estimated that the amount of garbage generated by the United States will reach 216 million tons by the year 2000. *Solid Waste Law Needs Rewriting*, *CHI. TRIB.*, March 18, 1992, at 20.

6. *RECYCLING & INCINERATION*, *supra* note 2, at 4.

7. *MANAGING ASH*, *supra* note 3, at 8. Source reduction—a reduction in the amount of waste produced—provides a feasible long-term solution, but it requires drastic "changes in production method and consumer preferences." *Id.*

scale solution.⁸ Incineration achieves mass volume reduction of solid waste, which as a result conserves landfill space.⁹ Furthermore, incinerators, also known as resource recovery or waste-to-energy facilities, can generate steam or electrical energy through the incineration process.¹⁰ Thus, many municipalities are turning to incineration, what the Environmental Protection Agency (EPA) calls the "best available demonstrated technology" for solid waste disposal.¹¹

The acceptance of incineration as the best alternative to landfilling has been impeded by widespread public apprehension regarding the potential environmental hazards and financial concerns associated with incineration.¹² Community groups, environmentalists, scientists, and EPA have addressed the control of pollution emitted from incineration facilities.¹³ As a result of persistent lobbying, more stringent air quality standards were enacted, which, coupled with the development of mechanisms such as scrubbers¹⁴ to reduce airborne emissions, have lessened the concern about air pollution from incinerators.¹⁵ However, in removing the pollutants from incinerator smokestacks, lead, cadmium, and other heavy metals are transferred to the ash residue which remains after incineration.¹⁶

Recycling is a more immediate solution, and one which has received nationwide attention; however, only 10% of municipal waste is recycled. *Id.*

8. RECYCLING & INCINERATION, *supra* note 2, at 5.

9. *Id.* at 8.

10. MANAGING ASH, *supra* note 3, at 8.

11. Scott Pendleton, *Incineration Expected to Increase in '90s*, CHRISTIAN SCI. MONITOR, Apr. 25, 1991, at 12 (quoting EPA).

12. Thomas J. Maier, *Trying a European Import*, in RUSH TO BURN, *supra* note 4, at 81, 81-83 (1989). One "primary reason for opposition to [incineration] is concern about health risks from airborne emissions and ash." MANAGING ASH, *supra* note 3, at 8. EPA has acknowledged that inhalation of the emissions may result in between 5 and 60 cases of cancer per year. *Id.* Furthermore, incinerators are public financial burdens: "The typical price tag for an incinerator built by most major vendors exceeds \$200 million. And the taxpayers are paying for it." Maier, *supra*, at 82.

13. Michelle Slatalla, *The Debate Over Danger*, in RUSH TO BURN, *supra* note 4, at 104, 104-05.

14. A scrubber is a particle collecting device which traps pollution before it leaves a stack or vent. RECYCLING & INCINERATION, *supra* note 2, at 175.

15. Kirk Johnson, *Incinerators Creating New Landfill Woes*, N.Y. TIMES, Jan. 30, 1989, at B-1. See also MANAGING ASH, *supra* note 3, at 8.

16. MANAGING ASH, *supra* note 3, at 7. Dioxins and heavy metals "that once went up the stack now go down the ash chute, and the toxins are just as unpopular in the ground as they were in the air." Johnson, *supra* note 15, at B-1. Such heavy metals are toxic and can cause cancer, learning disabilities, and congenital defects. Lori Gilmore, *The Export of Nonhazardous Waste*, 19 ENVTL. L. 879, 885 (1989). The fly ash, airborne ash within an incinerator, and bottom ash, ash that

The amount of ash produced by municipal waste incineration is significant. Approximately 300 pounds of ash are produced for every 1,000 pounds of solid waste burned.¹⁷ The 137 incinerators now operating in the United States produce nearly eight million tons of ash each year.¹⁸ Most solid waste incinerator ash is disposed of in landfills, which if not lined securely to eliminate leaching,¹⁹ can allow heavy metals which concentrate in the ash to leach into groundwater supplies.²⁰ As a result, incinerator ash may pose a serious environmental hazard.²¹

The regulation of incinerator ash disposal "has been the focus of one of the longest-running legal and policy disputes in environmental law."²² However, each branch of government has been reluctant to address the issue, and the response has been inconsistent at every level.

remains on the floor after incineration, contain concentrated levels of heavy metals, specifically lead and cadmium. *MANAGING ASH*, *supra* note 3, at 7. The concentration and leachability of heavy metals in fly ash is significantly increased by the use of scrubbers. *RECYCLING & INCINERATION*, *supra* note 2, at 175.

17. Michelle Slatalla, *The "Trash" of Incineration*, in *RUSH TO BURN*, *supra* note 4, at 111, 112.

18. Greg Henderson, *Supreme Court Remands Major Waste Disposal Case*, UPI, Nov. 16, 1992, available in LEXIS, Nexis Library, UPI File.

19. Leachate, a toxic substance,

is produced when liquids, such as rainwater, percolate through wastes stored in a landfill. The resulting fluid will contain suspended components drawn from the original waste. Proper leachate management involves the storage of wastes in lined containers so that leachate may be collected before it seeps into soil or groundwater.

Chemical Waste Management v. EPA, 869 F.2d 1526, 1530 (D.C. Cir. 1989).

20. *MANAGING ASH*, *supra* note 3, at 9, 31. In reality, however, "there is no such thing as a secure landfill." James J. Florio, then Congressman, *Foreword to BEYOND DUMPING* at vii, viii (Greenwood Press 1984). Liners and leachate collection systems will deteriorate over time. Peter Montague, *The Limitations on Landfilling*, in *BEYOND DUMPING* 3, 6 (1984). The law of entropy supports the dispersion of chemicals from a landfill into the air, soil, and groundwater. *Id.* Simply put, "[t]o prevent the leakage of hazardous chemicals out of landfills, we will have to stop putting hazardous chemicals into landfills." *Id.* at 10.

21. Rather than dispose of the ash in local landfills, several large municipalities have attempted to transport ash to other states and countries. William Bunch, *Where Will All the Garbage Go?*, in *RUSH TO BURN*, *supra* note 4, at 76, 76-77. The *Khian Sea*, a boat carrying over 14,000 tons of incinerator ash from Philadelphia, traveled from 1986 to 1988 seeking a place to dump the ash. Mary Critharis, *Third World Nations Are Down in the Dumps: The Exportation of Hazardous Waste*, 16 *BROOK. J. INT'L L.* 311, 318 (1990). The ash was rejected by 15 countries on five continents during its journey. *Id.* at 318 n.45. The ash was labeled as fertilizer and bulk construction material in efforts to find a country which would accept it. *GILMORE*, *supra* note 16, at 881 n.13. The ultimate dumping ground was not revealed by the ship captain—but the ash was probably illegally dumped at sea. *Id.* at 881 n.11.

22. Linda Greenhouse, *Hazardous-Waste Ruling Overturned*, N.Y. TIMES, Nov. 17, 1992, at B-10.

A. Judicial Consideration of Incinerator Ash Disposal

In November, 1989, the Environmental Defense Fund (EDF), a non-profit environmental organization, brought companion suits against two waste-to-energy incineration facilities challenging the management and disposal of solid waste incinerator ash at the facilities.²³ EDF argued in both cases that the ash from the incinerators should be managed and disposed of as hazardous waste because it exhibited Extraction Procedure (EP) toxicity, which is a statutory characteristic of hazardousness.²⁴ In *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, EDF brought suit against the privately owned and operated Westchester Resource Recovery Facility (the Facility).²⁵ In *Environmental Defense Fund, Inc. v. City of Chicago*, suit was brought against the municipally owned and operated Chicago Northwest Incinerator.²⁶

These cases comprised the first judicial examination of the regulation of municipal solid waste incinerator ash. They represented a request for guidance regarding safe management and national disposal standards for incinerator ash.²⁷ At the district court level, both cases were decided in favor of the respective defendants.²⁸ On appeal, the Second Circuit, in *Environmental De-*

23. *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991); *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated and remanded*, No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992). See also *Solid Waste: EDF Sues Chicago, Wheelabrator Under RCRA for Municipal Waste Ash Handling Practices*, 18 Env't Rep. (BNA) 2077 (Jan. 29, 1988) [hereinafter *Solid Waste*].

24. *Wheelabrator*, 725 F. Supp. 758, 761 n.6; *City of Chicago*, 727 F. Supp. 419, 421 n.2. Solid waste, "as defined in [the Code of Federal Regulations] § 261.2, which is not excluded from regulation as a hazardous waste under § 261.4(b), is a hazardous waste if it exhibits any of the characteristics identified in this subpart." 40 C.F.R. § 261.20(a) (1990). The four identified characteristics of hazardousness are ignitability, corrosivity, reactivity, and EP toxicity. 40 C.F.R. §§ 261.21-24 (1980) (amended 1990). However, certain hazardous wastes are statutorily exempt from classification as hazardous. 40 C.F.R. § 261.3(a)(1) (1989). See generally *MANAGING ASH*, *supra* note 3, at 16-20.

Leachability is evaluated under federal law by use of the EP toxicity test. *RECYCLING & INCINERATION*, *supra* note 2, at 182. The EP toxicity test "measures the potential for a waste to liberate (leach) hazardous constituents by mimicking conditions in a municipal solid waste landfill." *Id.* at 16. After EDF initiated the suits addressed in this Note, EPA replaced the EP toxicity test with the Toxicity Characteristic Leaching Procedure (TCLP) test which expanded the testing to 38 new chemicals. *Id.* at 20.

25. 725 F. Supp. at 758.

26. 727 F. Supp. at 419.

27. *Solid Waste*, *supra* note 23, at 2077.

28. *Wheelabrator*, 725 F. Supp. at 758; *City of Chicago*, 727 F. Supp. at 419.

fense Fund, Inc. v. Wheelabrator Technologies, Inc.,²⁹ affirmed the district court's decision, that ash may be treated and disposed of as non-hazardous waste.³⁰ However, the Court of Appeals for the Seventh Circuit reversed the district court's ruling in *Environmental Defense Fund, Inc. v. City of Chicago*,³¹ and held that the ash from municipal waste incinerators was subject to regulation as a hazardous waste.³² The Supreme Court overturned the Seventh Circuit's decision on November 16, 1992, and remanded the case to the lower court for further consideration in light of a memorandum on ash disposal distributed by EPA two months earlier.³³

B. Legislative History

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA),³⁴ an amendment to the Solid Waste Disposal Act,³⁵ to regulate both municipal solid waste and hazardous waste.³⁶ Subtitle C of RCRA establishes strict "cradle-to-grave" standards for hazardous wastes,³⁷ while Subtitle D addresses non-hazardous solid wastes.³⁸ RCRA section 3001, under Subtitle C, mandates the identification and listing of specific hazardous wastes which require regulation.³⁹ Section 3001 also exempts specific materials from regulation "even though they may exhibit characteristics that would otherwise define them as hazardous."⁴⁰

29. 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991).

30. *Id.* at 213-14.

31. 948 F.2d 345 (7th Cir. 1991), *vacated and remanded*, No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992).

32. *Id.* at 352.

33. No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992).

34. 42 U.S.C. §§ 6901-6992k (1976).

35. 42 U.S.C. §§ 3251-3259 (1965) (omitted in general amendments of Solid Waste Disposal Act, Oct. 21, 1976).

36. John Quarles, *In Search of a Waste Management Strategy*, NATURAL RESOURCES & ENV'T, Summer 1990, at 3. RCRA defines hazardous waste as a waste which "may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of." RCRA § 1004, 42 U.S.C. § 6903(5)(B) (1976).

It is important to note that RCRA addresses waste going into the incinerator, but does not mention ash—or any other by-product of incineration.

37. RCRA § 3001, 42 U.S.C. § 6921 (1976). See Florio, *supra* note 20, at vii. The "cradle-to-grave" regulatory approach to hazardous waste means "track[ing] the existence and the ultimate disposal of those wastes" from start to finish. *Id.*

38. RCRA § 4001, 42 U.S.C. § 6941 (1976). See also *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 964 (D. Conn. 1991). For a discussion of the *B.F. Goodrich* case, see *infra* notes 144-47 and accompanying text.

39. 42 U.S.C. § 6921 (1976).

40. MANAGING ASH, *supra* note 3, at 15.

“Household waste” is one category of waste which is exempt from the hazardous waste regulations of Subtitle C.⁴¹ Household waste includes waste, whether hazardous or not, from all residences, hotels, and motels.⁴²

The household waste exclusion is significant because although municipal solid waste is composed primarily of non-hazardous household waste, it “may contain small quantities of household hazardous wastes (e.g. pesticides and solvents) as well as small quantity generator [hazardous] wastes”⁴³ Thus, under the household waste exclusion, an incineration facility or landfill may be accepting and processing hazardous waste.⁴⁴

II. ENVIRONMENTAL DEFENSE FUND, INC. V. WHEELABRATOR TECHNOLOGIES, INC.

A. The District Court Decision in *Wheelabrator*

In *Wheelabrator*, EDF alleged that the ash produced at the Facility exhibited a characteristic of hazardousness⁴⁵ and consequently should have been disposed of as a hazardous waste pursuant to Subtitle C of RCRA.⁴⁶ EDF’s allegations were based on data from the EP toxicity test, which measures the potential for

41. RCRA § 3001(i) exempts household waste as follows:

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if such facility:

(i) receives and burns only—

(A) Household waste (from single and multiple dwellings, hotels, motels, and other residential sources) and

(B) Solid waste from commercial or industrial sources that does not contain hazardous waste; and

(ii) such facility does not accept hazardous wastes identified or listed under this section, and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received or burned in such facility.

42 U.S.C. § 6921(i) (1976).

42. *Id.*

43. 54 Fed. Reg. 51,071, 51,074 (1989). See also *B.F. Goodrich*, 754 F. Supp. at 966 (“[h]ousehold waste’ and [municipal solid waste] are not synonymous”). For a discussion of the *B.F. Goodrich* case, see *infra* notes 144-47 and accompanying text.

44. MANAGING ASH, *supra* note 3, at 15. When the household waste exclusion was originally promulgated, EPA did not expect the wastes or ash by-product produced from household waste to have a hazardous characteristic. *Id.*

45. See *supra* note 24 for a discussion of the characteristics of hazardousness from 40 C.F.R. § 261.20.

46. *Wheelabrator*, 725 F. Supp. at 761. See *supra* notes 34-44 and accompanying text for a discussion of Subtitle C of RCRA.

waste to leach hazardous matter.⁴⁷ EDF cited *AL Tech Specialty Steel Corp. v. EPA*,⁴⁸ in which the Second Circuit Court of Appeals held that waste should be subject to regulation as a hazardous waste when it exhibits a characteristic of hazardousness.⁴⁹

EDF also argued in *Wheelabrator* that the Facility violated federal regulations and the analogous New York state regulations which require a generator of hazardous waste to apply for, and receive, a permit from EPA "before engaging in the treatment, storage, disposal, transportation, or offering for transportation of hazardous waste."⁵⁰ Responding to EDF's allegations, the defendants acknowledged that the ash was not handled as hazardous waste pursuant to RCRA Subtitle C, and that they had not complied with the regulations governing the disposal or transportation of hazardous waste at the Facility.⁵¹ Based on the household waste exclusion in section 3001(i) of RCRA, the defendants argued that compliance with RCRA requirements was not necessary.⁵² Municipal waste ash was generated from household waste, they contended, therefore, the ash should be excluded from hazardous waste regulations.⁵³

47. *Wheelabrator*, 725 F. Supp. at 762. The ash samples from the Facility failed the EP toxicity test 9 times out of 10, thus meeting the standard for hazardousness characterization. *Id.* at 761 n.6. See *supra* note 19 and accompanying text for an explanation of "leaching." See *supra* note 24 for a discussion of the EP toxicity test.

48. 846 F.2d 158 (2d Cir. 1988).

49. *Id.* AL Tech Corporation brought suit against EPA and the New York State Department of Environmental Conservation "seeking judicial determination that it did not operate a hazardous waste treatment, storage or disposal facility and thus was not subject to regulation under . . . the Resource Conservation and Recovery Act . . ." *Id.* On appeal, the Second Circuit held that the leachate from a landfill was a hazardous waste "regardless of whether it was derived from disposal of a listed hazardous waste, where it exhibited a characteristic of a hazardous waste." *Id.* For a discussion of the characteristics of hazardousness see *supra* note 24.

50. *Wheelabrator*, 725 F. Supp. at 761 (referring to 40 C.F.R. § 262.12 and N.Y. COMP. CODES R. & REGS. tit. 6, § 371.3). The Federal regulation stipulates that "[a] generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number from the Administrator." 40 C.F.R. § 262.12.

51. *Wheelabrator*, 725 F. Supp. at 761-62. The ash was disposed of at the Sprout Brook Residue Disposal Site, an ashfill not licensed for hazardous waste disposal. *Id.* at 761.

52. *Id.* at 762. For the language of the household waste exemption, RCRA § 3001(i), see *supra* note 41.

53. *Id.* at 764. Defendants based their argument on the language in RCRA § 3001(i), specifically "otherwise managing" and asserted that this phrase was meant to include the management and *disposal* of incinerator ash. *Id.*

1. *Legislative Interpretation of Section 3001(i)*

The *Wheelabrator* court first examined the legislative history of the 1984 RCRA amendments, focusing on section 3001(i), to determine whether Congress intended municipal waste incinerator ash to be treated as a hazardous waste.⁵⁴ A 1983 report of the Senate Committee on the Environment and Public Works, interpreting section 3001(i), asserted that in addition to the exemption of "treating, storing, disposing of or otherwise managing" household waste, the *generation* of waste should also be exempted.⁵⁵ The court interpreted the term "generation" as "extend[ing] to ash and other wastes generated in the process of resource recovery."⁵⁶ Despite the fact that Congress neglected to include the term "generation" in the statute, the *Wheelabrator* court maintained that Congress intended to include generation in the household waste exclusion.⁵⁷ Accordingly, the court concluded that Congress intended ash generated by an incineration facility to be exempt from treatment as a hazardous waste under the household waste exclusion.⁵⁸

2. *Agency Interpretation of RCRA Section 3001(i)*

Statutory interpretation by a government agency, such as EPA, is given deference by courts unless it is inconsistent with Congress's statutory interpretation.⁵⁹ However, EPA's conflicting interpretations of RCRA section 3001(i) made it virtually impossible to defer to the Agency's opinion.⁶⁰

In 1980, EPA adopted the original household waste exclusion.⁶¹ In the preamble to the 1980 regulations, EPA stated that "household waste is excluded in all phases of its management,

54. *Wheelabrator*, 725 F. Supp. at 764.

55. S. REP. NO. 284, 98th Cong., 2d Sess. 61 (1983), cited in *Wheelabrator*, 725 F. Supp. at 765.

56. *Wheelabrator*, 725 F. Supp. at 765.

57. *Id.* The *Wheelabrator* opinion reads, "While it is true that the legislation itself does not include the term generation and that it is the legislation with which we are concerned, the legislative history is probative on the issue of Congress' intent, given that the scope of the statute is unclear on its face." *Id.*

58. *Id.*

59. *Id.* at 766. The accepted policy is that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985). See also *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

60. *Wheelabrator*, 725 F. Supp. at 766.

61. *City of Chicago*, 727 F. Supp. at 421.

residues remaining after treatment (e.g. incineration, thermal treatment) are not subject to regulation as hazardous waste.”⁶² In 1985, however, EPA stated in the Federal Register that in light of the fact that RCRA was silent on the categorization of ash, ash should be considered hazardous waste if it exhibited one of the characteristics of hazardousness.⁶³ EPA also noted that it did “not see in this provision [RCRA] an intent to exempt the regulation of incinerator ash . . . if the ash routinely exhibit[ed] a characteristic of hazardous waste.”⁶⁴ Unofficially reversing EPA’s position, J. Winston Porter, the Assistant Administrator for the Office of Solid Waste and Emergency Response, commented in 1987 that EPA “believes that the language and legislative history of section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.”⁶⁵ Notwithstanding, in 1989, Sylvia Lowrance, then Director of the Office of Solid Waste, stated that the 1985 policy should be maintained. The 1985 policy stated that ash must be managed as a hazardous waste if it exhibited a characteristic of hazardousness.⁶⁶

Against this background, the district court in *Wheelabrator*, citing *United States v. Riverside Bayview Homes, Inc.*,⁶⁷ held that the presumed congressional intent regarding RCRA section 3001(i) should take precedence over EPA’s interpretation and comments.⁶⁸ EDF attempted to introduce evidence that Congress did, in fact, support EPA’s 1985 policy that ash which exhibits hazardous characteristics should be handled under the auspices of Subtitle C.⁶⁹ The court, however, stated that the evidence of-

62. 45 Fed. Reg. 33,098 (1980).

63. 50 Fed. Reg. 28,702, 28,725-26 (1985) (codified at 40 C.F.R. §§ 260-61, 264-66, 270-71, 280). See *supra* note 24 for a discussion of the characteristics of hazardousness. In 1985, EPA also stated that “residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash.” 50 Fed. Reg. 28,725-26. Therefore, EPA observed, “the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue.” *Id.*

64. 50 Fed. Reg. 28,725-26.

65. *Wheelabrator*, 725 F. Supp. at 767. Mr. Porter may have been acknowledging that EPA’s interpretation of RCRA § 3001(i) was “inconsistent with Congress’s intent to encourage energy recovery facilities.” *Litigation: Ash from Municipal Incinerators Excluded from RCRA Regulation, Federal Court Says*, 20 *Env’t Rep.* (BNA) 1347 (Dec. 1, 1989).

66. *Wheelabrator*, 725 F. Supp. at 768.

67. *Id.* at 766; see also *Riverside Bayview Homes*, 474 U.S. 121, 131 (1985).

68. *Wheelabrator*, 725 F. Supp. at 766.

69. *Id.* at 769. The evidence produced by EDF consisted of two letters, one signed by six Senators, and the other from Representative James J. Florio, now Governor of New Jersey, both supporting the treatment of ash as a hazardous waste if it exhibited a characteristic of hazardousness. *Id.*

ferred—in the form of letters from congressmen—did not represent the opinions of Congress as a whole.⁷⁰ Although the *Wheelabrator* court recognized that the household waste exclusion may “lack[] any justification on environmental grounds,” it applied the exclusion to incinerator ash.⁷¹ In so doing, the court rejected EDF’s arguments that the Facility violated regulations requiring safe disposal of hazardous waste and permits to generate hazardous waste.⁷²

3. *The Facility’s Compliance with RCRA Section 3001(i)(2)*

a. *Contractual prevention of hazardous waste*

EDF argued in the alternative that “even if defendants’ construction of Section 3001(i) is correct, the Facility cannot advantage itself of the exclusion” because the Facility did not comply with the requirements in section 3001(i).⁷³ Specifically, EDF contended that the Facility had not established that it was *not* processing commercial or industrial hazardous waste as required in section 3001(i); or alternatively, that the Facility had not established that the section 3001(i)(2) provisions to prevent hazardous wastes from being accepted at the Facility were employed.⁷⁴

RCRA section 3001(i)(2) requires established contractual agreements, or “appropriate notification or inspection procedures to assure that hazardous wastes are not received or burned in such facility.”⁷⁵ The defendants demonstrated that the Facility had contractual agreements with Westchester County and the Westchester County Industrial Development Agency,⁷⁶ notified waste haulers of the standards at the Facility,⁷⁷ and conducted

70. *Id.* at 770. Judge Haight, author of the *Wheelabrator* opinion, wrote “the Senators’ and Florio letters, while certainly not ‘waste,’ are ‘hazardous’ to the present purpose of statutory construction.” *Id.*

71. *Id.* (citing the letter by James Florio).

72. *Id.* at 764-70.

73. *Wheelabrator*, 725 F. Supp. at 770. See *supra* note 41 for the language of RCRA § 3001(i).

74. *Wheelabrator*, 725 F. Supp. at 770.

75. RCRA § 3001(i)(2), U.S.C. § 6921 (1976). For the complete language of the statute, see *supra* note 41.

76. *Wheelabrator*, 725 F. Supp. at 771-72. The Facility had a written agreement prohibiting the acceptance of hazardous waste with Westchester County and the Westchester County Industrial Development Agency. *Id.*

77. *Id.* Truck drivers who delivered waste were required to sign a written guarantee for the wastes which they were carrying. *Id.* A sign was posted at the Facility’s entrance identifying types of waste accepted. *Id.* at 772.

random inspections in compliance with section 3001(i)(2).⁷⁸

The best efforts of the Facility to ensure that no hazardous wastes entered the Facility were deemed sufficient by the *Wheelabrator* court to meet the standards of RCRA section 3001(i)(2).⁷⁹ The agreement between the Facility, Westchester County and the Westchester County Industrial Development Agency did not require that absolutely no hazardous waste enter the Facility, merely that every entity involved make the best effort to keep hazardous wastes out.⁸⁰ The court held that the safeguards enacted by the Facility were adequate under section 3001(i)(2).⁸¹

b. Small quantity generators

EDF was particularly concerned with the acceptance by the Facility of hazardous waste from small quantity generators.⁸² Hazardous waste produced by small quantity generators "is not exempted from classification as hazardous" simply because it is generated in small quantities.⁸³ However, under federal law, small quantity hazardous waste is exempt from many regulations.⁸⁴ The relevant regulation allows small quantity generators to dispose of their hazardous wastes at facilities licensed to accept municipal or industrial waste.⁸⁵

The *Wheelabrator* court reasoned that it is illogical "to allow small quantity generators to dispose of their waste in a facility licensed to deal with municipal or industrial waste and then to deem that facility a hazardous waste disposal site subject to regulation as such."⁸⁶ Therefore, the court held that the Facility could continue to accept hazardous waste from small quantity genera-

78. *Id.* The trucks hauling waste to the Facility were checked for radioactivity, and were subjected to random searches. *Id.*

79. *Id.* at 773.

80. For a discussion of the agreement, see *supra* notes 76-78 and accompanying text.

81. *Wheelabrator*, 725 F. Supp. at 773.

82. *Id.* Small quantity generators engage in the production of small amounts of hazardous waste. *Id.* The small quantity generator is conditionally exempt from regulation as a hazardous waste generator if it generates less than 100 kilograms of hazardous waste in a month. 40 C.F.R. § 261.5(a) (1988). Waste generated by small quantity generators may be delivered to facilities which are "[p]ermitted, licensed, or registered by a State to manage municipal or industrial solid waste." 40 C.F.R. § 261.5(g)(3)(iv). See *supra* note 43 and accompanying text for a discussion of small quantity generators.

83. *Wheelabrator*, 725 F. Supp. at 722.

84. *Id.*

85. 40 C.F.R. § 261.5(g)(3)(iv).

86. *Wheelabrator*, 725 F. Supp. at 772.

tors "without subjecting itself to regulation as a hazardous waste disposal facility."⁸⁷ Thus, in addition to the potentially hazardous waste exempted under the household waste exclusion, incineration facilities may receive hazardous waste from small quantity generators.⁸⁸

c. Request for discovery

EDF's argument, that the defendants failed to establish that hazardous waste was not being accepted by the Facility, was accompanied by a request for the opportunity to take discovery.⁸⁹ The court granted EDF's request for discovery, "limited to the questions of whether and with what frequency the Facility accepts hazardous waste for processing."⁹⁰

B. The Appeal

On April 16, 1990, summary judgment was entered in favor of the defendants.⁹¹ EDF appealed the decision and on April 24, 1991, the Court of Appeals for the Second Circuit heard the case.⁹² The Second Circuit affirmed the district court ruling that ash from a municipal waste resource recovery facility may be disposed of as non-hazardous solid waste.⁹³ The court based its appellate decision, in part, on Judge Haight's decision in the lower court and, in part, on section 306 of the Clean Air Act Amendments of 1990.⁹⁴ Section 306 of the 1990 Clean Air Act Amendments constrained EPA from regulating ash until November 15, 1992.⁹⁵

87. *Id.* at 773.

88. For a discussion of the household waste exclusion, see *supra* notes 41-44 and accompanying text.

89. *Wheelabrator*, 725 F. Supp. at 774. The court noted that Rule 56(f) of the Federal Rules of Civil Procedure grants a continuation for discovery. *Id.* The rule applies when the facts necessary for the allegations are in the possession of the opposition. *Id.*

90. *Id.* at 775.

91. *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 931 F.2d 211, 212, *cert. denied*, 112 S. Ct. 453 (1991) [hereinafter *Wheelabrator II*]. After taking discovery, EDF accepted the entry of summary judgment in favor of *Wheelabrator* in exchange for the right to appeal the district court ruling. Plaintiff's Brief on Appeal at 4, *Wheelabrator II*, 931 F.2d at 211.

92. *Wheelabrator II*, 931 F.2d at 211.

93. *Id.* at 213.

94. *Id.*

95. 42 U.S.C. § 6921 (Supp. II 1990). Section 306 of the Clean Air Act Amendments of 1990 reads as follows: "For a period of 2 years after the date of enactment of the Clean Air Act Amendments of 1990, ash from solid waste incineration units burning municipal waste shall not be regulated by the Admini-

The Second Circuit held that the legislative history of the 1990 Clean Air Act Amendments revealed that Congress did not intend to preclude EDF's suits by the passage of the Amendments.⁹⁶ However, the court also found that Congress made a conscious "decision not to express an opinion" regarding the categorization of municipal waste incinerator ash.⁹⁷ Based on these findings, the court of appeals deferred to the district court's decision.⁹⁸ The writ of certiorari filed by EDF was denied November 18, 1991.⁹⁹

III. ENVIRONMENTAL DEFENSE FUND, INC. V. CITY OF CHICAGO

A. The District Court

At the district court level, *Environmental Defense Fund, Inc. v. City of Chicago* progressed in similar fashion to the *Wheelabrator* case.¹⁰⁰ EDF alleged that the City of Chicago violated RCRA "by generating hazardous waste and not complying with the hazardous waste requirements under RCRA."¹⁰¹ Like the *Wheelabrator* Facility, the ash generated at the Northwest Facility was determined to be toxic under the EP toxicity test.¹⁰² In response to EDF's allegations, the City contended that the incinerator ash was generated from a non-hazardous waste stream (municipal waste), and should be exempt from RCRA hazardous waste regulations under the section 3001(i) household waste exclusion.¹⁰³

The district court in *City of Chicago* considered both the legislative and EPA interpretations of RCRA section 3001(i), and concluded, as did the *Wheelabrator* district court, that "the ash

strator of the [EPA] pursuant to Section 3001 of the Solid Waste Disposal Act." *Id.*

96. *Wheelabrator* II, 931 F.2d. at 213. The House and Senate Conferees stated they did "not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator Inc.*, . . . and *Environmental Defense Fund v. City of Chicago*, . . . or any State activity regarding ash." H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. 335, 342 (1990).

97. *Wheelabrator* II, 931 F.2d at 213.

98. *Id.*

99. 112 S. Ct. 453 (1991). The Seventh Circuit did not issue its decision until the day after the petition for certiorari was denied, November 19, 1991. *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991) [hereinafter *City of Chicago* II].

100. *City of Chicago*, 727 F. Supp. at 419.

101. *Id.* at 420.

102. *Id.* at 421. Thirty-two samples of ash from the Northwest Facility were tested, and 29 had enough lead or cadmium to meet the standard for extraction procedure toxicity, a characteristic of hazardousness. *Id.* at 421 n.2.

103. *Id.* at 421.

remaining after the incineration of household waste and non-hazardous commercial waste is exempt from regulation if the facility satisfied the criteria of section 3001(i)."¹⁰⁴ EDF was granted leave for additional discovery regarding the allegations that the Northwest Facility was accepting hazardous waste, and that the procedures at the facility were not adequate to prevent the acceptance of hazardous waste.¹⁰⁵ However, in July 1990, EDF stated that it would not pursue the discovery approach, and agreed not to oppose a renewed summary judgment motion by the City.¹⁰⁶ Summary judgment was granted for the City on August 20, 1990.¹⁰⁷ Thus, at the district court level, the outcomes of the *Wheelabrator* and *City of Chicago* cases were the same.

B. The Appeal

On appeal, however, the companion cases divided. The United States Court of Appeals for the Seventh Circuit reversed the district court holding in *City of Chicago*.¹⁰⁸ The appellate court held that "ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA."¹⁰⁹ To reach this decision the Seventh Circuit examined RCRA and the rationale behind it, rather than relying on presumed congressional intentions and the history of the regulations.¹¹⁰

The appellate panel established two important premises. First, the ash generated by municipal solid waste incinerators is a new and different substance from the solid waste that was to be incinerated.¹¹¹ This assertion invalidated the connection between

104. *Id.* at 422.

105. *City of Chicago*, 727 F. Supp. at 425.

106. *City of Chicago II*, 948 F.2d at 346.

107. *Id.*

108. *Id.* at 345.

109. *Id.* at 352.

110. *Id.* at 350-52. Chief Judge Bauer cited Supreme Court Justice Scalia in his decision to focus on the purpose of the statute. *Id.* Justice Scalia noted that the use of legislative history is "neither compatible with our judicial responsibility of assuring reasoned, consistent and effective application of [statutes], nor conducive to a genuine effectuation of congressional intent . . ." *Id.* at 350 (citing *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989)). The Seventh Circuit did not rely on the Second Circuit's decision in *Wheelabrator*, but merely mentioned the opposing decision. *Id.* at 346-47.

111. *City of Chicago II*, 948 F.2d at 351. The court stated, "To borrow a phrase from computer programmers, resource recovery quite literally is 'garbage in, garbage out,' but the 'garbage' that emerges from the incineration process—ash—is fundamentally different in its chemical and physical composition from the plastic, paper, and other rubbish that goes in." *Id.*

the household waste to be incinerated and the ash generated by the process of incineration.¹¹² Second, the term "otherwise managing" in RCRA section 3001 does not include "generation," or the "act or process of producing hazardous waste."¹¹³ Hence, the court held that the section 3001(i) household waste exclusion should be limited to management activities and not the generation of municipal solid waste incinerator ash.¹¹⁴ The City's argument that the household waste exclusion applied to ash generated by municipal waste incinerators was abrogated.¹¹⁵ In support of its decision, the Seventh Circuit added that "[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills."¹¹⁶ Thus, the Seventh Circuit determined that ash from resource recovery incinerators should be subject to hazardous waste regulation under Subtitle C of RCRA.¹¹⁷

C. The Supreme Court Responds

On November 16, 1992, the Supreme Court granted the petition for certiorari submitted by the City of Chicago.¹¹⁸ The Court vacated the judgment of the Seventh Circuit and remanded the *City of Chicago* case "for further consideration in light of the Memorandum of The Administrator of the Environmental Protection Agency . . . regarding Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)."¹¹⁹ Thus, the Supreme Court did not resolve the case on its merits, but rather ordered the Seventh Circuit to re-examine the ash disposal issue.¹²⁰

The Memorandum from William Reilly, Administrator of

112. This theory is further supported by the evidence that nonhazardous materials upon incineration may take on hazardous characteristics due to the process of incineration. See *supra* note 63.

113. *City of Chicago II*, 948 F.2d at 351-52.

114. *Id.* at 352. See *supra* notes 55-58 and accompanying text for a discussion of the term "generation" and the household waste exclusion.

115. *City of Chicago II*, 948 F.2d at 352.

116. *Id.*

117. *Id.*

118. *City of Chicago v. Environmental Defense Fund, Inc.*, No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992).

119. *Id.* For a discussion of the EPA Memorandum, see *infra* notes 122-33 and accompanying text.

120. Greenhouse, *supra* note 22, at B-10.

EPA, dated September 18, 1992, took the position that ash generated from municipal solid waste should be exempt from regulation under RCRA Subtitle C.¹²¹ This statement reversed the official 1985 EPA statement that ash should be categorized as hazardous waste under Subtitle C if it exhibits a characteristic of hazardousness.¹²² The Administrator maintained that excluding ash from treatment as a hazardous waste under the "household waste exclusion" was consistent with RCRA section 3001(i).¹²³ The EPA Memorandum examined the language "disposed of" from RCRA section 3001(i) which provides that an incinerator should not be regarded as "treating, storing, disposing of, or otherwise managing hazardous waste" if the facility receives only household waste.¹²⁴ The Administrator presupposed that the term disposal did not refer to the burning of trash in the facility, and therefore concluded that "ash is the only waste 'disposed of' by such a facility."¹²⁵ Accordingly, EPA determined that "Congress arguably intended that . . . ash not be regarded as a hazardous waste."¹²⁶

Focusing on the legislative history of RCRA section 3001(i), the EPA Memorandum first addressed the argument that Congress intended to include "generation" with the "treating, storing, disposing of, or otherwise managing" list from section 3001(i).¹²⁷ The absence of the term "generation" in the actual statute was explained by the Administrator as, at most, a reflection that "Congress did not expressly address the precise issue of whether . . . ash should be exempt from hazardous waste regulation, and does not indicate that Congress intended that . . . ash be regulated as a hazardous waste."¹²⁸

Second, the EPA Memorandum focused on one objective of the RCRA statute—to foster the use of incineration facilities, and in so doing, eliminate obstacles to the development and opera-

121. Memorandum from the Administrator of the United States Environmental Protection Agency Regarding Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation Under Section 3001(i) (Sept. 18, 1992) at 1 [hereinafter EPA Memorandum].

122. *Id.* See *supra* notes 63-64 and accompanying text for a discussion of the 1985 EPA position.

123. EPA Memorandum, *supra* note 121, at 2.

124. *Id.* at 2-3.

125. *Id.* at 3.

126. *Id.*

127. *Id.* See *supra* notes 55-58 and accompanying text for a discussion of the term "generation" from the *Wheelabrator* case; see *supra* notes 111-16 and accompanying text for the Seventh Circuit's interpretation of the term "generation."

128. EPA Memorandum, *supra* note 121, at 3 n.2.

tion of such facilities.¹²⁹ The Administrator maintained that requiring ash to be disposed of as a hazardous waste would substantially frustrate this objective because the cost of ash disposal would be an obstacle to the operation of incineration facilities.¹³⁰ Third, the EPA Memorandum applied the theory that Congress “intended to ‘exclude waste streams generated by consumers at the household level’” from hazardous waste regulation.¹³¹

Finally, the EPA Memorandum declared that the new criteria for municipal solid waste landfills announced by EPA in October 1991 should be sufficient to regulate landfills for safe acceptance of municipal solid waste ash.¹³² Based on the new criteria, the Administrator concluded that the disposal of ash can be regulated under Subtitle D of RCRA.¹³³

IV. ANALYSIS OF *WHEELABRATOR* AND *CITY OF CHICAGO*

A. Statutory Exclusions from Subtitle C.

Although the companion EDF cases were the first to focus on the categorization of municipal solid waste incinerator ash, several courts have addressed the various statutory exclusions from RCRA Subtitle C hazardous waste regulation.¹³⁴ For example, in 1987, EDF brought a suit concerning another Subtitle C exclusion—the mining waste exclusion—in *Environmental Defense Fund, Inc. v. EPA*.¹³⁵ The mining waste exclusion was promulgated in 1980 under the Bevill Amendment which required EPA to conduct a study of hazardous mining wastes.¹³⁶ Prior to the Bevill

129. *Id.* at 4. There are now 11 stated objectives of RCRA—the most relevant one being “the environmentally safe disposal of nonrecoverable residues.” RCRA § 1003(a), 42 U.S.C. § 6902(a)(1)(1988). For further discussion of RCRA objectives, see *infra* notes 149-51 and accompanying text.

130. EPA Memorandum, *supra* note 121, at 4. See *infra* note 169 for an example of increased costs due to disposal in hazardous waste landfills.

131. EPA Memorandum, *supra* note 121, at 4 (quoting 45 Fed. Reg. 33,066, 33,098 (1980)). However, this theory was promulgated prior to the 1985 EPA statement that incinerator ash is not included in the household waste exclusion.

132. EPA Memorandum, *supra* note 121, at 5. The new criteria is found at 56 Fed. Reg. 50,978 (1991) (to be codified at 40 C.F.R. pts. 257, 258).

133. EPA Memorandum, *supra* note 121, at 5. The EPA Memorandum stated that the new criteria for landfills will protect both human health and the environment. *Id.*

134. For a discussion of RCRA Subtitle C, see *supra* notes 37-44 and accompanying text.

135. 852 F.2d 1309 (D.C. Cir. 1988).

136. *Id.* at 1311. The study required EPA to determine “adverse effects on human health and environment” of the mining wastes, and to consider “disposal methods, their cost, and the impact on the cost of mining products” *Id.*

Amendment, EPA proposed that mining waste be treated as a "special waste," a category for low-hazard waste generated in large volume.¹³⁷ In 1980, however, EPA eliminated the category of "special waste."¹³⁸

EPA justified the mining waste exclusion through a cost-benefit analysis.¹³⁹ The analysis concluded that mining wastes have "lower exposure and risk potential' than other industrial wastes."¹⁴⁰ The D.C. Circuit upheld the mining waste exclusion based on the statutory deference which Congress conferred upon EPA.¹⁴¹ *Environmental Defense Fund, Inc. v. EPA* is an example of a validation of a statutory exclusion.¹⁴² The justification for the mining waste exclusion should not be applied to the household waste exclusion since the wastes are fundamentally different. Furthermore, *Environmental Defense Fund, Inc. v. EPA* can be distinguished from the *Wheelabrator* and *City of Chicago* cases because in *Wheelabrator* and *City of Chicago* the issue was not the validity of the household waste exclusion, but rather how broadly to interpret the exclusion.¹⁴³

In another case, this one involving the household waste exclusion, the district court in *B.F. Goodrich Co. v. Murtha*¹⁴⁴ held that "municipal solid waste containing hazardous substances could give rise to liability under CERCLA," even if the waste would have been treated less stringently under the household waste exclusion.¹⁴⁵ In essence, the court narrowed the application of the household waste exclusion, and held that under CERCLA, if there is proof that hazardous substances have been transported or deposited, liability exists.¹⁴⁶ This clarification of the exclusion is consistent with the policy of CERCLA.¹⁴⁷ *B. F.*

137. *Id.*

138. *Id.* Based on the more stringent EP toxicity criteria under Subtitle C, EPA believed that "special wastes" would no longer qualify for regulation under Subtitle C. *Id.*

139. *Id.* at 1312.

140. *Environmental Defense Fund, Inc.*, 852 F.2d at 1312. EPA noted that "most mining sites are removed from population centers, located in drier climates with minimal toxic leaching, and isolated from drinking water supplies, surface water, or other water supply receptors." *Id.*

141. *Id.* at 1314.

142. *Id.* at 1313.

143. *Wheelabrator*, 725 F. Supp. at 762-64; *City of Chicago*, 727 F. Supp. at 421.

144. 754 F. Supp. 960 (D. Conn. 1991).

145. *Id.*

146. *Id.* at 973.

147. *Id.*

Goodrich is an example of a court maintaining a statutory exclusion while controlling and narrowing its application.

B. The Companion Cases

In rendering the *Wheelabrator* decision, the courts focused on the legislative history and presumed congressional intent regarding RCRA section 3001.¹⁴⁸ Consequently, the courts disregarded the comprehensive purpose of RCRA and the policy supporting the statute.¹⁴⁹ RCRA was enacted to promote public health and safety in light of evidence that hazardous wastes were contaminating the air, soil, surface water, and groundwater.¹⁵⁰ Another stated purpose of RCRA was to authorize the provision of guidelines for the disposal of both hazardous and solid wastes.¹⁵¹ By basing its decision on the presumption that EPA would be reviewing the status of incinerator ash disposal in November 1992, the Second Circuit in *Wheelabrator* participated in the refusal to take action or provide guidelines for the regulation of ash.¹⁵²

The *Wheelabrator* court, without substituting its own judgment for that of Congress or EPA, could have chosen to narrow the definition of the household waste exclusion akin to the decision in *B.F. Goodrich Co. v. Murtha*.¹⁵³ The issue in the companion cases was not the validity of the household waste exclusion, as in *Envi-*

148. *Wheelabrator*, 725 F. Supp. at 764-66.

149. RCRA § 1003, 42 U.S.C. § 6902 (1976), states, in pertinent part: The objectives . . . are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

(4) regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment;

(5) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(6) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues

Id.

150. Florio, *supra* note 20, at viii.

151. RCRA § 1003(4), (5), 42 U.S.C. § 6902(4), (5) (1988).

152. *Solid Waste: Hazardous or Not Interest Groups Want Incinerator Ash Legislation*, 20 Env't Rep. (BNA) 1650 (Jan. 26, 1990) [hereinafter *Incinerator Ash Legislation*].

153. 754 F. Supp. at 960. For a discussion of *B.F. Goodrich Co.*, see *supra* notes 144-47 and accompanying text.

ronmental Defense Fund, Inc. v. EPA, but rather the application of the exclusion.¹⁵⁴ However, the Second Circuit, in reliance on the validity of the household waste exclusion, applied it in a situation which admittedly lacked environmental justification.¹⁵⁵

Conversely, the Seventh Circuit in *City of Chicago* focused almost primarily on the comprehensive purpose of RCRA section 3001 at the risk of oversimplification.¹⁵⁶ In essence, the court eliminated all municipal solid waste incinerator ash from the household waste exclusion.¹⁵⁷ The court examined the statutory definitions of the language to determine congressional intent, and thus avoided the complex congressional history and convoluted agency interpretations of section 3001.¹⁵⁸ The Seventh Circuit applied necessary common sense to the legal process, and paved the way for other courts to focus on the plain language and environmental purpose of statutes.

C. The Supreme Court's Position

In the brief filed for the United States as amicus curiae, the Solicitor General's office recommended that the Seventh Circuit decision be vacated and remanded to the court of appeals for consideration in light of the EPA Memorandum.¹⁵⁹ The Supreme Court followed this recommendation to the disappointment of

154. *Wheelabrator*, 725 F. Supp. at 762. The court commenced its discussion of the case with the statement that "if proper construction of the statute excludes defendants from compliance with hazardous waste laws, their conceded non-compliance has no legal significance." *Id.*

155. *Id.* at 770.

156. *City of Chicago II*, 948 F.2d at 351. The court stated that: [i]t does not follow that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste. Such a reading of section 3001(i) would be inconsistent with RCRA's policy of encouraging the careful management of materials that pose a danger to human health and the environment.

Id.

157. *Id.* at 351-52. If metals, batteries, and other materials which make the ash toxic were separated from municipal solid waste prior to incineration, the ash may not exhibit a characteristic of hazardousness. RECYCLING & INCINERATION, *supra* note 2, at 196.

158. *Id.* The court summarized its actions: "We should take at face value a statute's plain language so long as our reading is not absurd; we should ignore a legislative history that results in a reading that is." *Id.* at 352.

159. Brief for the United States as Amicus Curiae at 13, *City of Chicago v. Environmental Defense Fund, Inc.*, No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992).

both parties to the *City of Chicago* case.¹⁶⁰ The City of Chicago requested that the Supreme Court hear the case in order to create uniform federal regulations for incinerator ash.¹⁶¹ EDF stated that there was no reason to remand the case because the issue is one of federal law and not agency policy.¹⁶²

The Seventh Circuit made it clear in the *City of Chicago* judgment that it would not defer to the conflicting EPA statements.¹⁶³ Consequently, on remand, the Seventh Circuit may view the EPA Memorandum as simply another "flip-flop of their prior position."¹⁶⁴ Additionally, the EPA Memorandum is not a Federal Regulation, and EPA does not plan to issue an official notice announcing their opinion.¹⁶⁵ A policy statement by an agency does not carry the weight of statutory law.¹⁶⁶ Finally, with the inauguration of the Clinton Administration, the current policy may be overturned by the new EPA Administrator or by Congress.¹⁶⁷ Thus, the EPA Memorandum may have little bearing on the Seventh Circuit's ultimate decision.

160. *Greenhouse*, *supra* note 22, at B-10.

161. Petition for a Writ of Certiorari filed by the City of Chicago at 12, *City of Chicago v. Environmental Defense Fund, Inc.*, No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992). The City is concerned about the practical problem of disposing ash in landfills located in states outside the Seventh Circuit. *Id.* at 18. The Northwest Facility disposed of ash in a landfill located in Michigan which is in the Sixth Circuit. *Id.* at 12. A disposal site located in a circuit which has not classified ash for disposal purposes may refuse to accept ash from the Seventh Circuit in fear of RCRA penalties. *Id.* at 12.

162. On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit Brief for Respondents at 8, *City of Chicago v. Environmental Defense Fund, Inc.* No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992).

163. *City of Chicago II*, 948 F.2d at 350. The court referred to EPA as a "waffling administrative agency" and stated that the "see-sawing statements from the EPA to which the district court gave 'little weight' deserve no weight at all." *Id.*

164. *Ash from Combustion of Municipal Waste to be Considered Non-hazardous*, EPA Says, 23 Env't Rep. (BNA) 1459 (Sept. 25, 1992) [hereinafter *Ash from Combustion*].

165. *Id.*

166. 5 U.S.C. § 553(b)(A) (1988). See also *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 37-38 (D.C. Cir. 1974). The general policy statement, such as the EPA Memorandum, is an informational device which provides a "formal method by which an agency can express its views." *Id.* at 38. It is not binding as a rule but is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Id.* Ultimately this means that the "agency cannot apply or rely upon a general statement of policy as law" *Id.*

167. See generally *Incinerator Ash Not Hazardous, EPA Declares in Memorandum*, 20 GROUND WATER MONITOR (Oct. 6, 1992).

V. IMPACT AND CONCLUSION

The decision to treat solid waste incinerator ash as hazardous waste by the Seventh Circuit would directly affect Illinois, Indiana, and Wisconsin, and indirectly impact the nation.¹⁶⁸ The cost of ash disposal would rise because fewer landfills are licensed to accept hazardous waste.¹⁶⁹ The increase in disposal costs could induce municipalities to revert to disposing more solid waste in landfills rather than incinerating.¹⁷⁰ Landfills which previously accepted incinerator ash could risk classification as hazardous waste dumps.¹⁷¹

On the other hand, in April 1990, EPA reported that solid waste municipal ash leaches lead and cadmium at levels of concern according to EPA-approved testing procedures.¹⁷² For this reason, EPA concluded that ash should be disposed of in "well-designed monofill[s]"¹⁷³ which will "greatly reduce[] the leach-

168. Ash shipped from the east coast for disposal in the midwest will be affected by the Seventh Circuit's decision. In an editorial letter to the New York Times, George Baggett, a member of the Waste Minimization Commission in Kansas City, Missouri, said that "[w]e are fighting East Coast shipments of garbage incinerator ash to a small landfill in northern Missouri." George Baggett, *Midwest Won't Keep Taking New York's Garbage Much Longer*, N.Y. TIMES, Aug. 18, 1992, at A18.

169. John Holusha, *Ruling on Ash May Increase Cities' Disposal Costs*, N.Y. TIMES, Nov. 22, 1991, at D1. See *Incinerator Ash Legislation*, *supra* note 152; see also *MANAGING ASH*, *supra* note 3, at 9, 78. Capacity at hazardous waste landfills is very limited and the permitting process for new hazardous waste landfills is difficult. Brief Amici Curiae of City of Ames, Iowa, et al. at 13, *City of Chicago v. Environmental Defense Fund, Inc.*, No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992).

The Petition for a Writ of Certiorari filed by the City of Chicago stated that the cost of disposing one ton of waste in a Subtitle D (nonhazardous waste) landfill averages \$23.15. Petition for Writ of Certiorari at 9 n.3. The average cost of stabilization and disposal at a Subtitle C (hazardous waste) landfill is \$210 per ton. *Id.* Chicago's Northwest Facility disposes of between 110,000 and 140,000 tons of ash each year, which if sent to a Subtitle C landfill, would result in increased costs for disposal alone of \$20 million. *Id.*

170. Brief of the National League of Cities and National Association of Counties as Amici Curiae in Support of Petitioners at 3, *City of Chicago v. Environmental Defense Fund, Inc.*, No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992). The National League of Cities claimed that local governments have "great financial stake in the outcome of this litigation" because the additional cost of disposing ash at hazardous waste landfills may make "use of the facility economically infeasible." *Id.* at 2-3. The brief stated that "[f]rom an economic standpoint, it is simply cheaper for many local governments to dispose of untreated [municipal solid waste] in a sanitary landfill than to burn the same material in a resource recovery facility and dispose of the ash in a hazardous waste landfill." *Id.* at 3.

171. *MANAGING ASH*, *supra* note 3, at 77.

172. 55 Fed. Reg. 17,303 (1990).

173. Monofills are landfills for one element only, in this case, ash. *MANAG-*

ability of constituents of concern such as lead and cadmium.”¹⁷⁴ The new criteria for municipal solid waste landfills mentioned in the EPA Memorandum does not require ash to be disposed of in monofills.¹⁷⁵

The split between the circuits on the categorization of municipal solid waste incinerator ash is critical.¹⁷⁶ Ash may be transported for disposal to landfills in other states, accordingly, it is important that federal standards for ash disposal be determined.¹⁷⁷ Each state would then have a common basis from which to devise its own operating, emission, and disposal requirements for incinerator ash.¹⁷⁸

The optimal resolution to the ash disposal issue would keep cost to a minimum without jeopardizing health and environmental safety. To reach this goal, the mere categorization of ash is not adequate. Several regulation strategies tailored to the specific attributes of incinerator ash have been proposed. A Senate bill (S. 976) would impose “Subtitle C requirements for inspections, enforcement, monitoring, analysis and testing” without designating the municipal solid waste ash as hazardous.¹⁷⁹ Another recommendation is to reintroduce the special waste category for incinerator ash.¹⁸⁰ Perhaps the most fundamental solution is to keep the materials out of the waste stream which cause incinerator ash to exhibit hazardous characteristics.¹⁸¹ Richard Denison,

INC ASH, *supra* note 3, at 79. Monofills are recommended as a “sensible short term management approach” because the acidic conditions from the codisposal of municipal solid waste may promote leaching of the toxic constituents in the ash. *Id.* In addition, ash disposed of in monofills is recoverable, whereas ash mixed with municipal solid waste is not. *Id.*

174. 55 Fed. Reg. 17,303.

175. 56 Fed. Reg. 50,978 (1991).

176. Petition for a Writ of Certiorari filed by City of Chicago at 9, *City of Chicago v. Environmental Defense Fund, Inc.* No. 91-1328, 1992 U.S. LEXIS 7198 (Nov. 16, 1992).

177. *Id.* The City of Chicago’s petition for certiorari stated that the Supreme Court should “resolve this conflict so that federal regulation of the ash does not depend upon the location of the resource recovery facility” *Id.*

178. RECYCLING & INCINERATION, *supra* note 2, at 257.

179. *Ash from Combustion*, *supra* note 164, at 1459.

180. *Governors Turn to Ash*, ENGINEERING NEWS—RECORD, Aug. 9, 1990, at 24. The governors stated that “[s]uch an approach would provide the extra protection needed for this unique waste, while avoiding the unnecessary expense associated with regulating ash as hazardous waste.” *Id.* However, the categorization of special waste was dropped by EPA, and would need to be reinstated. *Environmental Defense Fund, Inc. v. EPA*, 852 F.2d at 1311.

181. RECYCLING & INCINERATION, *supra* note 2, at 196. Incineration technology has been successful in Europe in part due to the intensive practice of source reduction and waste separation prior to incineration. Adrian Peracchio,

230 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. IV: p. 207

a scientist at EDF, remarked that he would be willing to forego the label of "hazardous waste" for solid waste incinerator ash, as long as safe regulations are established.¹⁸²

Whatever the route, Congress should not continue to frustrate the purpose of RCRA by its indecision regarding incinerator ash regulation. Without unequivocal guidance, ash will remain in "regulatory limbo."¹⁸³ The courts are not the appropriate forum for the creation of complex environmental regulations. By returning a decision contrary to the current EPA policy, the Seventh Circuit can encourage Congress to continue the examination of the ash disposal issue in anticipation of a resolution appropriate to the specific character of municipal solid waste incinerator ash.

Kathleen J. Rutt

West Germany Combines Recycling and Burning, in RUSH TO BURN, supra note 4, at 84, 84-85. See supra note 157.

182. *Incinerator Ash Legislation, supra note 152, at 1650.*

183. *Governors Turn to Ash, supra note 180, at 24.*