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# City of Chicago v. Environmental Defense Fund, Inc." Making the Case for Broader Application of Chevron, U.S.A. v. Natural Resource Defense Council

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***CITY OF CHICAGO V. ENVIRONMENTAL DEFENSE FUND, INC.<sup>1</sup>:  
MAKING THE CASE FOR BROADER APPLICATION OF CHEVRON,  
U.S.A. V. NATURAL RESOURCE DEFENSE COUNCIL<sup>2</sup>***

Cities and municipalities throughout the United States are currently awash in a solid waste disposal crisis.<sup>3</sup> Presently, the United States produces 196 million tons of solid waste each year,<sup>4</sup> and that number is expected to grow in the future.<sup>5</sup> The initial sign of this crisis was a shortage of landfill space.<sup>6</sup> Faced with dwindling landfill space, municipalities have turned increasingly to combustion and waste-to-energy facilities.<sup>7</sup> These facilities reduce the amount of waste by approximately 90 per cent,<sup>8</sup> leaving a residue of municipal waste combustion (MWC) ash.<sup>9</sup>

With the expanding use of combustion as a solid waste disposal technique, controversy has evolved over what should be done with the MWC ash produced. Research indicates that the ash may exceed statutory limits for toxicity.<sup>10</sup> However, the ash has never actually been subjected to regulation as a hazardous waste by the Environmental Protection Agency (EPA).<sup>11</sup>

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1. 114 S. Ct. 1588 (1994).

2. 467 U.S. 837 (1984).

3. Senator John H. Chafee, *Forward to RECYCLING AND INCINERATION EVALUATING THE CHOICES* xix (Richard A. Denison & John Ruston eds., 1990) [hereinafter *RECYCLING AND INCINERATION*].

4. 59 Fed. Reg. 29,372 at 29,373 (1994).

5. Chafee, *supra* note 3, at xix. One author predicts that the amount of garbage produced in the United States may grow as high as 216 million tons by the year 2000. Eleanor Revelle & Rosemary Ashworth, *Solid Waste Law Needs Rewriting*, CHI. TRIB., March 18, 1992, at 20.

6. Chafee, *supra* note 3, at xix.

7. There are currently 150 municipal waste combustors, of which 80% are waste-to-energy facilities, that incinerate about 16% of the solid waste produced in the United States. 59 Fed. Reg. 29,372. Between 1983 and 1993, the number of waste-to-energy facilities increased from 50 to 142. Michael Valenti, *Today's Trash Tomorrow's Fuel*, MECHANICAL ENGINEERING-CIME, Jan. 1993, at 64.

8. Valenti, *supra* note 7, at 64.

9. The ash produced can generally be broken down into fly ash and bottom ash. Bottom ash is the ash which collects at the bottom of the combustion unit and makes up approximately 75%-80% of the total ash. Fly ash is ash which is generally collected in the air pollution control units and makes up the remainder of the total ash. 59 Fed. Reg. 29,372, 29,373 (1994).

10. 55 Fed. Reg. 17,303 (1990). See also *Municipal Incinerator Ash: Hearings on Hazardous Waste of the Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988) (statement of Michael Herz); *RECYCLING AND INCINERATION*, *supra* note 3, at 177-201.

11. The EPA has labeled MWC ash a "newly identified" waste because it had not been

In response to the failure to regulate MWC ash as a hazardous waste, the Environmental Defense Fund initiated litigation in order to obtain judicial recognition of MWC ash as a hazardous waste.<sup>12</sup> This litigation proceeded to the Second and Seventh Circuit Courts of Appeal.<sup>13</sup> Following a split between those Circuits,<sup>14</sup> *certiorari* was granted by the Supreme Court to review the decision of the Seventh Circuit.<sup>15</sup>

The purpose of this Note is to examine the Supreme Court's reasoning in *City of Chicago v. Environmental Defense Fund*, and to explore the implications of the Court's decision. First, Section II of this Note delineates the relevant statutory and regulatory background concerning the regulation of municipal solid waste. Next, Section III presents the statement of the case.

Finally, Section IV analyzes the Supreme Court's decision. Section IV(A) criticizes the Court's limited focus in interpreting the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>16</sup> Section IV(B) contends that the Court's interpretation of RCRA is incorrect because it violates one of the express purposes of the Act. Section IV(C) argues that deference should have been given to the Environmental Protection Agency's interpretation of RCRA, in accordance with the standard set out in *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>17</sup>

previously regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA). 59 Fed. Reg. 29,372, at 29,375 (1994).

12. See *Environmental Defense Fund, Inc. v. Wheelabrator Tech.*, 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*, 113 S. Ct. 486 (1992).

13. See *Environmental Defense Fund, Inc. v. Wheelabrator Tech.*, 931 F.2d 211 (2d Cir. 1991); *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991).

14. The Second Circuit held that the intent of Congress was clearly to exclude MWC ash from regulation as a hazardous waste. *Environmental Defense Fund, Inc., v. Wheelabrator Tech.*, 931 F.2d 211, (2d Cir. 1991). The Seventh Circuit held that the plain language of the statute required MWC ash to be tested for hazardous characteristics. *Environmental Defense Fund, Inc., v. City of Chicago*, 948 F.2d 345, 352 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992). See Hillary A. Sale, *Trash, Ash, and Interpretation of RCRA*, 17 HARV. ENVTL. L. REV. 409 (1993); 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. ENVTL. L. J. 207 (1993).

15. *City of Chicago v. Environmental Defense Fund, Inc.*, 113 S. Ct. 2992 (1993).

16. 42 U.S.C. §§ 6901-6992(h) (1983 & Supp. 1994).

17. 467 U.S. 837 (1984)(holding that where a statute is ambiguous, an interpretation by the agency authorized to administer the statute will be given deference if it is a permissible construction of the statute).

## BACKGROUND

*Regulation of Solid Waste in General*

In the United States, solid waste is regulated by the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>18</sup> Congress enacted RCRA for the purposes of protecting the public from contamination by hazardous waste and promoting conservation of material and energy resources through resource recovery.<sup>19</sup> RCRA creates separate regulatory procedures, depending upon whether waste is found to be hazardous or non-hazardous.

If a substance is found to be a hazardous waste, it is stringently regulated under Subtitle C of RCRA.<sup>20</sup> RCRA does not establish a method by which substances can be determined to be hazardous.<sup>21</sup> Rather, Congress delegated this authority to the EPA through Section 3001 of Subtitle C of the Solid Waste Disposal Act (as amended by RCRA).<sup>22</sup> In 1980, the EPA established two mechanisms through which a substance could be designated as being hazardous.<sup>23</sup> The first mechanism is listing.<sup>24</sup> A solid waste will be listed as hazardous only if it meets at least one of the three specified criteria.<sup>25</sup> If a solid waste meets one of these criteria, it is listed as hazardous by the EPA, unless a petition is granted by the Administrator excluding the waste from regulation under Subtitle C.<sup>26</sup>

The second mechanism by which a substance can become a hazardous waste is by failing one or more of the hazardous characteristic tests.<sup>27</sup> The characteristics identified by the EPA to be tested for are toxicity,<sup>28</sup>

18. 42 U.S.C. §§ 6901-6992(h) (1983 & Supp. 1994).

19. *See* 42 U.S.C. § 6902(a) ( Supp. 1994).

20. *See* 42 U.S.C. §§ 6921- 6934 (1983 & Supp. 1994).

21. *See* 42 U.S.C. § 6921(a).

22. *See* 45 Fed. Reg. 33,084 (1980).

23. *Id.*

24. *See* 40 C.F.R. § 261.30 (1993). In the initial phase of implementation, the EPA listed 85 process wastes as hazardous wastes, and 400 chemicals as hazardous if they are discarded. 45 Fed. Reg. 33,084 (1980).

25. 40 C.F.R. § 261.11 (1993). Generally, a solid waste will be listed if it possesses any of the characteristics (toxicity, ignitability, corrosivity, or reactivity) of a hazardous waste; if it is shown or suspected of being toxic to humans; or if it contains certain toxic constituents listed in app. VIII to pt. 261.

26. 40 C.F.R. § 261.30(a) (1993). The delisting process is described in 40 C.F.R. §§ 260.20-.22 (1993), as authorized under 42 U.S.C. § 6921(f) (1983).

27. *See* 40 C.F.R. § 261.20 (1993).

28. 40 C.F.R. § 261.24 (1993). Toxicity is tested using the Toxicity Characteristic Leaching Procedure (TCLP) as described in app. II to pt. 261. If analysis of the TCLP extract indicates that a regulated compound exists at a level equal to or greater than the regulatory level, the

ignitability,<sup>29</sup> corrosivity<sup>30</sup> and reactivity.<sup>31</sup> The EPA has prescribed certain tests which are to be conducted on a representative sample of the waste in order to determine if it possesses any such characteristics.<sup>32</sup> If a representative sample possesses a particular characteristic, the whole of the waste is considered hazardous.<sup>33</sup> Once a solid is determined to be hazardous, that waste will continue to be subject to Subtitle C regulation regardless of treatment, or anything else which may be done to the waste.<sup>34</sup>

Subtitle C regulates generators,<sup>35</sup> transporters,<sup>36</sup> and operators of hazardous waste treatment, storage and disposal facilities (TSDFs).<sup>37</sup> Generators and transporters of hazardous wastes are required by RCRA to keep records of the quantity of hazardous waste produced and the elements of that waste which are detrimental to human health.<sup>38</sup> Further, generators of hazardous waste must keep the hazardous waste in appropriate containers<sup>39</sup> that are labeled to accurately reflect the contents of the container.<sup>40</sup> Finally, hazardous waste generators must maintain a manifest system which assures that all hazardous waste generated is treated or disposed of in facilities which have obtained a permit to handle hazardous wastes.<sup>41</sup> Transporters must also comply with that manifest system.<sup>42</sup>

solid waste is considered hazardous. 40 C.F.R. § 261, app. II (1.3) (1993).

29. 40 C.F.R. § 261.21 (1993). Solid waste is considered to possess the characteristic of ignitability if: it is a liquid containing less than 24 percent alcohol and having a flash point below 60°C (140°F); it is not a liquid and can cause fire at normal temperatures and pressure through friction, etc.; or, it is an ignitable compressed gas as defined in 49 C.F.R. § 173.300

30. 40 C.F.R. § 261.22 (1993). Corrosivity exists if an aqueous liquid has a pH less than or equal to 2 or greater than or equal to 12.5, or if a liquid corrodes steel at a rate greater than 6.35 mm per year at a temperature of 55°C (135°F).

31. 40 C.F.R. § 261.23 (1993). The reactivity characteristic depends on the relative stability of the waste, its likelihood to cause toxic fumes if mixed with water or other substances, or its likelihood of detonation.

32. *See, e.g.*, 40 C.F.R. § 261.22 (1993). Alternative test methods may be utilized if a petition is granted by the Administrator pursuant to 40 C.F.R. §§ 260.20, 260.21.

33. *See* 40 C.F.R. § 261, app. II(1.3) (1993).

34. Sale, *supra* note 14, at 413.

35. 42 U.S.C. § 6922 (1983).

36. 42 U.S.C. § 6923 (1983).

37. 42 U.S.C. § 6924 (1983).

38. 42 U.S.C. §§ 6922(1), 6923(1) (1983).

39. 42 U.S.C. § 6922(3) (1983).

40. 42 U.S.C. § 6922(2) (1983). Hazardous waste transporters are likewise required to transport only containers which are properly labeled by the generator. 42 U.S.C. § 6923(2) (1983).

41. 42 U.S.C. § 6922(5) (1983). *See also* 40 C.F.R. pt. 262 (1993).

42. 42 U.S.C. § 6923(3) (1983).

TSDFs are regulated more stringently than generators or transporters of hazardous waste.<sup>43</sup> EPA regulations on TSDFs are similar to those placed on generators and transporters.<sup>44</sup> In addition to those requirements, TSDFs are required to provide special training for employees,<sup>45</sup> to maintain contingency plans for accidents and post accident cleanup,<sup>46</sup> and to comply with regulations concerning closure and post-closure care of the site.<sup>47</sup> Finally, TSDFs are required to obtain a permit from the EPA in order to handle any hazardous waste.<sup>48</sup>

If a substance is not designated as hazardous, it is regulated under the more lenient standards of Subtitle D.<sup>49</sup> Subtitle D is administered primarily by the states.<sup>50</sup> The focus of Subtitle D is to encourage resource conservation and recovery<sup>51</sup> and to establish mandatory minimum federal requirements for state programs.<sup>52</sup> One area of specific focus in Subtitle D is the operation of sanitary landfills.<sup>53</sup> EPA regulations, enacted pursuant to Subtitle D, establish minimum standards for municipal landfills.<sup>54</sup> Further, the EPA requires that all new landfills have composite synthetic liners, or the equivalent, over layers of clay at the bottom of the site.<sup>55</sup> Municipal landfills are also required to be equipped with groundwater monitoring and leachate protection systems.<sup>56</sup>

### *The Household Waste Exclusion*

In addition to establishing criteria for determining hazardous wastes, the EPA created exemptions from subtitle C regulation for substances which may in fact be hazardous.<sup>57</sup> One exemption was the waste stream exemption for household wastes.<sup>58</sup> Household wastes are defined to include septic tank

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43. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1590 (1994).

44. *See* 40 C.F.R. §§ 264.12-.13, 264.73-.77, 265.12-.13, 265.73-.77 (1993).

45. 40 C.F.R. §§ 264.16, 265.16.

46. 40 C.F.R. §§ 264.31-.37, 264.50-,.56, 265.31-.37, 265.50-.56.

47. 40 C.F.R. §§ 264.111(c), 265.111(c).

48. *See* 40 C.F.R. pt. 270 (1993).

49. *See* 42 U.S.C. §§ 6941-6949 (1988).

50. *Sale*, *supra* note 14, at 414.

51. *See* 42 U.S.C. §§ 6941, 6941(a) (1983).

52. *See* 42 U.S.C. § 6943 (1983).

53. 42 U.S.C. § 6944 (1983).

54. 56 Fed. Reg. 50,978 (1991). *See also Sale*, *supra* note 14, at 415.

55. 56 Fed. Reg. 50,978 (1991).

56. *Id.*

57. *See* 40 C.F.R. § 261.4 (1993).

58. 45 Fed. Reg. 33,084 at 33,099 (1980). A waste stream exclusion exempts the handling of the waste within that particular waste stream from its generation to its disposal.

pumpings, and trash and rubbish created by families, hotels, apartments and condominiums.<sup>59</sup> While a great deal of this waste is non-hazardous, certain household wastes such as batteries and some cleaning agents can be hazardous.<sup>60</sup> This exemption was intended to apply to such waste from its generation through its disposal as incinerator ash.<sup>61</sup> However, the exemption was not intended to apply to household waste which had been mixed with hazardous waste.<sup>62</sup>

In 1984, Congress amended RCRA by passing the Hazardous and Solid Waste Amendments of 1984.<sup>63</sup> Among the changes to RCRA was the addition of the "Clarification of Household Waste Exclusion" as section 3001(i).<sup>64</sup> Section 3001(i) states:

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—

(1) such facility—

(A) receives and burns only—

(i) household wastes (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous wastes identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned at such facility.<sup>65</sup>

Upon passage by Congress, the EPA codified the new provision by repeating the statutory language.<sup>66</sup> In enacting the new provisions, the EPA occasioned to comment that they did not believe that the household waste exclusion applied to the residue ash created from incineration.<sup>67</sup> Following that 1985

59. *Id.*

60. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1590 (1994).

61. The EPA noted that "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g. incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33,084, at 33,099 (1980).

62. *Id.*

63. Pub. L. No. 98-616, 98 Stat. 3221.

64. 42 U.S.C. § 6921(i) (Supp. 1994). Section 3001 of the Solid Waste Disposal Act is found at 42 U.S.C. § 6921.

65. 42 U.S.C. § 6921(i) (Supp. 1994).

66. 40 C.F.R. §261.4(b)(1) (1993).

67. The EPA stated:

statement, the EPA did not regulate the ash as hazardous under Subtitle C, because they did not have data which suggested that the ash was toxic.<sup>68</sup> In subsequent years, the EPA offered sometimes conflicting statements regarding their interpretation of the household waste exclusion under section 3001(i).<sup>69</sup> Finally, in 1992, EPA Director William K. Reilly issued a memorandum which stated that the EPA interpreted the exclusion to apply to the ash created through incineration.<sup>70</sup>

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The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question, although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, 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 . . . . EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

50 Fed. Reg. 28,702, at 28,725–26 (1985).

68. In 1985, EPA did not have information indicating that the ash would possess a characteristic, so it did not regulate the ash under Subtitle C. *Id.* at 28,726.

69. In 1987, J. Winston Porter, the Assistant Administrator for the Office of Solid Waste and Emergency Response, testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works. During his testimony, Porter stated the EPA position on MWC ash:

Currently, EPA's regulations merely restate the statutory language. In the preamble codifying this statutory language, however, EPA advanced an interpretation of the statute that would subject ash residue's [sic] from energy—recovering MWC's [Municipal Waste Combustors] to Subtitle C regulation if the ash exhibited a characteristic of hazardous waste. The agency has reexamined that interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.

*Resource Conservation and Recovery Act Oversight: Hearings before the Subcomm. on Hazardous Wastes & Toxic Substances of the Comm. on Environment and Public Works, 100th Cong., 1st Sess. (1987) (statement of Winston Porter).*

In contrast, in 1988 Sylvia Lowrance, who at the time was Director of the EPA's Office of Solid Waste, stated at the same congressional hearing:

With regard to the ash, however, produced from such facilities, we said in a 1985 notice that the ash generated by these facilities which exhibits a characteristic of the hazardous waste must be managed as a hazardous waste. We continue to follow that 1985 policy, and that is our current interpretation.

*Regulation of Municipal Solid Waste Incinerators: Hearing on H.R. 2162 before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce, 101st Cong., 1st Sess. (MGMT. 1989) (statement of Sylvia Lowrance) [hereinafter *Hearing on H.R. 2162*.]*

70. The memorandum was distributed to all regional administrators of the EPA on September 18, 1992. The memo stated that MWC ash was exempt from regulation under Subtitle C, and that this proclamation superseded prior EPA determinations that the ash was not exempt from



## STATEMENT OF THE CASE

*Statement of Facts*

Beginning in 1971, the City of Chicago owned and operated a municipal waste incinerator. That facility, the Northwest Waste-To-Energy Facility, burned approximately 350,00 tons of municipal waste annually.<sup>71</sup> The burning of this waste was used to create energy which was utilized in the facility, and also sold to other entities.<sup>72</sup> The facility created 110,000 to 140,000 tons of MWC ash each year, which was disposed of in landfills that were not licensed to accept hazardous waste.<sup>73</sup>

*Procedural History*

In 1988, the Environmental Defense Fund brought suit in the Northern District of Illinois under the citizen suit provision of RCRA,<sup>74</sup> alleging violations of RCRA.<sup>75</sup> The District Court held that the MWC ash was exempt under section 3001(i) of RCRA and granted summary judgment for the City of Chicago.<sup>76</sup>

On appeal, the Seventh Circuit reversed, holding that the plain language of the statute did not include MWC ash within the household waste exclusion.<sup>77</sup> The City petitioned the Supreme Court for a writ of *certiorari*.<sup>78</sup> In

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regulation. See *EPA Ash Decision Provides Boost For Waste-Energy, Says IWSA's Burton*, INTEGRATED WASTE MGMT., Sept. 30, 1992, at 1.

71. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1589 (1994).

72. *Id.*

73. *Id.*

74. 42 U.S.C. § 6972 (1988).

75. *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989).

76. *Id.* The district court emphasized Congress' failure to expressly renounce the 1980 EPA interpretation of the Household Waste Exclusion, which exempted MWC ash. The district court reasoned that this failure to explicitly renounce the 1980 interpretation was concrete evidence that Congress intended to continue the exclusion of MWC ash from Subtitle C regulation. *Id.* at 422. Further, the district court found that holding facilities responsible for disposing of MWC ash as a hazardous waste would stifle the resource recovery goal of RCRA. *Id.*

77. *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991). The Seventh Circuit declined to take into account the legislative history of the 1984 Amendment to the household waste exclusion and examined only the actual language of the statute. *Id.* at 350. Because the statute did not include the term "generation" in it, and because the court did not believe any other term used encompassed generation, the court viewed the plain language of the statute to place MWC ash beyond the scope of the exclusion. *Id.* at 351.

78. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1590 (1994).

response to the City's petition, the Court invited the Solicitor General to express the views of the United States.<sup>79</sup> While that invitation was outstanding, the EPA issued a memorandum indicating that it interpreted RCRA to include the MWC ash within the household waste exclusion.<sup>80</sup> The Supreme Court granted the city's petition, vacated the Seventh Circuit's decision, and remanded the case for reconsideration in light of the EPA memorandum.<sup>81</sup> The Seventh Circuit reinstated its prior decision,<sup>82</sup> and the City of Chicago once again petitioned the Supreme Court for a writ *a certiorari*.<sup>83</sup> The case came before the Court upon granting *certiorari*.<sup>84</sup>

### *U.S. Supreme Court Decision—Majority Opinion*

The issue before the Supreme Court was whether the 1984 Clarification of Household Waste Exclusion exempted MWC ash produced during combustion from regulation under Subtitle C.<sup>85</sup> The Supreme Court, per Justice Scalia, held that the statute's plain language excluded MWC ash from coverage under the household waste exemption. The Court advanced two reasons for its position. First, the 1984 clarification of the household waste exclusion was not a waste stream exclusion, as had been the case in the exclusion's original form.<sup>86</sup> The Court examined the Clarification of Household Waste Exclusion and found its plain meaning was to exclude facilities which "treat, store, dispose of, or otherwise manage" hazardous waste.<sup>87</sup> The Court noted that there was no mention of MWC ash in the text, and held that the plain language of the 1984 amendment did not create an exclusion for the ash, but only an exclusion for the facility itself.<sup>88</sup> The Court held that in light of the RCRA policy to minimize the present and future risk to the public's health,<sup>89</sup> it "cannot interpret the statute to permit MWC ash sufficiently toxic to qualify as hazardous to be disposed of in ordinary landfills."<sup>90</sup>

The second argument advanced by the Court was that because the 1984 amendment omitted the term "generation", Congress did not include the

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79. *Environmental Defense Fund, Inc. v. City of Chicago*, 112 S. Ct. 1932 (1992).

80. *See* 42 U.S.C. § 6921 (Supp. 1994).

81. *City of Chicago v. Environmental Defense Fund, Inc.*, 113 S. Ct. 486 (1992).

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

83. *City of Chicago v. Environmental Defense Fund, Inc.*, 113 S. Ct. 2992 (1993).

84. *Id.*

85. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1589 (1994).

86. *Id.* at 1591.

87. *Id.*

88. *Id.* at 1592.

89. *See* 42 U.S.C. § 6902(b) (1983 & Supp. 1994).

90. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1592 (1994)

creation of hazardous waste as an activity which was exempt under the exclusion.<sup>91</sup> The Court reasoned that a facility generates hazardous waste because the ash becomes a distinct substance, separate from the original solid waste.<sup>92</sup> The Court examined the definitions of each of the activities included in the exclusion,<sup>93</sup> and noted that generation was not an aspect of any of those activities.<sup>94</sup>

Petitioners argued that the Senate Committee Report recommending passage of the 1984 amendments included generation in the list of exempted activities, which evidenced the intent of Congress to create a waste stream exclusion.<sup>95</sup> The Court rejected that argument, however, and simply remarked that it is the text of the statute which is authoritative, not a Committee Report.<sup>96</sup> Further, the Court compared the 1984 Amendments

91. *Id.*

92. *Id.*

93. "Treatment" is defined as:

any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34) (1983).

"Storage" is defined as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." 42 U.S.C. § 6903(33) (1983).

"Disposal" is defined as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters.

42 U.S.C. § 6903(3) (1983).

"Otherwise Managing" is defined as "collection, source separation, storage, transportation, processing, treatment, recovery, and disposal." 42 U.S.C. § 6903(7) (1983).

94. 114 S. Ct. at 1592.

95. *See id.* at 1593.

96. *Id.* Justice Scalia has shown a great reluctance to resort to legislative history. In *Blanchard v. Bergeron*, Justice Scalia wrote that the use of legislative history:

is neither compatible with our judicial responsibility of assuring reasoned, consistent and effective as application of . . . statutes . . . , nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

489 U.S. 87, 99 (1989) (Scalia, J. concurring in part and concurring in the judgment).

with the Superfund Amendments and Reauthorization Act of 1986.<sup>97</sup> In the Superfund Amendments, Congress amended 42 U.S.C. section 6921 to exempt those who recover methane from landfills from regulation under Subtitle C as generators, transporters, treaters, storers, or disposers of hazardous waste.<sup>98</sup> The Court concluded that this example indicated that if Congress had intended to create a waste stream exclusion in the 1984 Amendments, it was aware of how to do so.<sup>99</sup>

Finally, the Court rejected the argument that it should defer to the EPA interpretation, in accordance with *Chevron U.S.A. v. Natural Resources Defense Council*,<sup>100</sup> because the text of the Clarification of the Household Waste Exclusion is unambiguous.<sup>101</sup> The Court, acknowledging RCRA's twin goals of fostering resource recovery and preventing contamination, stated that, "It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text."<sup>102</sup>

### *Dissenting Opinion*

The Dissent, per Justice Stevens, argued that the Clarification of Household Waste Exclusion encompasses MWC ash.<sup>103</sup> Justice Stevens presented two reasons for his position. First, he concluded that the 1984 amendment was intended to be a clarification, and not a modification or renunciation.<sup>104</sup> Justice Stevens offered the Senate Committee Report,<sup>105</sup> which recommended passage of the amended version of section 3001(i), as evidence that Congress intended to maintain the existing exclusion, but to extend its coverage to the mixing of household waste and other non-hazardous wastes.<sup>106</sup>

97. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1593 (1994). See Pub. L. No. 99-499, § 124(b), 100 Stat. 1689.

98. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1593 (1994).

99. *Id.* (citing *Keene Corp. v. United States*, 113 S. Ct. 2035, 2040 (1993) ("[I]t is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another.")).

100. 467 U.S. 837 (1984).

101. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1594 (1994). The Court chose not to take up the question of whether a memorandum, like the one issued by the EPA on MWC ash, should be accorded any less deference under *Chevron* than a rule in the Federal Register of the Code of Federal regulations. *Id.*

102. *Id.*

103. *Id.* (Stevens, J., dissenting) (Justice Stevens was joined by Justice O'Connor in dissent).

104. See *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1596 (1994) (Stevens, J., dissenting).

105. S. REP. NO. 984, 98th Cong., 2nd Sess. 61 (1983).

106. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1596 (1994) (Stevens, J. dissenting). The Senate Report states that the "[n]ew section [3001(i)] clarifies

Justice Stevens disputed the majority's conclusion that Congress intended to regulate MWC ash under Subtitle C because it left the term "generation" out of the statute's text. Justice Stevens noted that the Senate Committee Report had included "generation" in the statute,<sup>107</sup> and he criticized the majority for refusing to give any weight to that Report.<sup>108</sup>

Finally, Justice Stevens found that the text of the Clarification of Household Waste exclusion was ambiguous, because there was "substantial tension" between the broad definition of "hazardous waste generation" and the language of the household waste exclusion.<sup>109</sup> Justice Stevens concluded that both provisions could be read to refer to the same activity.<sup>110</sup> He preferred to give effect to the interpretation of the statute that includes MWC ash in the household waste exclusion because it respects the title of the 1984 amendment as a "clarification", explains why the legislative history fails to delineate an intent to place new burdens on municipal waste incinerators, and defers to the interpretation given to the exclusion by the EPA.<sup>111</sup>

## ANALYSIS

### *The Language of the Statute Is Ambiguous Because It Can Be Read to Include the Creation of MWC Ash in the Household Waste Exclusion*

The Supreme Court viewed the omission of the term "generation" from the 1984 amendment to the household waste exclusion as determinative of

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the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and nonhazardous waste from other sources." *Id.* (citing S. REP. NO. 284).

107. 114 S. Ct. at 1596.

108. Justice Stevens wrote:

The majority's refusal to attach significance to "a single word in a committee report," reveals either a misunderstanding of, or lack of respect for, the function of Legislative committees. The purpose of the committee report is to provide the Members of Congress who have not taken part in the committee's deliberations with a summary of the provisions of the bill and the reasons for the committee's recommendation that the bill should become law. The report obviously does not have the force of law. Yet when the text of a bill is not changed after it leaves the committee, the Members are entitled to assume that the report fairly summarizes the proposed legislation. What makes this Report significant is not the single word "generation," but the unmistakable intent to maintain an existing rule of law. The omission of the single word "generating" from the statute has no more significance than the omission of the same word from the text of the 1980 regulation.

*Id.* at 1597 n.7.

109. *Id.* at 1597.

110. *Id.*

111. *Id.* at 1598.

Congress's intention to place MWC ash beyond the scope of the exclusion.<sup>112</sup> This narrow reading of the statutory text, however, creates only an illusion of unambiguity.<sup>113</sup> An interpretation which allows the creation of MWC ash to fall within the household waste exclusion is readily available from the language of the statute, and the circumstances surrounding its adoption.<sup>114</sup>

First, the term "treatment" can be argued to cover the process of turning household and non-hazardous commercial and industrial waste into ash.<sup>115</sup> "Treatment" is defined as "any method, technique or process, including neutralization, designated to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable to recovery, amenable for storage, or reduced in volume."<sup>116</sup>

The incineration of solid waste falls squarely within the definition of "treatment". Combustion decomposes the combustible elements within the solid waste, changing those elements from a solid state to a gaseous or steam form.<sup>117</sup> This process clearly constitutes a physical change, and likely a chemical change as well. Further, the purposes for combustion fall within those described in the definition of "treatment". The primary purpose of combustion is to reduce the volume of the solid waste so that less landfill space is taken in disposal.<sup>118</sup> The second purpose of incineration is to make the solid waste amenable to recovery by turning it into electricity or steam for use as energy.<sup>119</sup>

The Court held that these facilities were not "treating" the solid waste, but rather were creating a hazardous waste when they incinerate the non-hazardous household and commercial and industrial waste.<sup>120</sup> Under the

112. *Id.* at 1593.

113. *See id.* at 1597 (Stevens, J., dissenting).

114. *See* Brief for Petitioner at 15. *City of Chicago v. Environmental Defense Fund, Inc.*, 985 F.2d 303 (7th Cir. 1993) (No. 92-1639).

115. It can also be argued that the phrase "or otherwise managing" can be used to cover the creation of MWC ash. *See* *Environmental Defense Fund, Inc. v. Wheelabrator Tech.*, 725 F. Supp. 758, 764 (S.D.N.Y. 1989).

116. 42 U.S.C. § 6903(34) (1988).

117. *See* Brief for Petitioner at n. 6., *City of Chicago v. Environmental Defense Fund*, 985 F.2d 303 (7th Cir. 1993) (No. 92-1639).

118. Valenti, *supra* note 7, at 64.

119. *Id.* In a survey of 39 waste-to-energy facilities, 25 facilities reported that they generated approximately 3.8 billion kilowatt hours of electricity annually, enough to service 1.5 million homes. For each ton of solid waste which is combusted, the equivalent of approximately one barrel of oil is produced in energy. Marc Rogoff, *What Goes Around Comes Around*, AMERICAN CITY AND COUNTY, April, 1994, at 36.

120. *See* *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1592 (1994).

regulatory framework of RCRA, however, these facilities are not “generating” hazardous waste.<sup>121</sup> Under RCRA, household waste becomes a solid waste when it is discarded by the household (or the equivalent entity).<sup>122</sup> When the facility incinerates that solid waste it is treating it.<sup>123</sup> The ash which remains is the residue of the original solid waste.<sup>124</sup> It is still the same solid waste, it is simply in a reduced and altered state.<sup>125</sup> In order to claim that a municipal waste combustor is “generating” hazardous waste, it would be necessary to consider the MWC ash as being part and parcel a different substance from the original solid waste.<sup>126</sup> That line of reasoning requires a conceptual termination of the existence of the original solid waste in order to claim that a new substance has been formed from its incineration.<sup>127</sup> If that were the case, then incineration would have to be considered the disposal of that solid waste, rather than its treatment.<sup>128</sup> That position is untenable at best.

The second reason that the term “generation” is not necessary to exclude MWC ash from regulation under Subtitle C is that Congress simply codified the 1980 household waste exclusion, and extended its coverage to include household waste which is combined with non-hazardous waste.<sup>129</sup> The 1980 household waste exclusion stated:

- (b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:
- (1) Household wastes, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g. refuse-derived fuel) or reused. “Household waste” means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)<sup>130</sup>

That regulation did not mention the term “generation”, yet it was interpreted to be a waste stream exclusion, and explicitly applied to the waste residue from incineration.<sup>131</sup>

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121. “Generation” is defined as “the act or process of producing hazardous waste.” 42 U.S.C. § 6903(6) (1983).

122. See 42 U.S.C. § 6903(27) (1983); See also *American Mining Congress v. Environmental Protection Agency*, 824 F.2d 1177, 1183, 1193 (D.C. Cir. 1987).

123. See *supra* notes 117-19 and accompanying text.

124. Brief for Petitioner at 15.

125. *Id.*

126. See *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345, 351 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992).

127. *Id.*

128. See Brief for Petitioner at 15.

129. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1596 (1994) (Stevens, J., dissenting).

130. 45 Fed. Reg. 33,120 (1980).

131. 45 Fed. Reg. 33,099 (1980) (“Since household waste is excluded in all phases of its

The statute should be interpreted as adopting language similar to the 1980 regulation.<sup>132</sup> First, neither the statute, nor any Committee Report, make any mention of a congressional desire to narrow the scope of the 1980 exclusion.<sup>133</sup> The Supreme Court has held that if no evidence exists that Congress intended to repudiate a preexisting administrative interpretation, it is presumed to have accepted that interpretation.<sup>134</sup> Further, the language of the 1984 amendment closely resembles the 1980 regulation.<sup>135</sup> Justice Stevens noted in his dissent that “in 1980 the EPA referred to the exclusion of household waste ‘in all phases of its management,’” while the 1984 statute lists all phases of the incinerator’s management.<sup>136</sup>

*The Language of the Statute Is Ambiguous in Light of the Stated Purposes of RCRA*

The interpretation of RCRA adopted by the Supreme Court cannot be said to be the unambiguous intent of Congress because it clearly nullifies some of the primary purposes of RCRA.<sup>137</sup> The Supreme Court has held that in interpreting a statute, the purpose of that statute plays an important role in determining what the statute means.<sup>138</sup> In *Crandon v. United States*, the Court noted that when it attempts to determine the meaning of a statute, it “look[s]

management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste.”). See *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1595 (1994) (Stevens, J., dissenting).

132. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1596 (1994) (Stevens, J., dissenting). “A common-sense reading of the statutory text in light of the Committee Report and against the background of the 1980 regulation reveals an obvious purpose to preserve, not to change, the existing rule.” *Id.* at 1597.

133. *Environmental Defense Fund Inc., v. Wheelabrator Tech.*, 725 F. Supp. 758, 765 (S.D.N.Y. 1989). On the contrary, the Report of the Senate Committee made it abundantly clear that it intended a waste stream exclusion to be created. The report stated:

All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . .

S. REP. NO. 284, 98th Cong., 2nd Sess. 61 (1983).

134. See *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) (“congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.”). See also *Environmental Defense Fund, Inc. v. Wheelabrator Tech.*, 725 F. Supp. 758, 765 (S.D.N.Y. 1989) (“Congress clearly knew of the EPA’s interpretation of the 1980 regulation, and had it disagreed, would have made clear its disagreement.”).

135. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1595–96 (1994) (Stevens, J., dissenting).

136. *Id.*

137. See Brief for Petitioner at 15.

138. *Crandon v. United States*, 494 U.S. 152 (1990).



not only to the particular statutory language, but to the design of the statute as a whole and to its object or policy."<sup>139</sup> The Court has also stated that "it is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."<sup>140</sup>

The Court's interpretation defeats two well stated purposes of RCRA. First, holding that MWC ash is regulated under Subtitle C eviscerates the statutory purpose of fostering resource recovery.<sup>141</sup> RCRA states that:

The objectives of this chapter are to promote protection of health and the environment and to conserve valuable material and energy resources by—  
(1) providing technical and financial assistance to state and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques . . . ;

. . . .

(10) promoting the demonstration, construction and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water and land resources; and  
(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.<sup>142</sup>

Regulating MWC ash under Subtitle C will effectively eliminate any incentive for resource recovery.<sup>143</sup> The comparative costs of disposing of MWC

139. *Id.* at 158.

140. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

141. *See* Brief for Petitioner at 17. *See also* *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419, 422 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992).

142. 42 U.S.C. § 6902(1), (10) & (11) (1983). Congress has made that purpose clear in other parts of RCRA as well. In §6901 (c), the statute states: "(1) millions of tons of recoverable material which could be used are buried each year. . . ; (3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments." 42 U.S.C. § 6901 (c) (1), (3).

Further, in § 6901 (d), the statute notes that: "(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and (3) technology exists to produce usable energy from solid waste". 42 U.S.C. § 6901 (d) (2), (3), (1988).

Finally the EPA has commented that "combustion of municipal solid waste, particularly through waste-to-energy facilities, can be an important component of a local government's waste management practices." 59 Fed. Reg. 29,373 (1994).

143. Brief for Petitioner at 17 (citing an EPA statement).

ash in Subtitle C landfills is substantially higher than disposal in Subtitle D landfills, which is allowed if MWC ash is considered to fall within the household waste exclusion.<sup>144</sup> On average, it costs roughly \$42 per ton to dispose of the ash in a Subtitle D landfill.<sup>145</sup> To dispose of the ash in a Subtitle C landfill, however, costs an average of ten times more, or \$453 per ton.<sup>146</sup>

A facility could always dispose of the unrecovered solid waste in a Subtitle D landfill because that waste is either by definition non-hazardous, or it falls within the household waste exclusion.<sup>147</sup> The practical effect of regulating MWC ash under Subtitle C, therefore, is to provide a strong economic incentive to abandon resource recovery, and dispose of the unrecovered waste in a Subtitle D landfill.<sup>148</sup> It is highly unpersuasive to contend that Congress unambiguously gutted one of the major objectives of RCRA.<sup>149</sup> Had this been its intent, it would certainly have made that intention explicit.<sup>150</sup> Absent an explicit declaration of that intent, the Supreme Court should not have simply ignored the stated purpose of RCRA.

The second purpose which the Supreme Court's interpretation defeats is the policy of reducing reliance on landfilling as a disposal method, and preserving the existing landfill space as a resource.<sup>151</sup> Congress has stated that:

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

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144. *Id.*

145. *Supreme Court Ruling Favorable To Seiler*, PR NEWSWIRE, May 6, 1994, available in LEXIS, Environment library, News file.

146. *Id.* It is important to note that the effect of the case will be felt immediately because the EPA has told operators to assume that the ash is hazardous unless it is tested and found to be non hazardous. *Cities, Industry Ask EPA to Extend Implementation Period for Ash Standards*, DAILY REPORT FOR EXECUTIVES, June 2, 1994, at A104.

147. *See City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1597 (1994) (Stevens, J., dissenting).

148. *See Brief for Petitioner at 17.* In fact, some cities have already stated that they may close their waste-to-energy facilities because of the increased cost. *Supreme Court: Ash From Trash Is Hazardous Waste; This Means Cities That Burn Trash For Fuel Cannot Just Dump The Ash. Officials Say Some Trash-Burning Plants May Close*, ORLANDO SENTINEL, May 3, 1994, at A10.

149. *See Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419, 423 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992).

150. *Id.*

151. This purpose is somewhat interconnected with the purpose of promoting resource recovery. Congress noted that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste . . ." 42 U.S.C. § 6941 (a) (3) (1988).

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.<sup>152</sup>

The need to preserve landfill space is becoming increasingly urgent.<sup>153</sup> The EPA estimates that by the year 2003, 70% of the landfills in the United States will have reached capacity.<sup>154</sup> Since 1978, 14,000 of the 20,000 municipal solid waste (MSW) landfills operating at that time have closed, leaving only 6,000 MSW landfills operating currently.<sup>155</sup>

When hazardous waste landfills are considered specifically, the problem becomes particularly acute. In 1987, the EPA estimated that the United States had a hazardous waste landfill capacity of 34 million tons.<sup>156</sup> Approximately 13 million tons of MWC ash are produced each year.<sup>157</sup> If this ash is required to be disposed of in hazardous waste landfills, in light of the difficulty in siting new landfills, the capacity of existing landfills would be rapidly outstripped, resulting in a severe crisis in the disposal of hazardous waste.<sup>158</sup> It seems highly unlikely that Congress intended to abandon its efforts to preserve our nation's landfill capacity, and undertake to throw the country into a potential hazardous waste disposal crisis. Once again, if this were the intent of Congress, it would have certainly commented on the issue.<sup>159</sup> In absence of such a comment, it can hardly be said that Congress unambiguously intended to have MWC ash disposed of as a hazardous waste, because that would be in clear contravention of RCRA's stated policy of preserving landfill capacity.<sup>160</sup>

152. 42 U.S.C. § 6901 (b) (1), (8) (1988).

153. *Municipal Incinerator Ash: Hearing on H.R. 2517, H.R. 4255 and H.R. 4357 before the Subcomm. on Transportation, Tourism and Hazardous Materials of the Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988) (statement of Rep. Thomas A. Luken).

154. *Id.*

155. RECYCLING AND INCINERATION, *supra* note 3, at 4. The reasons for which these landfills closed ranges from environmental dangers to simply having reached capacity. Unfortunately, new landfills are not being sited as quickly, which will have an effect on capacity. *Id.*

156. *Hearing on 2162, supra* note 69 (statement of David Sokol). In the northeast United States there is only one hazardous waste landfill facility. Stephen L. Kass & Michael B. Gerrard, *The Return of Lender Liability*, N.Y. L.J., Feb 25, 1994, at 3.

157. Valenti, *supra* note 7, at 64.

158. Of course not all MWC ash will show a characteristic of hazardous waste, but the possibility of a substantial amount of it showing a characteristic must be taken into consideration. See *Hearing on H.R. 2162, supra* note 69.

159. See *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419, 423 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992).

160. *Id.*

*Deference Should Have Been Given to the EPA Under the Chevron Principle*

It is a well-settled principle of judicial review that courts will give deference to an agency's reasonable interpretation of the statutes it is entrusted to administer.<sup>161</sup> The Supreme Court, in *Chevron U.S.A. v. Natural Resource Defense Council*, established the standard by which courts are to review agency interpretations of ambiguous statutes. The Court held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>162</sup>

The rationale behind the doctrine of deference to administrative interpretations is twofold. First, and primarily, is the notion that decisions which require evaluation of competing policies, in the absence of express congressional guidance, are simply more appropriately made by administrative agencies.<sup>163</sup> The Court in *Chevron* explained that "while agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."<sup>164</sup>

The second reason behind the doctrine of deference is the expertise of the administrative agencies in determining the proper interpretation in light of competing policies.<sup>165</sup> The Court in *Chevron* explained that deference to administrative interpretations

has been consistently followed by this Court whenever a decision as to the reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.<sup>166</sup>

Therefore, absent express congressional direction, general deference should be given to those who have been delegated authority to implement the statutes because they are more appropriately granted power to make policy choices,

161. *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1401 (1992).

162. *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842-43 (1984).

163. *See Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 524, 2534 (1991) ("[j]udicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

164. 467 U.S. at 865 ("federal judges— who have no constituency—have a duty to respect legitimate policy choices by those who do").

165. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990) ("[T]he judgments about the way the real world works that have gone into the [agency's interpretation] are precisely the kind that agencies are better equipped to make than are courts.").

166. *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 844 (1984).

and better suited to make those choices than the courts.<sup>167</sup>

Since *Chevron*, the principle of deference has been narrowly interpreted to be inapplicable whenever, “[e]mploying traditional tools of statutory construction,” the court can find the proper interpretation of the statute in question.<sup>168</sup> It has also been implied that courts need not defer to an agency’s interpretation if there is a “pure question of statutory construction for the courts to decide.”<sup>169</sup> In general, however, the Court has failed to establish a consistent approach in applying the *Chevron* principle.<sup>170</sup>

In *City of Chicago*, the Supreme Court implicitly accepted this narrow interpretation of *Chevron* by treating the question before it as simply one of statutory construction.<sup>171</sup> This interpretation renders *Chevron* virtually meaningless for two reasons. First, courts would almost never get to the point where they must look to the administrative interpretation in order to find the meaning of a statute.<sup>172</sup> As Justice Scalia noted in *Cardoza-Fonseca*, “this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue.”<sup>173</sup> This defeats the main purpose of deference, which is to place the interpretive function in the hands of those who have the expertise to make that determination.<sup>174</sup> The second reason that this interpretation weakens *Chevron* is that it allows for such inconsistent applications of the doctrine that it loses its pragmatic function of allowing private and public actors to rely on agency interpretations to guide their activities.<sup>175</sup>

The controversy in *City of Chicago* calls for a more broadly interpreted doctrine of deference. Rather than making deference a last resort, deference should be given whenever the statute is silent on the question at hand, and the agency has been delegated authority to implement the statute in that regard

167. *See id.*

168. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

169. *Id.* at 454 (Scalia, J., concurring in judgment).

170. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1325 (1986) (noting that the Supreme Court has “oscillated between activism and restraint in reviewing agency decisions”).

171. *See supra* notes 100-102 and accompanying text.

172. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in judgment).

173. *Id.*

174. *See Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 865 (1984).

175. For instance, many incinerator operators relied on the fact that the EPA had never subjected MWC ash to Subtitle C regulation. A doctrine of deference affords these entities the luxury of knowing what a statute means in terms of their specific activity. If the courts are permitted to simply ignore an agency interpretation merely because they can find another interpretation, that virtually destroys the ability of others to rely on agency interpretations in guiding their activities.

(assuming the interpretation is permissible).<sup>176</sup> No distinction between pure questions of law and mixed questions of law should be drawn.<sup>177</sup> Deference should be given to the administrative agency when a matter within the competence of the agency is at issue.<sup>178</sup>

The situation in *City of Chicago* was appropriate for judicial deference to the EPA's interpretation of the household waste exclusion for several reasons. First, the statute was silent or ambiguous with respect to whether MWC ash is covered under the household waste exclusion. As the Court noted, RCRA makes no mention of MWC ash, or what should be done with it.<sup>179</sup> In this respect, the statute should be considered silent on the issue. At worst, the statute is ambiguous.<sup>180</sup> There is a question as to whether the creation of MWC ash is covered by the term "treatment",<sup>181</sup> as well as a question concerning the close resemblance of the statutory language and the 1980 regulation.<sup>182</sup>

Second, the EPA's interpretation is a permissible one.<sup>183</sup> An agency's interpretation is permissible if it is a construction which is "rational and consistent with the statute."<sup>184</sup>

The EPA was required to balance the competing policies of protecting health and resource recovery.<sup>185</sup> The EPA does not have any solid proof that MWC

176. See *Dole v. United Steelworkers of America*, 494 U.S. 26, 44 (1990) ("Unless Congress has directly spoken to the issue . . . OMB's interpretation is of the Act entitled to deference").

177. Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV., 2071, 2096 (1990).

178. *Id.* The idea behind this theory is that of comparative competence. When the administrative agency is in a superior position to decide how certain statutory language should be interpreted, the courts should simply give deference where deference is due. *Id.*

179. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1592 (1994).

180. It is interesting to note that virtually everyone besides the Supreme Court felt that the statute was ambiguous. In 1985, the EPA states that "the statute is silent as to whether hazardous residues from burning combined household and non-household non-hazardous waste are hazardous waste," and that "the legislative history does not directly address this question." 50 Fed. Reg. 28,725 (1985). Also Representative Thomas A. Luken stated that, "the very basic question of whether or not ash should be regulated under subtitle D, as a solid waste, or under subtitle C as a hazardous waste, remains ambiguous in the statute." *Hearing on H.R. 2162, supra* note 69.

181. See *supra* notes 112-28 and accompanying text.

182. See *supra* notes 129-36 and accompanying text.

183. The question of whether the EPA memorandum is the type of agency interpretation to which deference may be afforded is beyond the scope of this Note. For a short discussion supporting giving deference to the memo, see *Environmental Defense Fund, Inc. v. City of Chicago*, 985 F.2d, 303, 304-5 (7th Cir. 1993) (Ripple, J., dissenting), *aff'd*, 114 S. Ct. 1588 (1994).

184. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987). See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988).

185. See 42 U.S.C. § 6902(a) (Supp. 1994).

ash is a health risk,<sup>186</sup> and recent changes in the requirements for Subtitle D landfills substantially improves the safety of those landfills.<sup>187</sup> There can be little doubt that the interpretation given by the EPA is a rational one.<sup>188</sup> Finally, as has been discussed previously in the Analysis section of this Note, the interpretation is consistent with the statute.<sup>189</sup>

Finally, the policy determinations required in interpreting the household waste exclusion are more appropriately made by the EPA.<sup>190</sup> One particular factor which makes the EPA superior to the courts in interpreting RCRA is that circumstances surrounding the household waste exclusion change.<sup>191</sup> Congress is incapable of constantly amending statutes to reflect changes.<sup>192</sup> Administrative agencies, however, are able to respond to these changes and most effectively implement the purposes of the statute.<sup>193</sup> In administering the household waste exclusion, the EPA has been faced with new information regarding the toxicity of MWC ash,<sup>194</sup> as well as the development of safer landfilling techniques.<sup>195</sup> Acknowledging the superiority of the EPA in making these policy determinations is simply giving deference where deference is due, and gives meaning to the principle of deference established by *Chevron*.

186. See 50 Fed. Reg. 28, 726 (1985).

187. See *High Court Ruling—Once Feared—Gets Ho-Hum Response from Industry*, INTEGRATED WASTE MGMT., May 11, 1994, at 1; *EPA Ash Decision Provides Boost For Waste-Energy, Says IWSA's Burton*, INTEGRATED WASTE MGMT., Sept. 30, 1992, at 1.

188. This is not to say that the interpretation is the best one. However, in light of the information which is before the EPA, this interpretation seems a valid compromise between the two primary objectives of RCRA.

189. See *supra* notes 112-60 and accompanying text.

190. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1598 (1994) (Stevens, J., dissenting). In his dissent, Justice Stevens concluded that:

The majority's decision today may represent sound policy. Requiring cities to spend the necessary funds to dispose of their incinerator residues in accordance with the strict requirements of Subtitle C will provide additional protections to the environment. It is also true, however, that the conservation of scarce landfill space and the encouragement of the recovery of energy and valuable materials in municipal wastes were major concerns motivating RCRA's enactment. Whether those purposes will be disserved by regulating municipal incinerators under Subtitle C, and, if so, whether environmental benefits may nevertheless justify the costs of such additional regulation are questions of policy that we are not competent to resolve.

*Id.*

191. See Sunstein, *supra* note 177, at 2088.

192. See *id.*

193. See *id.* Sunstein argues that administrative bodies are the superior arena for responding to changed circumstances because these agencies combine the judicial virtue of responding to individual circumstances with the legislative virtue of public accountability. *Id.* at 2089.

194. See 55 Fed. Reg. 17,303 (1990).

195. See 56 Fed. Reg. 50,978 (1991).

## CONCLUSION

In *City of Chicago v. Environmental Defense Fund*, the Supreme Court handed down a decision which significantly impacts the future of resource recovery in the United States. While it is probable that Congress will enact legislation treating MWC ash as a "special waste",<sup>196</sup> it is not certain, nor should Congress have to do this. The interpretation of section 3001(i) of the Solid Waste Disposal Act given by the Court virtually ignores the purpose of the Resource Conservation and Recovery Act.<sup>197</sup> The Court bordered on legislating from the bench by choosing to give preference to protecting health over resource recovery, a task rightfully belonging with either Congress or the EPA.<sup>198</sup> The Court's focus on the omission of the word "generation" from the statutory text provides a severely strained interpretation of the statute.<sup>199</sup> The Court should have deferred to the EPA's interpretation of the household waste exclusion.<sup>200</sup> This was an ideal case to reaffirm the doctrine of deference to administrative interpretations.

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196. See *Slants & Trends*, SOLID WASTE REP., July 7, 1994, available in LEXIS, Environment library, News file; *Swift Willing to Push Ash Legislation to Alter Effects of Supreme Court Ruling*, DAILY REP. FOR EXECUTIVES, July 1, 1994, at A125.

197. See *supra* notes 137-60 and accompanying text.

198. *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S. Ct. 1588, 1592 (1994).

199. See *supra* notes 112-36 and accompanying text.

200. See *supra* notes 161-96 and accompanying text.



