ARTICLES

CITY OF CHICAGO v. ENVIRONMENTAL DEFENSE FUND: SEARCHING FOR PLAIN MEANING IN UNAMBIGUOUS AMBIGUITY*

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INTRODUCTION

On May 2, 1994, the Supreme Court ruled in City of Chicago v. Environmental Defense Fund,¹ that municipal waste combustion ash generated by a resource recovery incinerator is not automatically exempt from hazardous waste regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA).² For environmental lawyers who focused on the “ash issue” for the first time on the day that the Court handed down its ruling, the Court’s reasoning likely seemed entirely unremarkable. No doubt the environmental law bar perceived a bittersweet irony in seeing Justice Scalia (not known for his solicitude for environ-

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* This Article finds its impetus in a talk at the New York University School of Law on the City of Chicago v. Environmental Defense Fund case by one of the authors, Professor Richard Lazarus, who argued the case before the Supreme Court on behalf of the Environmental Defense Fund. The talk was part of the N.Y.U. Environmental Law Journal Solid Waste Colloquium held at New York University School of Law on March 4, 1994. At that time, the case was still pending before the Court. Claudia Newman, who greatly assisted Professor Lazarus in the case before the Court, worked with him in converting that earlier presentation into an article that analyzes the Court’s decision and its aftermath. The views expressed in this Article are those of the authors alone and not necessarily those of the Environmental Defense Fund.

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¹ 114 S. Ct. 1588 (1994).

² Justice Scalia wrote the opinion of the Court demonstrating a strong reliance on the plain meaning of section 3001(i) for his conclusion. Id. at 1591-92. Justices Stevens and O’Connor dissented from the opinion, claiming that “the relevant statutory text is not as unambiguous as the Court asserts.” Id. at 1598.
mental concerns) write the Court’s opinion in favor of the Environmental Defense Fund. But the opinion otherwise likely seemed to be no more than another in a series of cases reflecting the Court's present fascination with “plain meaning” at the expense of judicial consideration of other indicia of congressional intent (e.g., legislative history) in determining a statute’s meaning.

Initial appearances, however, can be deceiving. Indeed, most persons following the case had expected the City of Chicago to prevail in its contention that section 3001(i) of RCRA exempted municipal waste combustion ash from Subtitle C hazardous waste regulation. The only question was on which of two alternative bases the City would win: either (1) as the City principally argued, and the Second Circuit held, because section 3001(i)’s “plain meaning” supported the City’s position; or (2) as the United States argued, because the statutory language was ambiguous and the Court should therefore defer to the Environmental Protection Agency's (EPA) authoritative interpretation, which supported Chicago’s claimed exemption. For these rea-

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3 See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (Scalia, J.) (holding that South Carolina’s Beachfront Management Act, which prohibits the building of any structure in designated “coastal zones,” automatically constitutes a taking of property when the regulation deprives the owner of all economically viable use of the land); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (Scalia, J.) (denying standing to challenge Department of Interior action under the citizen suit provision of the Endangered Species Act without a showing that the agency action impaired a “concrete interest” held by the plaintiff); Lujan v. National Wildlife Fed’n, 497 U.S. 871 (1990) (Scalia, J.) (denying standing to challenge Department of Interior action opening up certain public lands to mining activities upon a showing by the plaintiff that two of its members had visited “in the vicinity” of certain affected federal land).

4 There were two environmental plaintiffs in the case: the Environmental Defense Fund and Citizens for a Better Environment. Because the Environmental Defense Fund was the lead plaintiff, both plaintiffs are referred to collectively in this Article as the “Environmental Defense Fund” or “EDF.”

5 See James P. Brudney, Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response, 93 Mich. L. Rev. 1, 7-8 (1994) (arguing that courts should give more weight to legislative history).


7 Brief for the City of Chicago at 14-17, City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994) (No. 92-1639) [hereinafter Chicago Brief].


sons, virtually every law review article on the issue had concluded that the City of Chicago's view should prevail.\textsuperscript{10}

This Article discusses what prompted the Court to rule instead in the Environmental Defense Fund's favor and the likely impact of that ruling. The Article seeks to describe candidly the litigation hurdles and resulting strategies of both sides and the battle over images that ultimately played a significant role in the advocacy of the parties and the United States. The Article also seeks to respond to claims that the Court's ruling will ultimately hinder environmental protection both by promoting unsafe disposal of household waste and by prompting courts in other cases to ignore legislative history favorable to environmental plaintiffs.

Part I of this Article provides the basic factual and regulatory backdrop to the Supreme Court's decision. Part II discusses the litigation before the Supreme Court. Part III describes the Supreme Court's decision and comments briefly on both its likely impact on resource recovery facilities, as well as its broader precedential impact on judicial construction of environmental statutes. Part IV describes some of the developments in Congress and EPA in the aftermath of the Supreme Court's ruling. Finally,

\textsuperscript{10} See Bradley K. Groff, Note, \textit{Burned-If-We-Do, Burned-If-We-Don't: Treatment of Municipal Solid Waste Incinerator Ash under RCRA's Household Waste Exclusion}, 27 GA. L. REV. 555, 558 (1993) (stating "in light of the policy behind RCRA and the plain language of the household waste exclusion, [municipal] incinerator ash should be excepted from burdensome hazardous waste regulation"); Hillary A. Sale, Note, \textit{Trash, Ash, and Interpretation of RCRA}, 17 HARV. ENVT'L. L. REV. 409, 411 (1993) (stating "sound principles of statutory interpretation and important public policy concerns suggest that . . . all ash derived from the incineration of non-hazardous waste [should be] exempt from Subtitle C of RCRA"); Jane Ellen Warner, Student Comment, \textit{The Household Waste Exclusion Clarification; 42 U.S.C. Section 6921(i): Did Congress Intend to Exclude Municipal Solid Waste Ash from Regulation as Hazardous Waste Under Subtitle C?}, 16 W. NEW ENG. L. REV. 149, 179 (1994) (stating "[f]rom [a] consideration of appropriate legislative history, it appears quite clear that ash falls within section 3001(i) and should be excluded from regulation under Subtitle C of RCRA"). There is only one article that does not embrace Chicago's view entirely. See Benjamin Hershkowitz, Student Article, \textit{Analysis of the Household Waste Exclusion for Municipal Solid Waste Incinerator Ash — 42 U.S.C. § 6921(f),} 2 N.Y.U. ENVT'L. L.J. 84 (1993). But even that article concludes only that it is "unclear" whether the statute has the plain meaning claimed by Chicago, which would seem to suggest that the statute is at least ambiguous and therefore Chicago should win based on judicial deference to EPA. \textit{Id.} at 116. That article, however, instead curiously sidesteps the ultimate issue. See \textit{id.} (stating that "it is not within the scope of this Article to answer the question of how to interpret the household waste exclusion").
there is a brief conclusion commenting on the role of posturing and compromise in environmental law and litigation.

I

RESOURCE RECOVERY FACILITIES AND THE ASH PROBLEM

During the 1980s, municipalities increasingly turned to resource recovery facilities as the technological panacea to the solid waste crisis then looming before most major metropolitan areas. By producing energy from waste incineration, such facilities could reduce both the amount (by weight and volume) of solid waste that required disposal and the nation's dependency on fossil fuels, including the adverse environmental effects associated with their exploitation.

The principles of conservation of mass, however, soon revealed resource recovery facilities' downside. A resource recovery facility significantly reduces the amount of waste, to be sure, but it cannot eliminate the waste problem. It instead creates new and different kinds of waste disposal problems: (1) air emissions; and (2) combustion ash residue. The incineration process can, moreover, successfully break down the chemical compounds that present some of the hazards within those wastes. But incineration cannot eliminate them all — like those presented by basic chemical elements such as heavy metals that plainly cannot be further broken down by normal combustion processes. Incineration can also create new hazards by produc-

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11 The effective reduction achieved by resource recovery facilities, however, is substantially less than that frequently stated by champions of those facilities. A recent study of the issue prepared by the National League of Cities explains:

Often, the claim is made that 'incineration reduces the volume of waste by 75%' or some other higher percentage. This claim can only be supported by making some misleading comparisons between the volume and weight of a typical ton of MSW and volume and weight of incinerator ash. The claim cannot be supported when you consider the overall garbage disposal needs of the entire community. . . . [T]he bottom line is that once [a city] builds a [waste to energy] facility, the community will still need approximately 40 percent of the landfill volume it would have needed without incineration.

ing new compounds and by increasing the concentrations and leachability of those toxic constituents present in ash residue.  

Even assuming, therefore, that the environmental benefits of resource recovery exceed the environmental costs, those costs remain significant. Moreover, because there is no reason to suppose that those subject to these newly created costs are identical to those receiving the benefits of resource recovery, significant opposition to resource recovery is inevitable. The siting of these and other kinds of hazardous waste treatment, storage, and disposal facilities has, for this very reason, proven increasingly problematic.  

Even more broadly, the economic viability of resource recovery facilities is unavoidably affected adversely to the extent that the facilities must comply with air pollution requirements restricting their emissions and land disposal restrictions applicable to their ash residue.

The City of Chicago case is significant, therefore, because it concerns the regulatory status of the ash residue, i.e., how much municipalities have to pay to arrange for disposal of that residue. The Environmental Defense Fund (EDF) brought the lawsuit against Chicago, along with a parallel lawsuit filed in New York against a private resource recovery facility, Wheelabrator Technologies, upon EDF's determining that the ash residue constituted a "hazardous waste" within the meaning of RCRA. Under RCRA, the generation, transportation, treatment, storage, and disposal of "hazardous wastes" are subject to a comprehensive


regulatory regime contained within Subtitle C of RCRA. By contrast, "solid wastes" are subject only to RCRA Subtitle D, which imposes a significantly less stringent set of regulations pertaining only to waste disposal.

The scientific basis for EDF's claim was its conclusion that the heavy metals that concentrated in the ash residue would cause the ash to flunk EPA's toxicity characteristic analysis, which is one of several bases for determining when waste is "hazardous." The reason why the ash was likely to flunk that test, according to EDF, was that the heavy metals were especially susceptible to leaching from ash — because of that material's high ratio of surface area to mass — which is also the focus of concern of EPA's analysis for waste toxicity.

The City of Chicago's principal response to EDF's claim was that Congress had exempted municipalities from disposing of the ash residues as a hazardous waste in order to maintain the economic viability of resource recovery facilities. The City was therefore not disputing before the Supreme Court the validity of EDF's scientific proffer in the lower courts. Rather, the City was willing to assume that the ash residue was in fact hazardous. The City's legal contention was that, regardless of the hazard of the ash residue, Congress intended to allow the City to dispose of the ash in landfills lacking the safeguards (e.g., double liners and double leachate collection systems) required for hazardous waste disposal.

For those uninitiated in environmental law, the City's legal argument should seem strange, if not bordering on the lunatic. Chicago contended that Congress intended to allow an admittedly hazardous waste to avoid regulation designed to protect the public against its hazards. According to the City, therefore, Congress intended to allow a hazardous waste to be treated, stored, transported, and disposed of throughout the nation pursuant to a legal fiction that the waste did not possess the hazardous characteristics that Chicago admitted it in fact had. The City purported to discover this sweeping exemption in a statute aimed at closing

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18 EDF Brief, supra note 11, at 15-16.
19 Chicago Brief, supra note 7, at 6.
“the last remaining loophole in environmental law”\textsuperscript{21} by promising comprehensive “cradle to grave” regulation of hazardous waste.\textsuperscript{22}

Perhaps, unfortunately, for those battle-scarred in environmental law, there is nothing facially absurd about the City’s contention. This nation’s environmental laws reach far, wide, and deep in their efforts to strike a new relationship between human activity and the natural environment. Many of those who find their activities sharply restricted by those laws claim that their reach is too broad. But, in all events, the political price for their legislative enactment is frequently a multiplicity of exemptions more or less hidden in the statutes’ otherwise aspirational and uncompromising rhetoric and surrounding legislative history.\textsuperscript{23} 

There was, moreover, consensus among the parties in the City of Chicago litigation that Congress had intended to allow EPA to create a significant household waste exemption from RCRA hazardous waste regulation for the benefit of municipalities such as the City of Chicago. Although not provided for explicitly in the statutory language, the parties did not dispute that Congress intended to allow municipalities to dispose of untreated household waste in solid waste landfills not licensed for hazardous waste, regardless of the hazard of that household waste.\textsuperscript{24} EPA had, by regulation, expressly exempted household waste from hazardous waste regulation.\textsuperscript{25} The apparent rationale for that exemption was that only a very small percentage of the large volume of household waste was in fact hazardous, but the cost to municipalities of isolating that small hazardous component for separate disposal would be enormous.\textsuperscript{26}

\textsuperscript{22} See Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2011 n.1 (1992) (“RCRA directs the EPA to establish a comprehensive ‘cradle to grave’ system regulating the generation, transport, storage, treatment, and disposal of hazardous wastes, §§ 6921-6939b, which includes identification and listing of hazardous wastes. § 6921.”).
\textsuperscript{24} See S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976) (stating that hazardous waste regulation “is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances”).
\textsuperscript{25} 40 C.F.R. § 261.4(b)(1) (1994).
Given the existence of a longstanding exemption for household waste prior to combustion, the City’s contention in the City of Chicago litigation immediately becomes more plausible than it initially seemed. The gravamen of the City’s claim was simply that the household waste exclusion should apply to the waste residue produced when the household waste was incinerated, including the incineration of household waste mixed with other types of nonhazardous wastes. To the City, therefore, the issue was not whether Congress intended to create an exemption for household wastes. The issue was instead the far more modest one of whether the exemption that EDF did not contest extended to its logical antecedent: the ash residue.

EPA’s first regulations concerning the household waste exclusion, announced in 1980, also lent support to the City’s claim. The regulation extended the regulatory exemption to “household waste that has been collected, transported, stored, treated, disposed, recovered . . . or reused.” An accompanying Federal Register preamble addressed the issue even more directly: “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.”

EPA’s regulation provided limited assistance to municipalities such as Chicago, however, for two reasons: (1) the absence of any explicit statutory support; and (2) its inapplicability to resource recovery facilities that burned household waste mixed with other types of municipal waste. Municipalities were preparing in the 1980s to invest huge sums in resource recovery facilities. They needed statutory assurances that these facilities would not be subject to RCRA’s expensive hazardous waste regulations and that such an exemption would extend to facilities that burned a municipal solid waste mixture that included, but was not limited to, household waste. The latter extension was critical because collection practices do not tend to distinguish between different types of municipal waste and because of the large volume of waste needed to make resource recovery facilities economical.

Congress responded in 1984 by including section 3001(i) as part of a package of sweeping legislative amendments to RCRA enacted that year. Section 3001(i), ironically entitled *Clarification of Household Waste Exclusion*, provided resource recovery facilities with a statutory safe haven from Subtitle C hazardous waste regulations.29 So long as a resource recovery facility was burning only "municipal solid waste" — which could include both household waste and nonhazardous solid waste from commercial and industrial sources — the facility would not "be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes."30

Municipalities, including the City of Chicago, believed that section 3001(i)'s exemption extended to the ash residue produced by the incineration process. EDF, however, claimed that the language evinced no such congressional intent. Soon after the statute's enactment, EPA seemed to share EDF's view, but then following several years of sending conflicting signals in congressional testimony,31 EPA finally sided with Chicago. In the Fall of 1992, EPA Administrator William Reilly sent a memorandum to all EPA regional offices announcing his determination that section 3001(i) should be read to exempt from Subtitle C regulation municipal combustion ash that otherwise flunked

29 Section 3001(i) of the Resource Conservation and Recovery Act provides:

(i) Clarification of household waste exclusion
   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 waste (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 waste 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 in such facility.


30 Id.

31 See infra notes 42 and 43.
EPA's toxicity characteristic analysis. The Administrator concluded that "exempting [municipal waste combustion] ash from hazardous waste regulation is consistent with the text and legislative history of section 3001(i), and best serves the statutory goals embodied in that provision of protecting the environment and promoting resource recovery from nonhazardous solid waste." The Administrator's memorandum set the stage for the Supreme Court's resolution of the issue.

II

LITIGATION BEFORE THE SUPREME COURT IN CITY OF CHICAGO V. EDF

Supreme Court litigation often becomes a battle between competing images. Each side seeks to cast its case not only in the best possible light but also in a context that best emphasizes the aspects of the case that at least five Justices will find attractive. The contrasting images in the City of Chicago litigation were especially stark. The two parties and the United States as amicus curiae all pursued very different strategies before the Supreme Court in presenting their respective positions.

A. The City of Chicago

The City of Chicago was presented simultaneously with a dilemma and an opportunity. As described at this Article's outset, the City could win either of two ways: (1) the Court could conclude that section 3001(i)'s plain meaning supported the City; or (2) the Court could conclude that section 3001(i)'s meaning was ambiguous, but then defer to EPA's construction pursuant to Chevron U.S.A., Inc. v. Natural Resources Defense Co.

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33 Id. at 49a.
34 The descriptions in the text of the legal arguments of the two parties and of the United States are mere summaries and do not purport necessarily to describe all of the intricacies of those arguments.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the
The City accordingly had to make a strategic choice. The City could emphasize its plain meaning argument and de-emphasize its *Chevron* deference argument, in anticipation of the United States' favorable arguments on that latter issue. Alternatively, the City could give its plain meaning argument shorter shrift and provide more of a unified front with the United States on the *Chevron* deference argument, while maintaining that the Court need not reach the plain meaning argument at all.

Although the *Chevron* deference argument was undoubtedly the City's stronger claim, the City chose to emphasize plain meaning.\textsuperscript{36} Indeed, the City decided to emphasize "plain meaning" so strongly that it took the unusual step of formally opposing the motion of the United States to share in the City's oral argument time in order to support the City.\textsuperscript{37} The likely impetus for the City's somewhat surprising approach was its concern that the United States was ultimately an unreliable ally. Should, in other words, the City win the case based on *Chevron* deference, the City would remain vulnerable to EPA later changing its mind and concluding that the ash should be subject to RCRA Subtitle C. With a multi-million dollar long-term capital investment at

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Id. at 842-43 (citations omitted).

\textsuperscript{36} The City's opening brief was 35 pages long, of which six pages were devoted to the *Chevron* deference argument. Chicago Brief, supra note 7, at 29-34.

\textsuperscript{37} More typically, a party openly welcomes the opportunity to have the United States present oral argument on its behalf, especially where, as in this case, the issue involves the meaning of a federal statute. But whatever the merits of Chicago's decision to oppose the United States' motion, the City's strategy proved fairly successful. Surprising the United States, the City, and certainly EDF, the Court did not grant the federal government's motion to be allotted 10 minutes of the City's time, but instead gave the United States five minutes from each of the parties' time. See City of Chicago v. Environmental Defense Fund, 114 S. Ct. 435 (1993) (allotting 25 minutes to the City of Chicago, 25 minutes to EDF, and 10 minutes to the Solicitor General). The Court subsequently denied EDF's motion for reconsideration based on EDF's view that it should not have to share its argument time with a wholly adverse party, *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 595 (1993); Marcia Coyle & Claudia MacLachlian, *Garbage Time*, NAT'L L.J., Dec. 20, 1993, at 9.
stake, the City likely concluded that it preferred not to be subject to the future whims of EPA.\textsuperscript{38}

The image of the case that the City promoted to the Court had essentially two dimensions: one legal and one policy. Both focused on the resource recovery facility itself. The legal argument focused on the word “disposing” in section 3001(i), stressing that section 3001(i) stated in no uncertain terms that a resource recovery facility “shall not be deemed to be... disposing of... hazardous wastes.”\textsuperscript{39} The City argued that because ash is the only material that the resource recovery facility would be “disposing of,” this language was plainly intended to exempt the ash from RCRA Subtitle C.\textsuperscript{40}

In support of its legal argument, the City could rely on specific language in a Senate Report that had accompanied the 1984 amendment, which seemed to speak directly to the ash issue.\textsuperscript{41} The report provided that “[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion.”\textsuperscript{42} Ash, of course, is the only material “generated” by a resource recovery facility.

The policy dimension of the City’s proffered image was also forceful. Absent such an exclusion, the City contended, resource recovery facilities would not be economically viable. They would, therefore, shut down, which would be a far worse result for the environment. Municipalities would simply take all of their household waste to Subtitle D landfills pursuant to the household waste exclusion that all agreed applied to uncombusted household waste. There would be more waste in the landfills, not less, as well as greater use of environmentally destructive fossil fuels to compensate for the loss in energy production resulting from the shutdown of resource recovery facilities.\textsuperscript{43}

\textsuperscript{38} See infra text accompanying note 48.
\textsuperscript{40} Chicago Brief, supra note 7, at 14-15, 22.
\textsuperscript{41} Chicago Brief, supra note 7, at 23-28.
\textsuperscript{42} S. REP. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).
\textsuperscript{43} Chicago Brief, supra note 7, at 18-23.
B. The United States (EPA)

The United States had a major problem in its litigation before the Supreme Court. Its principal client, the Environmental Protection Agency (EPA), had expressed several views on the issue. First, there was EPA’s confusing, virtually incoherent discussion of the 1985 Federal Register preamble. EPA seemed to be asserting that it perceived no congressional intent to exempt from Subtitle C any ash that was in fact hazardous. That said, the preamble discussion went on to intimate that if it turned out that the ash was hazardous, EPA might have to revisit the issue and conclude that it was exempt. In short, EPA seemed to be saying that hazardous ash is exempt unless it actually turns out to be hazardous, in which case EPA might exempt the ash to avoid imposing burdens on resource recovery facilities. This was not exactly a principled position.

Compounding the confusion, two different EPA officials gave different versions of the agency’s views in congressional testimony in 1987 and 1989. One official suggested in 1987 that the 1985 preamble statement erroneously concluded that ash was not exempt. But, then in 1989, a second EPA official maintained that the agency continued to adhere to the views expressed in the 1985 preamble. EPA Administrator Reilly finally cleared up

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44 Hazardous Waste Management System: Final Codification Rule, 50 Fed. Reg. 28,726 (1985) ("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.").

45 EPA stated that it:

does not believe the [1984 amendments] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

Id.


47 See Regulation of Municipal Solid Waste Incinerators, Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on
the confusion when he distributed his September 1992 memorandum, which more formally expressed EPA’s new position that section 3001(i) exempted municipal waste combustion ash from RCRA Subtitle C.\textsuperscript{48}

The United States faced a second problem as well. The Reilly memorandum was issued in the waning days of the Bush Administration. The Clinton EPA was now under some pressure from the environmental community to reverse the agency’s position.\textsuperscript{49} At the same time, there was also a natural bureaucratic resistance to changing the agency’s views yet again.

The Solicitor General ultimately decided to file a brief that asserted the federal government’s support for Chicago. What may not have been clear to a casual observer, however, was that the Solicitor General’s position departed markedly from the Reilly memorandum. To be sure, both the Reilly memorandum and the Solicitor General’s brief supported the City’s view that the ash should be exempt. But the Solicitor General’s brief responded significantly to EPA’s apparent ambivalence. Indeed, the brief cleverly sought to convert both EPA’s prior waffling and its current ambivalence into a litigation asset.

The Reilly memorandum never once stated that the meaning of section 3001(i) was ambiguous. The memorandum instead quite systematically explained how an exemption for ash was “consistent” with the statutory language and legislative history and “best served” RCRA’s statutory goals. The federal government’s merits brief, by contrast, embraced a very different approach. Its exclusive thrust was that section 3001(i)’s meaning was ambiguous, thus entitling EPA’s current view to \textit{Chevron} deference.\textsuperscript{50}


\textsuperscript{48} \textit{See supra} text accompanying note 32.

\textsuperscript{49} There were rumors at the time that some EPA officials sought to distance themselves from the Reilly memorandum by having the United States not participate at all in the Supreme Court litigation.

\textsuperscript{50} \textit{See} U.S. Brief, \textit{supra} note 9, at 8. The Solicitor General’s initial brief in the case, before the Supreme Court accepted the Solicitor General’s suggestion that it remand the case to allow the Seventh Circuit to reconsider its ruling in light of the Reilly memorandum, likewise focused on the \textit{Chevron} deference argument. Brief for the United States as Amicus Curiae in Support of Petitioners at 8-12, \textit{City of Chicago v. Environmental Defense Fund}, 112 S. Ct. 1932 (1992) (No. 91-1328).
According to the Solicitor General’s brief to the Supreme Court on the merits of the case, EPA’s prior flip-flops on the ash issue simply confirmed the statute’s inherent ambiguity and the agency’s careful consideration of the issue over the years leading to the Reilly memorandum. The Solicitor General could likewise juxtapose the two parties’ opposing plain meaning arguments to bolster its assertion that the statute was genuinely ambiguous.

Finally, the Solicitor General’s exclusive focus on ambiguity allowed the United States to preserve the current EPA’s ability to change its mind once again. Indeed, the brief directly raised that possibility. It made clear that “the Administrator’s construction is not the only reasonable interpretation, ... and it could be revised again in light of further technological or policy considerations.”\textsuperscript{51} No doubt these caveats were what made the City of Chicago so wary of the United States’ position, ultimately prompting the City’s unusual decision to oppose sharing oral argument time with the federal government.\textsuperscript{52}

C. Environmental Defense Fund

Until the litigation before the Supreme Court, the Environmental Defense Fund (EDF) was in a fairly strong position. EDF could rely on its version of the plain meaning of the statutory language in the first instance. Even more importantly, it could rely on a backup argument that EPA’s 1985 Federal Register preamble discussion was both favorable to EDF and entitled to \textit{Chevron} deference. All that changed in the aftermath of EPA Administrator’s Reilly September 1992 memorandum. The force of the \textit{Chevron} deference argument was now against EDF, leaving EDF with only a plain meaning argument.

There were, moreover, several significant obstacles to EDF’s plain meaning argument. Most importantly, the definition of “plain meaning” is itself anything but plain. How much ambiguity is required before the meaning of a provision becomes ambiguous? Words are hardly ever entirely free of ambiguity and there is almost always room for disagreement based on at least plausible readings. In applying \textit{Chevron}, there is no principled distinction between the moment when plausibility rises to the degree necessary to decide that the “plain meaning” of Congress is clear,

\textsuperscript{51} U.S. Brief, \textit{supra} note 9, at 9.
\textsuperscript{52} \textit{See supra} text accompanying notes 37-38.
thus not entitling the agency view to deference, to a decision that Congress has not directly addressed the precise question at issue and reasonable agency interpretations must prevail.\textsuperscript{53} An individual Justice’s answer to that question is mostly an expression of the Justice’s own view of the proper relationship between the legislative, executive, and judicial lawmaker branches.

Second, to many observers of the case, a plain meaning argument on behalf of EDF likely seemed difficult to maintain with a straight face. There were certainly ample superficial signs of ambiguity including the following: (1) the word “disposal” in section 3001(i) seeming to give the City of Chicago its own plausible plain meaning argument; (2) a split in the circuits between two distinguished courts of appeals;\textsuperscript{54} (3) a dissent in the panel decision below filed by a respected judge;\textsuperscript{55} (4) an administrative agency that itself kept changing its mind; and (5) an overall statutory scheme unfamiliar to the Justices and notorious for its “mind numbing complexity.”\textsuperscript{56}

An additional obstacle EDF faced was how to respond to the City’s legislative history argument, without joining an ongoing battle between different factions of the Court regarding the merits of judicial reliance on legislative history.\textsuperscript{57} EDF needed


\textsuperscript{54} \textit{Compare} Environmental Defense Fund v. Wheelabrator Technologies, Inc., 931 F.2d 211 (2d Cir.), \textit{cert. denied}, 502 U.S. 974 (1991) (stating that the ambiguity of the statutory language justifies looking to the legislative history of the statute and holding that residue ash from the incineration of municipal waste is exempted from section 3001(i) of RCRA) \textit{with} Environmental Defense Fund v. City of Chicago, 985 F.2d 303 (7th Cir. 1993) (stating that the clear statutory language justifies following the plain meaning of the statute without considering policy arguments and holding that Chicago is not entitled to an exception under the statute).

\textsuperscript{55} \textit{City of Chicago}, 985 F.2d at 304 (Ripple, J., dissenting).

\textsuperscript{56} American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987); \textit{see also} Inland Steel Co. v. EPA, 901 F.2d 1419, 1421 (7th Cir. 1990) (calling RCRA a “statutory Cloud Cuckoo Land’’); \textit{John-Mark Stensvaaq, Hazardous Waste Law and Practice, § 1.2, at 1-2 (1986) (describing RCRA as “staggering in its bulk, complexity”).}

\textsuperscript{57} \textit{See} Brudney, supra note 5, at 1-3. \textit{Compare}, \textit{e.g.}, Immigration and Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 433 n.12 (1987) (Stevens, J.) (explaining that the Court will look to legislative history to establish whether Congress has clearly expressed an intention contrary to the plain language of the statute which would require the Court to “question the strong presumption that Congress expresses its intent through the language it chooses’’), Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 454-55 (1989) (Brennan, J.) (rejecting an approach that would allow consultation of legislative history only
to discount the Senate Report but without making this case a referendum on the merits of legislative history. EDF needed the votes of Justices like Stevens, Blackmun, and Ginsburg who generally approved of judicial reliance on legislative history. In addition, Justice Scalia, the principal opponent of reliance on legislative history, did not appear to be a reliable vote for EDF.

Finally, EDF knew that several of the Justices would likely be concerned about the potential impact of ruling in EDF's favor. After all, a bipartisan EPA (under both Presidents Bush and Clinton) was advising the Court that such a ruling would be harmful for both the economy and the environment. If those Justices viewed the legal issue as an otherwise close one, they would likely favor EPA's preferred option in order to avoid the kind of widespread negative environmental and economic effects that EPA warned would result.

In short, EDF faced a considerable challenge. It needed to provide the Court with a simple way of thinking about the issue that completely discredited those on the other side who claimed either plain meaning or ambiguity. EDF also needed somehow to assure the Justices that EPA's dire predictions would not result.

Accordingly, EDF painted a very different image of the case for the Court than had either the City of Chicago or the United States. EDF directed the Court's attention away from the resource recovery facility in Chicago, Illinois, and to the land disposal facility in Joliet, Illinois, where the ash was being disposed

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when application of the plain language of the statute would have an "absurd" result and, instead, adhering to the "course that strives for allegiance to Congress's desires in all cases"), and Green v. Bock Laundry Mach., 490 U.S. 504, 508 (1989) (Stevens, J.) (finding that when statutory language is unclear the Court will look to legislative history and extensively examine such history to determine the scope of Federal Rule of Evidence 609(a)(1)) with Public Citizen, 491 U.S. at 470-74 (Kennedy, J., concurring) (stating that when the result of applying unambiguous statutory language is not "patently absurd," the Court should not look to the legislative history for an alternative interpretation), K-Mart v. Cartier, Inc., 486 U.S. 281, 291-93 (1988) (Kennedy, J.) (explaining that when statutory language is imprecise, an agency is entitled to choose a reasonable definition and that any reference to legislative history during the initial determination of statutory ambiguity is irrelevant), Cardozo-Fonseca, 480 U.S. at 452-53 (Scalia, J., concurring) (suggesting that legislative history can play no role in statutory interpretation when the language of the law is clear), and Sable Communications v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) (stating that "[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only a vote").
of in a landfill not licensed for hazardous waste disposal.\textsuperscript{58} EDF then asked the Court to focus on the noun “resource recovery facility” in section 3001(i), and to consider how that noun could possibly provide an exemption for the land disposal facility in Joliet.\textsuperscript{59} EDF’s argument, in other words, was that section 3001(i) has a plain meaning; section 3001(i) confers an exemption on the resource recovery facility and does not purport to confer any exemption on any other kind of facility. Section 3001(i) creates a “facility” exemption and not, like EPA’s 1980 regulation, a “waste stream” exemption. What Chicago and the United States were seeking to do was to transform one kind of an exemption into a very different kind of exemption.

In challenging the City’s reliance on legislative history adverse to EDF, EDF candidly acknowledged the existence of a debate in the Court on the use of legislative history and contended that both sides of that debate should agree that the City’s reliance on legislative history was misplaced in this case. Here, what the City sought to accomplish through legislative history was not the interpretation of statutory language, but “the addition of language that is missing from the statute.”\textsuperscript{60} EDF further argued that the existence of the word “generation” in the Senate Report made it all the more important that the Court adhere to the statutory language: “the sharp contrast between the committee report and the actual statutory language . . . suggests the possibility of committee staff awareness of the distinction, coupled with the inability, for whatever reason, to obtain a substantive change in the wording of the statute itself.”\textsuperscript{61}

The hardest part of the case for EDF, however, concerned the need to challenge EPA’s predictions that EDF’s position would result in adverse economic and environmental effects. There was, of course, no record evidence on the issue. EPA’s view was not based on an administrative proceeding in which EDF would have had an opportunity to present its own evidence. As a result, the only official material currently before the Court was the Reilly memorandum, which presented a very one-sided

\textsuperscript{58} The Joliet facility is a lined landfill that exclusively receives municipal incinerator ash. Chicago Brief, supra note 7, at 7 n.3.
\textsuperscript{59} EDF Brief, supra note 11, at 7-12.
\textsuperscript{60} EDF Brief, supra note 11, at 33.
\textsuperscript{61} EDF Brief, supra note 11, at 33.
view. EDF was accordingly very limited in its ability to respond with its version of the facts.

In a move parallel to that of the Solicitor General, but in pursuit of a different end,\(^62\) EDF sought to convert this weakness into a strength. EDF attempted to discredit the Reilly memorandum by emphasizing that it was not the product of a rulemaking procedure but a mere advocacy document prepared for the *City of Chicago* litigation.\(^63\) And, then at least to make the Court feel comfortable with disregarding EPA’s warnings, EDF used EPA’s own official reports and testimony at congressional hearings to suggest that resource recovery facilities could comply with Subtitle C without shutdown.\(^64\) Reliance on these more official sources minimized EDF’s exposure from being attacked for citing to extra-record material.

III

The Supreme Court’s Decision

The Supreme Court essentially adopted EDF’s plain meaning argument in its entirety.\(^65\) Justice Scalia authored the Court’s opinion, which all members of the Court, except for Justices Stevens and O’Connor, joined.

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\(^62\) See *supra* text accompanying note 47.

\(^63\) EDF Brief, *supra* note 11, at 43-49. The Reilly memorandum was produced when an invitation from the Supreme Court to the Solicitor General to file a brief expressing the views of the United States on the issues raised in the *City of Chicago* litigation was still outstanding. See Environmental Defense Fund, Inc. v. City of Chicago, 112 S. Ct. 1932 (1992); City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1558, 1590 (1994).

\(^64\) EDF Brief, *supra* note 11, at 26-27, 47-48. EDF, for example, stressed that resource recovery facilities could significantly reduce their projected compliance costs simply by not mixing fly ash (the ash captured in the top of the combustion chamber) with bottom ash (the ash located in the bottom of the combustion chamber). Fly ash is far more likely to be hazardous than is bottom ash, but the latter constitutes about 90\% of the weight of the ash. Hence, by not affirmatively mixing the two ashes (as most resource recovery facilities currently do), a resource recovery facility could reduce the amount of ash that must be disposed in a Subtitle C landfill by up to 90\%. EDF Brief, *supra* note 11, at 26.

\(^65\) Because the Court relied on section 3001(i)'s plain meaning, the Court did not have to reach an interesting administrative law issue, raised in EDF's brief, that *Chevron* deference did not apply to the Reilly memorandum because it was not the product of a legislatively delegated exercise of agency lawmaking authority. See *City of Chicago*, 114 S. Ct. at 1594 n.5; EDF Brief, *supra* note 11, at 37-49.
According to the majority, "[t]he plain meaning of [section 3001(i)] is that so long as a facility recovers energy by incineration of the appropriate waste, it (the facility) is not subject to Subtitle C regulation as a facility that treats, stores, disposes of, or manages hazardous waste."\textsuperscript{66} Equally clear, according to the Court, is that the provision "does not contain any exclusion for the ash itself. Indeed, the waste the facility produces (as opposed to that which it receives) is not even mentioned."\textsuperscript{67}

The Court further relied on the absence of the word "generation" from section 3001(i)'s list of a resource recovery facility's activities that are exempted from Subtitle C regulation. It observed, "we think it follows from the carefully constructed text of section 3001(i) that while a resource recovery facility's management activities are excluded from Subtitle C regulation, its generation of toxic ash is not."\textsuperscript{68}

Justice Scalia's opinion for the Court, not surprisingly, gave short shrift to the statute's legislative history. The Court admonished that "it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently omits reference to generation."\textsuperscript{69} Reflecting Justice Scalia's narrow view of the circumstances in which legislative history is relevant,\textsuperscript{70} the Court's opinion concluded that nothing in the legislative history "convinces us that the statute's omission of the term 'generation' is a scrivener's error."\textsuperscript{71}

Finally, the Court rejected the City's claim that section 3001(i) would be an "'empty gesture' if it did not exempt ash."\textsuperscript{72} The Court asserted that exempting a resource recovery facility from the full panoply of burdensome Subtitle C requirements otherwise applicable to facilities that treat, store, or dispose of hazardous wastes enabled resource recovery facilities "to avoid

\textsuperscript{66} City of Chicago, 114 S. Ct. at 1591 (emphasis in original).
\textsuperscript{67} Id. (emphasis in original).
\textsuperscript{68} Id. at 1592.
\textsuperscript{69} Id. at 1593 (emphasis in original).
\textsuperscript{70} See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529-30 (1989) (Scalia, J., concurring) ("I respectfully decline to join [the majority's discussion of the legislative history of Rule 609(a)(1) of the Federal Rules of Evidence], however, because it is natural for the bar to believe that the judicial importance of such material matches its prominence in our opinions.").
\textsuperscript{71} City of Chicago, 114 S. Ct. at 1593 n.3.
\textsuperscript{72} Id. at 1593 (quoting EDF Brief, supra note 11, at 23).
the ‘full brunt of EPA’s enforcement efforts under RCRA.’”

The Court also pointed out that it is not

nothing (though petitioners may value it as less than nothing) to restrict the exemption that the agency previously provided — which is what the provision here achieved, by withholding all waste-stream exemption for waste processed by resource recovery facilities, even for the waste stream passing through an exclusively household-waste facility.74

The gravamen of Justice Stevens’ dissent, which Justice O’Connor joined, was that “EPA’s position, first adopted unambiguously in 1980 and still maintained today, was and remains a

73 Id. at 1594 (quoting Environmental Law Practice Guide: State and Federal Law § 29.05[1] (Michael B. Gerrard ed., 1993) [hereinafter Gerrard]). Subtitle C’s treatment, storage or disposal (TSD) requirements are set forth in RCRA at 42 U.S.C. § 6924 (1988 & Supp. V 1993) and in EPA’s implementing regulations at 40 C.F.R. §§ 264, 265, 270 (1994). EPA’s regulations applicable to TSD facilities that burn hazardous waste, including incinerators that recover energy in the process, are set forth at 40 C.F.R. § 264.340-51 (1994). EPA recently promulgated TSD requirements applicable to boilers and industrial furnaces that recover energy and material in the burning of hazardous wastes. See Burning of Hazardous Waste in Boilers and Industrial Furnaces, 56 Fed. Reg. 7134 (1991). By virtue of their not being considered Subtitle C TSD facilities, municipal waste incinerators are not subject to corrective action and closure, post-closure, and financial assurance requirements, which are probably the most expensive and far-reaching regulatory requirements added by the Hazardous and Solid Waste Amendments of 1984. Corrective action requires all TSD permittees to clean up all solid waste management units located on the same facility, regardless of when the units were created or closed. 42 U.S.C. § 6924(u)(v) (1988 & Supp. V 1993). “This corrective action requirement is one of the major reasons that generators and transporters work diligently to manage their wastes so as to avoid the need to obtain a. . . TSD permit.” Gerrard, supra, § 29.06[3][d]. EPA estimates that the total national cost of complying with corrective action ranges from $7 billion to $42 billion. 55 Fed. Reg. 30798, 30861 (1991). Closure and post-closure provisions require that the TSD facility be monitored and maintained properly for 30 years after closure, 40 C.F.R. § 264.117 (1994), and financial assurance regulations are intended to ensure that each TSD owner or operator will possess the financial resources necessary to implement the closure and post-closure plans after the facility closes. See 42 U.S.C. § 6924(a)(1)-(6) (1988) (setting forth detailed reporting requirements); 42 U.S.C. § 6924(t) (1988) (authorizing the Administrator of EPA to “specify policy or other contractual terms, conditions, or defenses. . .to effectuate the purposes of this chapter”); 40 C.F.R. §§ 264.140-264.151 (1994) (setting forth financial requirements). The successful TSD permitting process takes about four and one-half years to complete and, in light of the onerous regulatory requirements, many applications are unsuccessful. See United States Environmental Protection Agency Office of Solid Waste and Emergency Response, The Nation’s Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study 49-50 (1990).

74 City of Chicago, 114 S. Ct. at 1593 (emphasis in original).
correct and permissible interpretation of the Agency's broad congressional mandate.\textsuperscript{75} The dissent, in effect, concluded that section 3001(i) could permissibly be read to extend the reach of EPA's 1980 rule to the incineration of mixtures of household wastes and nonhazardous commercial and industrial wastes, while preserving the 1980 rule's reach, which exempted the generation of ash residue.\textsuperscript{76}

There are several aspects of the Court's opinion worthy of emphasis and/or speculation. First, the vote breakdown was somewhat surprising. EDF's failure to capture the votes of Justices Stevens and O'Connor suggests that the outcome was in fact closer than the 7-2 vote suggests. These were two significant votes for EDF to lose in this case, particularly when taken in combination. Indeed, one could speculate that if Justice Breyer had been on the Court at the time of this litigation, the case might have been decided differently. His greater receptivity to legislative history, and special sensitivity to the need for administrative agency flexibility, might have made him naturally sympathetic to EPA's argument and less inclined to find a "plain meaning."\textsuperscript{77} Indeed, he might well have even become the City's active and vocal ally, which might have made a difference in a case where none of the other Justices had any particular background on the legal issues.

Second, the City of Chicago lost far more than it expected. The City's likely worst case scenario if the Court ruled against it was that the City would simply burn pure household waste. By burning pure household waste, and not a mixture, the City could quickly eliminate its need to rely on section 3001(i) and rely instead on EPA's pre-existing 1980 rule. That rule extended the household waste exclusion to the incineration of pure household waste (whether or not part of a resource recovery process). It would, moreover, have been relatively easy for Chicago to ac-

\textsuperscript{75} Id. at 1598. Curiously, Justice Stevens' dissent never cites to the \textit{Chevron} case and, hence, like the majority, he never addresses the issue of whether \textit{Chevron} deference applies to an internal agency memorandum like the Reilly memorandum at issue in this case.

\textsuperscript{76} Id. at 1594-98.

\textsuperscript{77} See, e.g., Stephen Breyer, \textit{On the Uses of Legislative History in Interpreting Statutes}, 65 S. CAL. L. REV. 845 (arguing that despite recent criticisms of legislative history, judges should not abandon its use altogether).
accomplish such a conversion. The municipal incinerator was already burning almost exclusively household waste.78

In rejecting Chicago’s reading of section 3001(i), however, the Court also concluded that section 3001(i) had overruled the waste stream exemption that EPA’s 1980 rule had created. Chicago, therefore, can no longer rely on that earlier rule.

Finally, the Court’s reasoning in this case may inure to the disproportionate benefit of environmental groups in other cases. To be sure, cases will arise in which the legislative history is more favorable to environmental plaintiffs and, in those cases, the City of Chicago decision may be cited to the detriment of those plaintiffs. There is reason to speculate, however, that environmental plaintiffs will benefit more from the holding of this case than they will be harmed in future litigation.

The literal language of most environmental statutes tends to be extraordinarily aspirational and unforgiving in its application.79 More often, it is the regulated community, not the environmental groups, that tries to find some “give” or “play” in the law’s administration to make it more workable. Not surprisingly, a frequent authoritative source for the necessary “flexible” reading is the statute’s legislative history, the content of which tends to be the product of hard-fought and lengthy debate among committee staff members and interest groups. To the extent that the City of Chicago decision makes it more difficult for courts to rely on legislative history to read broad exemptions into statutory restrictions, it is likely to inure frequently (but not exclusively) to the benefit of environmental plaintiffs.

IV

The Aftermath

The Supreme Court’s decision propelled a flurry of activity at EPA and before Congress. The practical effect of the Court’s

78 Environmental Defense Fund v. City of Chicago, 727 F. Supp. 419, 420 (N.D. Ill. 1989) (finding as fact that 99% of the waste received at the facility consists of household waste), rev’d, 948 F.2d 345 (7th Cir. 1991), aff’d, 114 S. Ct. 1388 (1994).

ruling was, after all, enormous. Within just a few weeks, when the Court’s judgment became final, all resource recovery facilities across the country that burned municipal solid waste would have to dispose of their ash residue in a licensed Subtitle C landfill.

In addition, the Court’s decision raised a host of immediate legal issues for those facilities that had been disposing of their ash residue in Subtitle D landfills for years. For instance, would ash have to be exhumed and now disposed of in Subtitle C landfills? Would municipalities and facility operators now immediately be subject to civil and criminal penalties for their past, present, and future noncompliance? In order to answer these questions following the decision in City of Chicago, EPA needed to provide the regulated community in short order with guidance on how to comply with the Court’s mandate.

On May 10, 1994, EPA held a meeting with all of the stakeholders potentially affected by the Supreme Court decision. The stated purpose of the meeting was to share ideas on how to implement the Court’s mandate. EPA listened to the views of the waste-to-energy industry, the waste disposal industry, EPA regional offices, state and local governments, and environmental groups. On May 24, 1994, EPA held a public briefing to inform parties of its preliminary decisions. At that briefing, EPA announced its implementation strategy. EPA declared that by August 1994 all resource recovery facilities had to test the ash that they generate for hazardous characteristics. If the ash was  

80 Affected Groups, EPA Discuss Guidelines For States on High Court’s Ash Decision, Envt’l Rep. (BNA) No. 3, at § 123 (May 20, 1994). The EPA sought to determine how frequently the ash would have to be tested, what type of testing would be called for, whether the fly ash and the bottom ash would have to be tested separately, what type of treatment and disposal would be appropriate for hazardous ash, and whether generators would be liable retroactively for hazardous ash disposal in light of the Supreme Court ruling. Id.
81 Id.
83 Testing of Ash for Hazardous Constituents Must Begin Within Three Months, Officials Say, Envt’l Rep. (BNA) No. 5, at § 228 (June 3, 1994) [herein-after Testing of Ash]. The EPA announcement applies to all of the municipal incinerators across the country that produce energy through incineration of municipal solid waste. See Lee, supra note 82.
84 Testing of Ash, supra note 83. At the briefing, EPA recommended that resource recovery facilities immediately begin to test the ash residue. An EPA
determined to be hazardous, then owners and operators of facilities that managed the ash would be required formally to apply for a hazardous waste permit under 40 C.F.R. pt. 270, by November 24, 1994.\textsuperscript{85} The resource recovery facility operators would be required to treat the ash to below hazardous levels or dispose of it in Subtitle C hazardous waste landfills.\textsuperscript{86} EPA added that it would promulgate land disposal restrictions specific to the hazardous ash by November 1994, but later moved that deadline to December 1994 in a subsequent formal Federal Register notice.\textsuperscript{87} In that same notice, EPA notified facility operators that, although the agency presently allows operators to test fly ash and bottom ash together, it might require that the two be tested separately in the future.\textsuperscript{88}

EPA's approach to the ash issue has generated criticism from both sides. Three resource recovery facility operators and an industry trade association have already challenged EPA's implementation strategy in federal court.\textsuperscript{89} Those parties have petitioned the United States Court of Appeals for the District of Columbia Circuit to review EPA's announced requirements and their deadlines, the guidance document for sampling and testing ash that would require the toxicity characteristic test to be applied to the ash, and several other decisions included in EPA's implementation plan.\textsuperscript{90}

Some environmental groups have likewise criticized EPA's approach. For example, they have claimed that the agency should require operators to test bottom ash and fly ash separ-
rately because mixing the two is a deliberate effort to dilute the more toxic fly ash. The groups are also dissatisfied with EPA’s recommendation that the ash be tested only four times a year; they assert that daily testing is necessary because the waste burned varies from day to day. Finally, both industry and environmentalists object, albeit for different reasons, to EPA’s reliance on the Toxicity Characteristic Leaching Procedure for ash testing.

There has also been considerable action on Capitol Hill. Indeed, on August 12, 1994, the EDF joined representatives of local governments (including the National League of Cities, the National Association of Counties, and the City of Chicago) and the combustion industry in proposing legislation to Congress for special ash management regulations. Under the legislative proposal, the ash generated by a resource recovery facility would be exempt from Subtitle C regulation but subject to stricter regulations under RCRA’s Subtitle D program. This hybrid proposal sets out a seven-and-a-half-year plan for transition to more strict disposal requirements. Congress has yet to act on this

92 Id.
93 Id.; see Waste-to-Energy, supra note 90.
96 Id.
97 The plan includes the following elements:
   By Jan. 1, 1995, ash would have to be disposed of in a landfill with at least a single liner, a leachate collection system, and ground water monitoring. The landfill would have to comply with other 40 C.F.R. 258 regulations, and could not release contaminants to ground water or surface water.
   Thirty months after that, new ash disposal capacity would have to be permitted as a monofill with a double liner — a composite liner and a synthetic liner system. Monofills also would have to have a leachate collection system, a leak detection system, and a composite final cover system.
   Five years after enactment, the standards would be expanded to prohibit ash from going into units created by vertical expansion of non-complying units. Bottom ash no longer could be used as cover material. Also within five years, ash disposal facilities would be required to have permits or prior approval requiring compliance.
Id.
compromise proposal, probably because of opposition from grassroots environmental groups that are opposed to specific resource recovery facilities in their respective communities.98

CONCLUSION

The regulated community frequently decries what it claims are doomsayers in the environmental movement that make exaggerated predictions of pending environmental catastrophe.99 The City of Chicago litigation suggests instead that the regulated community is itself quite gifted in the practice of exaggeration and doomsaying.

While the litigation was pending, Chicago and its supporting amici advised the Court that a ruling against the City would cost the City “as much as $57 million each year.”100 It warned that the cost to resource recovery facilities would be prohibitive and “there could be no meaningful chance to achieve the statutory goal of promoting resource recovery.”101 Chicago posited that the most likely result of an adverse ruling was that local governments “will reduce their costs by ending resource recovery efforts and disposing of untreated municipal solid waste in landfills.”102

An amicus brief filed by the National League of Cities, U.S. Conference of Mayors, National Governor’s Association, and other state and local governmental organizations was even more dire in its prediction of the aftermath of a ruling against Chicago. Such a ruling, they told the Court, would “simply render existing and proposed facilities economically unviable.”103 “[I]nvestment in [resource recovery] facilities will no longer be made.”104 Municipalities will “abandon[ ] their use of resource recovery facili-

98 See Groups Rap Legislation, supra note 91.
100 Chicago Brief, supra note 7, at 21 n.9.
101 Chicago Brief, supra note 7, at 21.
104 Id.
ties in favor of the least-cost alternative of landfilling untreated waste.\textsuperscript{105}

The sky, however, has not fallen in the wake of the Supreme Court’s decision.\textsuperscript{106} And, in the aftermath, the regulated Cassandras have been singing a very different tune. Indeed, the day of the Court’s ruling, Chicago discovered that the cost of compliance would be between $4 million and $5 million, nowhere near the previously intimated $50 million-plus estimate.\textsuperscript{107} The City could, just as EDF had always stated, reduce its costs by re-forming its operations; for instance, the city could realize substantial savings by installing equipment for the retrieval of those items like batteries and paint cans containing heavy metals that would otherwise cause the ash to be hazardous.\textsuperscript{108} Other resource recovery industry officials in other cities likewise agreed that the economic impact of the ruling would be “minimal.”\textsuperscript{109}

Even more broadly, the City of Chicago litigation underscores an important feature of environmental law: it is never static. Environmental law is an ongoing, dynamic process. It is

\textsuperscript{105} Id. at 10.

\textsuperscript{106} The greater threat by far to the economic viability of resource recovery facilities is their inability to secure enough waste to burn. One cause of the relative shortage of available supplies is increased recycling and source separation, which reduces the amount of municipal waste available for incineration. See Jeff Bailey, Fading Garbage Crisis Leaves Incinerators Competing for Trash, WALL ST. J., Aug. 11, 1993, at A1; Barry Meier, Finding Gold, Of a Sort, in Landfills, N.Y. TIMES, Sept. 7, 1993, at A14. The second cause is the Supreme Court’s other “garbage” decision last Term in which the Court struck down as an impermissible burden on interstate commerce a local flow control ordinance. C & A Carbone v. Clarkstown, 114 S. Ct. 1677 (1994).

\textsuperscript{107} Compare Keith Schneider, Incinerator Operators Say Ruling Will Be Costly, N.Y. TIMES, May 3, 1994, at A18 (reporting a revised estimate by Chicago’s Commissioner of Environment of between $4 million and $5 million a year for ash disposal) with Geoffrey A. Campbell, Is Ash Hazardous? Supreme Court’s Answer May Be Costly For Cities, THE BOND BUYER, Oct. 8, 1993, at 4 (stating that Chicago officials previously estimated that the cost of treating ash as hazardous would be $50 million annually).

\textsuperscript{108} Schneider, supra note 107.

\textsuperscript{109} Stevenson Swanson & Robert Davis, Incinerator Ash Tests Required, CHI. TRIB., May 3, 1994, at N1. Some of the more recent industry reports of the decision’s minimal impact, however, seem to be based on industry claims that the ash does not flunk EPA’s toxicity characteristic analysis after all. See Impact of Supreme Court Decision on Ash Has Been Minimal, Industry Official Claims, Envt’ Rep. (BNA) No. 29, at § 1378 (Nov. 18, 1994). Whether those claims withstand scrutiny is still an open question.
marked by "dynamics and flux where a regulation is inseparable from a revision, a statute not far from an amendment."\textsuperscript{110}

The true impact of the \textit{City of Chicago} ruling goes beyond the regulatory status of ash. The decision has reinvigorated the environmental lawmaker process. It has compelled policymakers, including EPA, to address difficult issues that had formerly been answered through regulatory default and inattention. In this case, EDF has forced municipalities to consider the consequences of placing hazardous ash in unlined, unsafe landfills and to adopt some of the relatively inexpensive, yet quite effective methods available for reducing the risks associated with those hazards.

EDF has not simply burrowed into its Supreme Court victory, resisting any movement away from that result. EDF has instead seen the win for what it really is: leverage needed to trigger a candid and thoughtful dialogue with EPA and Congress on how this important environmental issue should be redressed. That is also why EDF so quickly agreed to begin working with the regulated community, including the City of Chicago, to develop a workable compromise plan. Additionally, it is unquestionably why that dialogue has been bearing early fruit in the form of legislative proposals.

Though the Supreme Court is the final interpreter of federal law, the hard work of developing an optimal program for the management of municipal combustion ash has now just begun.

\textsuperscript{110} \textit{William H. Rodgers, Jr., Environmental Law} \textsuperscript{\textsection} 1.2, at 25 (2d ed. 1994); \textit{see also} Daniel P. Selmi, \textit{Experimentation and the "New" Environmental Law, 27 Loy. L.A. L. Rev. 1051 (1994) (discussing the decentralization of environmental regulation as economic incentive programs are adopted under the Clean Air Act).