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# Regulation of Municipal Incinerator Ash: *City of Chicago v. Environmental Defense Fund, Inc.*

TIFFANY D. GABEHART\*

Waste disposal creates a serious problem for American cities. American households annually create over 160 million tons of municipal solid waste.<sup>1</sup> As a result of diminishing landfill space and increasing waste generation, landfilling, once the principal method of solid waste disposal, ceases to be a feasible solution.<sup>2</sup> This crisis has forced many municipalities to search for viable alternatives such as source reduction, recycling, and incineration.<sup>3</sup>

An increasing number of municipalities have turned to waste-to-energy incinerators as a solution to the waste disposal problem. In 1992, approximately 125 incinerators<sup>4</sup> burned 34 million tons of municipal trash, an amount that equals about 17 percent of the nation's annual output of solid waste.<sup>5</sup> Incineration reduces the volume of the municipal solid waste by 90 percent.<sup>6</sup> The ten per-

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<sup>1</sup> Kathleen J. Rutt, Comment, *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, 207 (1993).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Source reduction involves reduction in the amount of waste produced. Even though it provides a feasible long-term solution, its requirements for drastic changes in production methods and consumer preferences render it unsuccessful. On the other hand, the fact that municipalities only recycle 10% of their waste demonstrates the failure of the more immediate solution of recycling. *Id.* at 207 n.7.

<sup>4</sup> Stevenson Swanson & Robert Davis, *Incinerator Ash Tests Required*, CHI. TRIB., May 3, 1994, § Chicagoland, at 1.

<sup>5</sup> David G. Savage, *High Court's Trash Ruling A Blow To Cities Law: Ash From Incinerators May Be Hazardous, Needing Special Landfills, Justices Say. The Impact In California Is Not Seen As Especially Severe*, L.A. TIMES, May 3, 1994, at A21.

<sup>6</sup> *Id.*

cent remainder of ash must otherwise be disposed.<sup>7</sup> In addition to reducing the needed landfill space, the incineration process also produces steam or electrical energy.<sup>8</sup>

Despite its advantages, environmental groups have challenged municipal waste incineration because the ash produced could be environmentally hazardous.<sup>9</sup> Incineration annually generates nearly eight million tons of ash.<sup>10</sup> Most municipal waste incinerators treat this ash as non-hazardous waste under the Resource Conservation and Recovery Act (RCRA), disposing of it in ordinary landfills.<sup>11</sup> If these landfills lack secure lining, "heavy metals which concentrate in the ash [could] . . . leach into groundwater supplies."<sup>12</sup> *City of Chicago v. Environmental Defense Fund, Inc.*<sup>13</sup> addresses the question of whether incinerator ash should be treated as hazardous or non-hazardous waste.

This comment analyzes the decision of *City of Chicago v. Environmental Defense Fund, Inc.* Part I examines the history of the RCRA and *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.* Part II presents the facts and holding of *City of Chicago v. Environmental Defense Fund, Inc.* Finally, Part III discusses the possible impact the holding may have on communities throughout the United States.

## I. BACKGROUND

### A. History of the Resource Conservation and Recovery Act

In response to our nation's solid waste crisis, Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA) to promote the protection of health and the environment, the conservation of scarce landfill space, and the recovery of energy from municipal wastes.<sup>14</sup> RCRA divides solid waste into two categories for disposal purposes: hazardous and non-hazardous. Subtitle C of

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<sup>7</sup> *Id.*

<sup>8</sup> Rutt, *supra* note 1, at 208. Incineration advocates claim that the energy created per year equals 31 million barrels of oil. Savage, *supra* note 5, at A21.

<sup>9</sup> Rutt, *supra* note 1, at 208.

<sup>10</sup> *Id.* at 209.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *City of Chicago v. Environmental Defense Fund, Inc.*, 114 S.Ct. 1588 (1994).

<sup>14</sup> *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419, 421 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *aff'd*, 114 S.Ct. 1588 (1994), [hereinafter *EDF*].

RCRA imposes rigorous standards "from cradle to grave" for hazardous waste.<sup>15</sup> The high financial cost of complying with Subtitle C adds to the burden imposed by these complex requirements. For example, the cost of obtaining a permit to build a Subtitle C hazardous waste disposal facility can amount to \$1 million.<sup>16</sup> Meanwhile, Subtitle D more loosely regulates non-hazardous waste.<sup>17</sup> Essentially, Subtitle D forbids disposal of non-hazardous waste in open dumps.<sup>18</sup>

Instead of identifying which wastes were subject to hazardous waste regulation, RCRA requires the EPA to "develop and promulgate criteria for identifying the characteristics of hazardous waste."<sup>19</sup> In its 1980 regulations which identify and list hazardous wastes, the EPA included the "Household Waste Exclusion" which exempted the entire household waste stream from Subtitle C regulation.<sup>20</sup> The provision defines this "household waste" as "any waste material . . . derived from households (including single and multiple residences, hotels and motels)."<sup>21</sup> In the preamble to these regulations, the EPA indicated that incinerator ash should be included in the Household Waste Exclusion, and thereby exempted from Subtitle C regulation.<sup>22</sup>

In 1984, Congress added Section 3001(i), entitled "Clarification of Household Waste Exclusion," to RCRA. This provision expanded the household waste exclusion to include resource recovery facilities that burn "solid waste from commercial or industrial sources that does not contain hazardous waste."<sup>23</sup> This amendment did not specifically address municipal ash regulation.<sup>24</sup> As a result, controver-

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<sup>15</sup> *EDF*, 114 S. Ct. at 1590.

<sup>16</sup> Hillary A. Sale, Note, *Trash, Ash, And Interpretation of RCRA*, 17 HARV. ENVTL. L. REV. 409 (1993). These rigorous standards include "extensive record keeping, special training for employees, and the use of appropriate treatment, storage at disposal facilities." *Id.*

<sup>17</sup> *EDF*, 114 S. Ct. at 1590.

<sup>18</sup> Sale, *supra* note 16. Therefore, Subtitle D permits ash to be disposed of in an ordinary sanitary landfill. *Id.*

<sup>19</sup> 42 U.S.C. § 6921(a) (1994). This directive requires the EPA to consider the "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." *Id.*

<sup>20</sup> 727 F. Supp. at 421.

<sup>21</sup> 45 Fed. Reg. 33120 (1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1987)).

<sup>22</sup> *EDF*, 114 S. Ct. at 1590-91, (quoting 45 Fed. Reg. 33,099).

<sup>23</sup> 42 U.S.C. § 6921(i)(1)(A)(ii) (1988).

<sup>24</sup> 42 U.S.C. § 6921(i) (1988).

sy developed over Subtitle C exemption for ash from municipal waste combustion.

Since the enactment of the 1984 amendment, the EPA has made inconsistent claims about the treatment of incinerator ash. In 1985, the EPA promulgated new regulations which in their preamble acknowledge "the existence of toxic ash and interprets the 'household waste' statutes to exclude municipal ash only where toxic characteristics are rarely found in ash residue."<sup>25</sup> This view conflicts with a prior EPA view interpreting ash as part of the exempt household waste stream.<sup>26</sup> The EPA concluded the preamble by implying that it would not consider whether the ash was hazardous because of the importance of resource recovery facilities in fulfilling RCRA's purpose.<sup>27</sup>

Since 1985, the EPA has continued to be indecisive as to its position on the treatment of incinerator ash. In 1987, the EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response testified before Congress that the EPA recognized Congress' intent was to exclude incinerator ash from Subtitle C regulation.<sup>28</sup> In 1988, the Director of the EPA Office of Solid Waste testified before Congress that toxic incinerator ash should be regulated under Subtitle C.<sup>29</sup> Finally, the EPA in 1992 issued an internal memorandum exempting incinerator ash from Subtitle C regulation.<sup>30</sup>

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<sup>25</sup> Jane Ellen Warner, Note, *Environmental Law—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, 157 (1994), (citing 50 Fed. Reg. 28, 725-26 (1985)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Sale, *supra* note 17.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Congress imposed a two year moratorium on municipal solid waste incineration ash regulation in the 1990 Clean Air Act Amendments. Warner, *supra* note 24, at 158. Since the issuance of this memorandum occurred during this two year moratorium, the possibility exists that the EPA abused its discretion. Sale, *supra* note 16.

*B. Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*

Defendant Wheelabrator Technologies, Inc. ("Wheelabrator") owned and operated the Westchester Resource Recovery Facility in Peekskill, New York.<sup>31</sup> This facility produced ash as a result of the burning of solid waste to generate electricity.<sup>32</sup> Plaintiff Environmental Defense Fund (EDF) operated as a non-profit, environmental advocacy organization.<sup>33</sup> EDF contended that Wheelabrator violated RCRA because it had not disposed of its hazardous ash in accordance with Subtitle C.<sup>34</sup> EDF based this contention on the fact that nine out of the past ten ash samples had failed the EP toxicity test.<sup>35</sup> Wheelabrator argued that the household waste exclusion included incinerator ash, thereby relieving it of Subtitle C regulation.<sup>36</sup>

The United States District Court for the Southern District of New York held that the exemption from Subtitle C regulation applied to the ash from the incineration of solid municipal waste.<sup>37</sup> Relying on the district court's reasoning, the Court of Appeals for the Second Circuit affirmed.<sup>38</sup>

This decision involved the construction of Section 3001(i) of RCRA, particularly the phrase "otherwise managing."<sup>39</sup> The defendants argued that the "otherwise managing" language applies to managing and disposing of ash along with other waste management activities of the facility.<sup>40</sup> Meanwhile, EDF maintained that "otherwise managing" language did not include generation because the term generation is defined separately from management and was not specifically mentioned in section 3001(i).<sup>41</sup> The district court rejected both of these positions.

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<sup>31</sup> *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 761 (S.D. N.Y. 1989), *aff'd.*, 931 F.2d 211 (2nd. Cir. 1991).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Wheelabrator*, 931 F.2d at 212.

<sup>35</sup> *Wheelabrator*, 725 F.Supp. at 761 n.6. The EP toxicity test measures the qualities of solid waste. *Id.*

<sup>36</sup> *Id.* at 764.

<sup>37</sup> *Wheelabrator*, 931 F.2d at 213.

<sup>38</sup> *Id.*

<sup>39</sup> *Wheelabrator*, 725 F. Supp. at 764.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 764 n.13.

To determine the precise meaning of the phrase "otherwise managing," the district court focused on the legislative history of the 1984 amendment to RCRA.<sup>42</sup> The court found that "the legislative history makes clear that at the time of its passage, Congress intended Section 3001(i) to exempt ash from regulation under Subtitle C in order to pave the way for increased use of the resource recovery process."<sup>43</sup>

## II. CITY OF CHICAGO V. ENVIRONMENTAL DEFENSE FUND, INC.

The city of Chicago owned and operated the Northwest Waste-to Energy Facility, which incinerated solid waste and recovered usable energy in the form of steam or electricity.<sup>44</sup> This facility received 200 to 250 truckloads of refuse each weekday<sup>45</sup> and burned some 350,000 tons of solid waste annually.<sup>46</sup> The majority of this refuse existed as household waste, while the remainder took the form of non-hazardous commercial waste consisting of trash brought into the United States by international flights arriving at O'Hare Airport and contraband seized by law enforcement officials.<sup>47</sup> The incineration of this municipal solid waste left a residue of approximately 110,000 to 140,000 tons of ash annually. The city disposed of this ash at landfills that were not licensed to accept hazardous waste.<sup>48</sup>

The EDF contended that this incinerator ash met the definition of hazardous waste and that the city failed to meet the requirements of Subtitle C.<sup>49</sup> EDF based this allegation on the fact that the Northwest Facility had failed the EP toxicity test 29 out of 32 samples.<sup>50</sup> The city of Chicago argued, on the other hand, that ash from municipal incinerators fell under the household waste exclusion exempting it from Subtitle C regulation.<sup>51</sup>

The United States District Court for the Northern District of Illinois held exempt from Subtitle C the ash generated from the

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<sup>42</sup> *Id.* at 764.

<sup>43</sup> *Id.* at 770.

<sup>44</sup> *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 348 (7th Cir. 1991), *aff'd*, 114 S. Ct. 1588, 1589 (1994).

<sup>45</sup> *EDF*, 727 F. Supp. at 420.

<sup>46</sup> *EDF*, 114 S. Ct. at 1589.

<sup>47</sup> *EDF*, 727 F. Supp. at 420.

<sup>48</sup> *EDF*, 114 S. Ct. at 1589.

<sup>49</sup> *Id.*

<sup>50</sup> *EDF*, 727 F. Supp. at 421 n.2.

<sup>51</sup> *EDF*, 114 S. Ct. at 1589.

incineration of household waste and non-hazardous commercial waste.<sup>52</sup> The court reasoned that Congress must have meant to adopt the EPA's position because the 1980 household waste exclusion covered the management of ash residue and the 1984 clarification left the interpretation untouched.<sup>53</sup> On appeal, the Seventh Circuit of the United States Court of Appeals reversed. The Seventh Circuit held the ash generated from municipal incinerators subject to Subtitle C because the exclusion's limitation of "management" activities of resource recovery facilities does not include "generation" in its definition.<sup>54</sup> Therefore, "generating" activities fall under Subtitle C regulation.<sup>55</sup>

The United States Supreme Court granted certiorari and vacated the Seventh Circuit's ruling. Based on a memorandum issued by the EPA on the exemption of ash from Subtitle C regulation, the Court remanded the case for reconsideration.<sup>56</sup> Stating that the memorandum did not affect the court's decision, the Seventh Circuit again ruled that the ash from municipal incinerators is subject to Subtitle C regulation.<sup>57</sup>

On its second grant of certiorari, the Supreme Court held that the household waste exclusion does not exempt a resource recovery facility in its capacity as generator of hazardous waste.<sup>58</sup> Ash from incineration of municipal solid waste, therefore, requires the Subtitle C treatment.<sup>59</sup>

### III. STATUTORY INTERPRETATION OF SECTION 3001(I)

The outcome of *City of Chicago v. Environmental Defense Fund, Inc.* depended on the construction of section 3001(i), "Clarification of household waste exclusion."<sup>60</sup> The EDF limited its interpretation of the section 3001(i) exemption to very specific activities of municipal resource recovery facilities.<sup>61</sup> They maintained that section 3001(i) did not cover the "generation" of hazardous

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<sup>52</sup> *EDF*, 727 F. Supp. at 424.

<sup>53</sup> *Id.* at 423.

<sup>54</sup> *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345, 352 (7th Cir. 1991), *aff'd*, 114 S.Ct 1588 (1994).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 304.

<sup>57</sup> *Id.*

<sup>58</sup> *EDF*, 114 S. Ct. at 1594.

<sup>59</sup> *Id.*

<sup>60</sup> *EDF*, 948 F.2d at 346.

<sup>61</sup> *Id.* at 348.

waste.<sup>62</sup> In contrast, the City of Chicago broadly interpreted section 3001(i) by claiming that "otherwise managing" hazardous waste covers all of the resource recovery facility's activities.<sup>63</sup> Chicago's interpretation would include the disposal of ash from municipal incinerators.<sup>64</sup>

The tools available for a court to construe a statute are "the language and apparent purpose of the statute, its background and structure, its legislative history, and the bearing of related statutes."<sup>65</sup> Section 3001(i) is "a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency."<sup>66</sup>

Recognizing that RCRA's goals of encouraging resource recovery and protecting against contamination sometimes conflict, the Supreme Court stated that the best source for reconciling these conflicting goals was the enacted text.<sup>67</sup>

The plain meaning of [section 3001(i)] . . . is that so long as a facility recovers energy by incineration of the appropriate wastes, it (the facility) is not subject to Subtitle C regulation as a facility that treats, stores, disposes of, or manages hazardous waste. The provision quite clearly does not contain any exclusion for the ash itself.<sup>68</sup>

Whenever a decision regarding the meaning of a statute with conflicting policies must be made, the Supreme Court has consistently recognized that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."<sup>69</sup> Since the EPA's interpretations of section 3001(i) have been conflicting and inconsistent, the Supreme Court gave the EPA's interpretations considerably less deference than it normally gives an agency's construction of a statute it administers.<sup>70</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *EDF*, 948 F.2d at 346.

<sup>67</sup> *EDF*, 114 S. Ct. at 1594.

<sup>68</sup> *Id.* at 1591.

<sup>69</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>70</sup> *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345, 346 (7th Cir. 1991), *aff'd*, 114 S. Ct. 1588 (1994). *See also* *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987) and *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 766 (S.D.N.Y. 1989), *aff'd*,

The language found in section 3001(i) does not exempt ash generated from municipal incinerators from Subtitle C.<sup>71</sup> The terms "otherwise managing" and "generating" lack interchangeability because RCRA precisely defines each.<sup>72</sup> Under RCRA, "generation" includes the creation of ash by the incineration of municipal waste.<sup>73</sup> The Supreme Court noted that the term "generating" was omitted from the provision.<sup>74</sup> Also, the Court rejected the City of Chicago's contention that "otherwise managing" encompasses the full scope of the facility's operation.<sup>75</sup>

#### IV. IMPACT ON COMMUNITIES UNDER THE *CITY OF CHICAGO V. ENVIRONMENTAL DEFENSE FUND, INC.* DECISION: THE CONFLICTING PREDICTIONS

The Supreme Court's ruling in *City of Chicago v. Environmental Defense Fund, Inc.* establishes the requirement that ash generated by incinerators be tested to see if it contains metals, such as lead and cadmium,<sup>76</sup> that could seep into underground water supplies.<sup>77</sup> Even though household garbage only contains small quantities of metals, the potential of toxic ash exists because the metals do not burn and become concentrated in the ash.<sup>78</sup> If the ash tests high in metals, the toxic material will be subject to treatment as hazardous waste under Subtitle C.<sup>79</sup> This means that the ash must now be dumped in a hazardous waste landfill.

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931 F.2d 211 (2nd Cir. 1991).

<sup>71</sup> EDF, 114 S. Ct. at 1592.

<sup>72</sup> EDF, 948 F.2d at 351.

<sup>73</sup> EDF, 114 S. Ct. at 1592.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Savage, *supra* note 5, at A21. It should be noted that "a facility may take in essentially the same non-hazardous household waste time and time again and never know which residue, if any, will list above the EPA toxicity limits." Warner, *supra* note 25, at 155.

<sup>77</sup> Swanson, *supra* note 4, at 1.

<sup>78</sup> *Id.* at 1. "Lead has been associated with slower mental development in children, and cadmium is listed as a probable cause of cancer." *Id.*

<sup>79</sup> Savage, *supra* note 5, at A21.

### A. *The Negative Predictions*

"For lack of a single word in a federal law, more than 130 U.S. communities may have to pay more to dispose of their trash."<sup>80</sup> The dumping of hazardous waste costs an estimated 10 times more than the dumping of non-hazardous materials.<sup>81</sup> Chicago officials predict it will cost an additional \$4.6 million per year to dispose of the estimated 23,000 tons of potentially toxic ash from the Northeast Waste-to-Energy plant.<sup>82</sup> Chicago currently spends \$4.5 million to dispose of incinerator ash in ordinary landfills.<sup>83</sup> Some city officials predict that this increased cost will discourage incineration of municipal solid waste.<sup>84</sup>

Another predicted problem involves the lack of hazardous waste disposal capacity.<sup>85</sup> As a result of the new requirement, some predict that within a few years the existing hazardous waste landfills will be filled up.<sup>86</sup> Also, it is politically difficult to obtain and expensive to build a new hazardous waste disposal site.<sup>87</sup> "This lack of hazardous waste disposal capacity is one of the problems that Congress intended to solve when it enacted the RCRA and specifically urged the creation of resource recovery facilities."<sup>88</sup>

Requiring toxic incinerator ash to meet Subtitle C regulations could subject municipalities to CERCLA liability.<sup>89</sup> Under CERCLA, the municipalities would be strictly liable for clean-up costs for damages to natural resources resulting from the ownership and operation of a resource recovery facility that handles hazardous waste or disposal of incinerator ash that tested hazardous.<sup>90</sup> "Although this potential liability under CERCLA exists for any hazardous threat, CERCLA specifically includes all RCRA hazardous

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<sup>80</sup> Aaron Epstein, *Court Ruling Raises Trash-To-Steam Cost The High Court Sided With Environmentalists. They Argued That The Ash Should Be Treated As Hazardous*, PHIL. INQ., May 3, 1994, at A03.

<sup>81</sup> *Id.*

<sup>82</sup> Swanson, *supra* note 4, at 1.

<sup>83</sup> *Id.*

<sup>84</sup> Savage, *supra* note 5, at A21.

<sup>85</sup> Sale, *supra* note 16.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* Strict liability under CERCLA applies to "cleanup costs incurred by both the government and private parties and for damages to natural resources." *Id.*

waste."<sup>91</sup>

Municipalities also fear that the potential liability under both RCRA and CERCLA could cause them financial problems.<sup>92</sup> To finance new projects, municipalities use bond issues. The success of these bonds depends upon their bond ratings and the risk of liability under RCRA and CERCLA could cause the municipalities' bond ratings to drop, resulting in more expensive borrowing.<sup>93</sup>

### B. *The Positive Predictions*

Predicting increased conservation and recycling, environmentalists welcomed the *City of Chicago v. Environmental Defense Fund, Inc.* decision.<sup>94</sup> EDF recommends that municipalities screen their trash for toxic materials, such as batteries and cans, before they burn the trash.<sup>95</sup> Also, the more hazardous fly ash can be separated "from the more abundant bottom ash."<sup>96</sup> By following EDF's advice, Chicago and other municipalities can minimize the financial impact of the court's ruling.<sup>97</sup>

Incinerator-industry officials predict that the decision will not significantly affect the industry.<sup>98</sup> "[They] contend that newly built incinerators, which use more sophisticated recycling and pollution-control technology than old burners, should have little trouble proving their ash is non-hazardous."<sup>99</sup> Also, some incinerator companies already test their ash for hazardous materials.<sup>100</sup> Furthermore, tough standards for testing and disposing of incinerator ash exist in some states such as New Jersey and Pennsylvania.<sup>101</sup> Finally, one of the nation's leading incinerator companies uses a chemical treatment that supposedly neutralizes the hazardous ash at a cost of only

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<sup>91</sup> Sale, *supra* note 16.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Savage, *supra* note 5, at A21.

<sup>95</sup> *Tougher Standards For Incinerators*, CHI. TRIB., May 7, 1994, Editorial, at 18.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* Also, the possibility exists that special disposal will not be needed because the tested ash could be non-hazardous. *Id.*

<sup>98</sup> Scott Allen, *High Court: Incinerator Ash Hazardous Ruling Lifts Disposal Exemption*, BOSTON GLOBE, May 3, 1994, at 3.

<sup>99</sup> Swanson, *supra* note 4, at 1.

<sup>100</sup> *Id.* The New Jersey incinerator company Odgen Martin Systems, Inc. claims that many of its facilities already test their ash. *Id.*

<sup>101</sup> Anthony R. Wood, *Ash-Disposal Rules May Not Hurt Locally A Ruling Requires Tighter Controls On Incinerator Ash. Around Here The Rules Are Already Tough.*, PHIL. INQ., May 5, 1994, at B04.

a few dollars a ton.<sup>102</sup>

### CONCLUSION

The decision to subject incinerator ash to hazardous waste regulations by the Supreme Court in *City of Chicago v. Environmental Defense Fund, Inc.* may be an unfavorable holding for municipalities, but the elimination of uncertainties about the household waste exclusion will benefit the United States as a whole. Before the Supreme Court's ruling, similarly-situated communities in circuits which had litigated the issue were subject to different requirements under RCRA and communities in circuits where the issue had not been addressed had no idea what RCRA's requirements were regarding municipal ash. There exists a need for consistent guidelines to provide municipal incinerators guidance in disposal of their ash. The *City of Chicago v. Environmental Defense Fund, Inc.* decision marks the first positive step in obtaining these necessary guidelines.

The Supreme Court's ruling has forced the EPA into action. After the decision, the EPA stated that it would fully comply with the decision and also help municipalities comply with the new law.<sup>103</sup> Currently, the EPA is drafting rules requiring municipal incinerators to test their ash for hazardous qualities.<sup>104</sup> The EPA's challenge now involves keeping disposal costs at a minimum, while continuing to improve the safety of incineration.<sup>105</sup>

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<sup>102</sup> Allen, *supra* note 99, at 3. This claim is made by a spokesman for Wheelabrator Technologies, Inc. *Id.*

<sup>103</sup> Gary Lee, *EPA Tightens Hazardous Ash Disposal. Move Follows Supreme Court Ruling on Municipal Waste Plants.*, WASH. POST, May 25, 1994, at A05.

<sup>104</sup> *Id.*

<sup>105</sup> *Tougher Standards*, *supra* note 95, at 18.