SUPREME COURT OF THE UNITED STATES

No. 92–1639

CITY OF CHICAGO, ET AL., PETITIONERS *v.* ENVIRONMENTAL DEFENSE FUND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[May 2, 1994]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, dissenting.

The statutory provision in question is a 1984 amendment entitled "Clarification of Household Waste Exclusion."[1] To understand that clarification, we must first examine the "waste exclusion" that the amendment clarified and, more particularly, the ambiguity that needed clarification. I therefore begin with a discussion of the relevant pre-1984 law. I then examine the text of the statute as amended and explain why the apparent tension between the broad definition of the term "hazardous waste generation" in the 1976 Act and the more specific exclusion for the activity of incinerating household wastes (and mixtures of household and other nonhazardous wastes) in the 1984 amendment should be resolved by giving effect to the later enactment.

When Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), it delegated to the Environmental Protection Agency (EPA) vast regulatory authority over the mountains of garbage that our society generates. The statute directed the

[1]Section 223 of the Hazardous and Solid Waste Amendments of 1984 amended §3001 of the Resource Conservation and Recovery Act of 1976. See 98 Stat. 3252; 42 U. S. C. §6921(i). The text of the provision is quoted *ante,* at 5–6.

EPA to classify waste as hazardous or nonhazardous and to establish regulatory controls over the disposition of the two categories of waste pursuant to Subtitles C and D of the Act. 42 U. S. C. §6921(a); see *ante,* at 3–4. To that end, the EPA in 1980 promulgated detailed regulations establishing a federal hazardous waste management system pursuant to Subtitle C.

Generally, though not always, the EPA regulations assume that waste is properly characterized as hazardous or nonhazardous when it first becomes waste. Based on that characterization, the waste is regulated under either Subtitle C or D. Household waste is regarded as nonhazardous when it is first discarded and, as long as it is not mixed with hazardous waste, it retains that characterization during and after its treatment and disposal. Even though it contains some materials that would be classified as hazardous in other contexts, and even though its treatment may produce a residue that contains a higher concentration of hazardous matter than when the garbage was originally discarded, such waste is regulated as nonhazardous waste under Subtitle D. See *ante*, at 4. Thus, an incinerator that burns nothing but household waste might "generate" tons of hazardous residue, but as a statutory matter it still is deemed to be processing nonhazardous waste and is regulated as a Subtitle D, rather than Subtitle C, facility.

Section 261.4(b)(1) of the EPA's 1980 regulations first established the household waste exclusion. See 45 Fed. Reg. 33120 (1980). The relevant text of that regulation simply provided that solid wastes derived from households (including single and multiple residences, hotels and motels) were "not hazardous wastes."[2] The regulation itself said nothing about the

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[2]The full text of 40 CFR §261.4(b)(1) (1993) reads as follows:

"(b) *Solid Wastes which are not hazardous wastes*. The following solid wastes are not hazardous wastes:

"(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. `Household waste' means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple

status of the residue that remains after the incineration of such household waste. An accompanying comment, however, unambiguously explained that "residues remaining after treatment *(e.g.* incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.,* at 33099. Thus, the administrative history of the 1980 regulation, rather than its text, revealed why a municipal incinerator burning household waste was not treated as a generator of hazardous waste.

The EPA's explanatory comment contained an important warning: if household waste was "mixed with other hazardous wastes," the entire mixture would be deemed hazardous.[3] Yet neither the comment nor the regulation itself identified the consequences of mixing household waste with other wastes that are entirely *nonhazardous*.[4] Presumably such a mixture would contain a lower percentage of hazardous material than pure household waste, and therefore should also be classified as nonhazardous—assumptions that are not inconsistent with the EPA's

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residences, hotels and motels)."

[3]"When household waste is mixed with other hazardous wastes, however, the entire mixture will be deemed hazardous in accord with §261.3(a)(2)(ii) of these regulations except when they are mixed with hazardous wastes produced by small quantity generators (see §261.5). While household waste may not be hazardous per se, it is like any other solid waste. Thus a mixture of household and hazardous (except those just noted) wastes is also regulated as a hazardous waste under these regulations." 45 Fed. Reg. 33099 (1980).

[4]In this regard, because the regulations left unexplained the ramifications of mixing household waste with nonhousehold waste that is not hazardous, the Court errs by asserting unqualifiedly that the Chicago incinerator "would have been considered a Subtitle C generator under the 1980 regulations." *Ante*, at 5.

warning that mixing household waste "with other *hazardous* wastes" would terminate the household waste exemption. The EPA's failure to comment expressly on the significance of adding 100 percent nonhazardous commercial or industrial waste nevertheless warranted further clarification.

Congress enacted that clarification in 1984. Elaborating upon the EPA's warning in 1980, the text of the 1984 amendment—§3001(i) of RCRA, 42 U. S. C. §6921(i)—made clear that a facility treating a mixture of household waste and "solid waste from commercial or industrial sources that does not contain hazardous waste," §6921(i)(1)(A)(ii), shall not be deemed to be treating hazardous waste. In other words, the addition of *non*hazardous waste derived from other sources does not extinguish the household waste exclusion.

The parallel between the 1980 regulation and the 1984 statutory amendment is striking. In 1980 the EPA referred to the exclusion of household waste "in all phases of its management."[5] Similarly, the 1984 statute lists *all phases* of the incinerator's management when it states that a facility recovering energy from the mass burning of a mixture of household waste and other solid waste that does not contain hazardous waste "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." See 42 U. S. C. §6921(i). Even though that text only refers to the exemption of the facility that burns the waste, the title of the section significantly characterizes it as a *waste* exclusion. Moreover, the title's description of the amendment as a "clarification" identifies an intent to codify its

[5]"Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g. incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33099 (1980).

counterpart in the 1980 regulation.

The Report of the Senate Committee that recommended the enactment of §3001(i) demonstrates that the sponsors of the legislation understood it to have the same meaning as the 1980 EPA regulation that it "clarified." That Report, which is worth setting out in some detail, first notes that the reported bill adds the amendment to §3001 "to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste." S. Rep. No. 98–284, p. 61 (1983). The Agency had promulgated the exclusion "in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households." *Ibid.* The Report explains that resource recovery facilities frequently take in household wastes that are mixed with other nonhazardous waste streams from a variety of commercial and industrial sources, and emphasizes the importance of encouraging commercially viable resource recovery facilities. *Ibid.* To that end, "[n]ew section [3001(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and nonhazardous waste from other sources." *Ibid.* The Report further explains:

> "All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of [the amendment] are met. First, such facilities must receive and burn only household waste and solid waste from other sources which does not contain hazardous waste identified or listed under section 3001.
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> "Second, such facilities cannot accept

> hazardous wastes identified or listed under section 3001 from commercial or industrial sources, and must establish contractual requirements or other notification or inspection procedures to assure that such wastes are not received or burned. This provision requires precautionary measures or procedures which can be shown to be effective safeguards against the unintended acceptance of hazardous waste. If such measures are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material from such commercial or industrial sources. Facilities must monitor the waste they receive and, if necessary, revise the precautionary measures they establish to assure against the receipt of such hazardous waste." *Ibid.*

These comments referred to the Senate bill that became law after a majority of the Senate followed the Committee's recommendation "that the bill (as amended) do pass." *Id.*, at 1.[6] Given this commentary, it is quite unrealistic to assume that the omission of the word "generating" from the particularized description of management activities in the statute was intended to render the statutory description any less inclusive than either the 1980 regulation or the Committee Report. It is even more unrealistic to assume that legislators voting on the

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[6]The Conference Committee adopted the Senate amendment verbatim. Its Report stated: "The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility." H. R. Conf. Rep. No. 98–1133, p. 106 (1984).

1984 amendment would have detected any difference between the statutory text and the Committee's summary just because the term "generating" does not appear in the 1984 amendment. A commonsense reading of the statutory text in the light of the Committee Report and against the background of the 1980 regulation reveals an obvious purpose to *preserve,* not to change, the existing rule.[7]

The relevant statutory text is not as unambiguous as the Court asserts. There is substantial tension between the broad definition of the term "hazardous waste generation" in §1004(6) of the Act and the household waste exclusion codified by the 1984 amendment: both provisions can be read to describe the same activity. The former "means the act or process of producing hazardous waste." 90 Stat. 2799; 42 U. S. C. §6903(6). Read literally, that definition is broad enough to encompass the burning

[7]The majority's refusal to attach significance to "`a single word in a committee report,'" *ante,* at 9, reveals either a misunderstanding of, or a lack of respect for, the function of legislative committees. The purpose of a committee report is to provide the Members of Congress who have not taken part in the committee's deliberations with a summary of the provisions of the bill and the reasons for the committee's recommendation that the bill should become law. The report obviously does not have the force of law. Yet when the text of a bill is not changed after it leaves the committee, the Members are entitled to assume that the report fairly summarizes the proposed legislation. What makes this Report significant is not the single word "generation," but the unmistakable intent to maintain an existing rule of law. The omission of the single word "generating" from the statute has no more significance than the omission of the same word from the text of the 1980 regulation.

of pure household waste that produces some hazardous residue. The only statutory escape from that conclusion is the 1984 amendment that provides an exemption for the activity of burning household waste. Yet that exemption does not distinguish between pure household waste, on the one hand, and a mixture of household and other nonhazardous wastes, on the other. It either exempts both the pure stream and the mixture, or it exempts neither.

Indeed, commercial and industrial waste is by definition nonhazardous: in order for it to fall within the exclusion created by the 1984 amendment, it must not contain hazardous components. As a consequence, the only aspect of this waste stream that would ordinarily be regulated by Subtitle C of RCRA is the ash residue. EPA could reasonably conclude, therefore, that to give any content to the statute with respect to this component of the waste stream, the incinerator ash must be exempted from Subtitle C regulation.

The exemption states that a facility burning 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 two conditions are satisfied. See *ante,* at 5–6. As long as the two conditions are met—even though the material being treated and disposed of contains hazardous components before, during, and after its treatment—that material "shall not be deemed to be . . . hazardous." By characterizing both the input and the output as not hazardous, the 1984 amendment excludes the activity from the definition of hazardous waste generation that would otherwise apply. For it is obvious that the same activity cannot both subject a facility to regulation because its residue is hazardous and exempt the facility from regulation because the statute deems the same

residue to be nonhazardous.[8]

Thus, if we are to be guided only by the literal meaning of the statutory text, we must either give effect to the broad definition of hazardous waste generation and subject all municipal incinerators that generate hazardous ash to Subtitle C regulation (including those that burn pure household waste) or give effect to the exclusion that applies equally to pure household waste and mixtures that include other nonhazardous wastes. For several reasons the latter is the proper choice. It effectuates the narrower and more recently enacted provision rather than the earlier more general definition. It respects the title of the 1984 amendment by treating what follows as a "clarification" rather than a repeal or a modification. It avoids the Court's rather surprising (and uninvited) decision to invalidate the household waste exclusion that the EPA adopted in 1980,[9] on

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[8]The Court characterizes my reading of the text as "imaginative use of ellipsis," *ante*, at 6, n. 1, because the subject of the predicate "shall not be deemed to be . . . hazardous" is the recovery facility rather than the residue that is disposed of after the waste is burned. That is true, but the reason the facility is exempted is because it is not "deemed to be . . . disposing of . . . hazardous wastes." Thus it is the statutorily deemed nonhazardous character of the object of the sentence—wastes—that effectively exempts from Subtitle C regulation the activity and the facility engaged in that activity. If, as the statute provides, a facility is not deemed to be disposing of hazardous wastes when it disposes of the output of the facility, it must be true that the output is deemed nonhazardous.

[9]Although the first nine pages of the Court's opinion give the reader the impression that the 1980 regulatory exclusion for pure household waste was valid, the Court ultimately acknowledges that its construction of the statute has the effect of "withholding all waste-stream

which municipalities throughout the Nation have reasonably relied for over a decade.[10] It explains why the legislative history fails to mention an intent to impose significant new burdens on the operation of municipal incinerators. Finally, it is the construction that the EPA has adopted and that reasonable jurists have accepted.[11]

The majority's decision today may represent sound policy. Requiring cities to spend the necessary funds to dispose of their incinerator residues in accordance with the strict requirements of Subtitle C will provide additional protections to the environment. It is also true, however, that the conservation of scarce landfill space and the encouragement of the recovery of

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exemption for waste processed by resource recovery facilities, even for the waste stream passing through an exclusively household-waste facility." *Ante*, at 10. Of course, it is not the 1984 amendment that casts doubt on the validity of the regulation, see *ante*, at 10, n. 4, but the Court's rigid reading of §1004(6)'s definition of the term "hazardous waste generation" that has achieved that result. Since that definition has been in the Act since 1976, the Court utterly fails to explain how the 1984 amendment made any change in the law.

[10]At oral argument Government counsel advised us that the Chicago incinerator is one of about 150 comparable facilities in the country and that the EPA has never contended that the acceptance of nonhazardous commercial waste subjected any of them to regulation under Subtitle C. Tr. of Oral Arg. 25.

[11]See especially Judge Haight's comprehensive opinion in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.,* 725 F. Supp. 758 (SDNY 1989), aff'd, 931 F. 2d 211 (CA2 1991). That decision is cited with approval by Circuit Judge Ripple, 985 F. 2d 303, 305 (CA7 1993) (dissenting opinion); *Environmental Defense Fund, Inc.* v. *Chicago,* 948 F. 2d 345, 352 (CA7 1991) (dissenting opinion), in this litigation.

energy and valuable materials in municipal wastes were major concerns motivating RCRA's enactment. Whether those purposes will be disserved by regulating municipal incinerators under Subtitle C and, if so, whether environmental benefits may nevertheless justify the costs of such additional regulation are questions of policy that we are not competent to resolve. Those questions are precisely the kind that Congress has directed the EPA to answer. The EPA's position, first adopted unambiguously in 1980 and still maintained today,[12] was and remains a correct and permissible interpretation of the Agency's broad congressional mandate.

Accordingly, I respectfully dissent.

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[12]Although there has been some ambivalence in the EPA's views since 1985, see 725 F. Supp., at 766–768, there is no ambiguity or equivocation in either its original or its present interpretation of the Act.