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?

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ENVIROMENTAL 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?

INTRODUCTION

The Resource Conservation and Recovery Act1 ("RCRA") was enacted to regulate daily management of hazardous and non-hazardous solid wastes, to protect human health and the environment, and to conserve depleting energy resources through recovery.2 Under Subtitle C of RCRA, Congress authorized the Environmental Protection Agency ("EPA") to promulgate regulations3 subjecting hazardous wastes to a strict "cradle-to-grave regulatory regime."4 The EPA's response to this congressional authorization, which left the Second and Seventh Circuit Courts in conflict regarding the interpretation of RCRA's "Household Waste" exemption, is the subject of this Note.5

Pursuant to congressional authorization, the EPA excluded municipal "household waste" from Subtitle C regulation.6 This

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5. See infra notes 14-15.

§ 261.4 Exclusions

(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 residences, hotels and motels.)

Id.
EPA exclusion classified “household waste” as waste that “has been collected, transported, stored, treated, disposed, recovered . . . or reused.”

The EPA regulations have never clearly expressed whether municipal waste ash which collects at the bottom of an incinerator after incineration (“bottom ash”) is excluded from Subtitle C regulation as “household waste” or, if the ash exhibits hazardous waste characteristics, whether the ash should be regulated as a hazardous waste. In section 3001(i) of the 1984 RCRA amendments, Congress clarified and expanded the “household waste” exclusion without addressing whether waste ash was specifically included as “household waste” or excluded as a hazardous waste. The codification of section 3001(i) essentially provided that a resource recovery facility which burned municipal solid waste was excluded from the hazardous waste regulation requirements of “treating, storing, disposing of, or otherwise managing” hazardous waste.

Following the RCRA amendments and because Congress did not clarify a per se ash exclusion, the EPA issued several conflicting interpretations of the “household waste” exclusion with respect to the bottom ash produced as a result of the waste management in-

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8. 45 Fed. Reg. 33,098 (1980). The EPA excluded ash in the preamble to its hazardous waste regulations stating: “[s]ince household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration . . . ) are not subject to regulation as hazardous waste.” Id. at 33,085 (Preamble). But see infra notes 58-63 and accompanying text for subsequent conflicting EPA positions on whether or not to exclude ash from hazardous waste regulation.
9. 42 U.S.C. § 6921(i) (1988). This is the codified amendment to RCRA, originally section 3001(i); see infra note 10 for the full text of the clarification.
10. The codification of section 3001(i), 42 U.S.C § 6921(i) provides:

**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 purpose 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 waste . . . , 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.

cineration process. It remained unclear whether bottom ash which exhibited hazardous waste characteristics should be regulated as a hazardous waste under the RCRA Subtitle C regulation or whether Congress intended to exempt it from the category of hazardous waste.

This confusion concerning classification of waste ash as hazardous or household waste crystallized in two recent circuit court cases which construed RCRA section 3001(i). Both cases addressed whether the clarification of the “household waste” exemption did, in fact, clarify whether municipal bottom waste ash is within the exemption.

This Note contrasts the Second Circuit’s holding in *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.* and the Seventh Circuit’s holding in *Environmental Defense Fund, Inc. v. City of Chicago* in an attempt to determine whether Congress intended to exempt municipal waste bottom ash from regulation as a hazardous waste, despite its hazardous propensities. Section I of

11. 45 Fed. Reg. 33,098, 33,099 (1980); see also supra note 5. But see infra notes 58-63 and accompanying text for conflicting EPA positions on whether or not to exclude ash from hazardous waste regulation.


13. See supra notes 9-10 and accompanying text.

14. 931 F.2d 211 (2d Cir. 1991) [hereinafter Environmental Defense Fund will be referred to as “EDF”].

15. 948 F.2d 345 (7th Cir. 1991).

16. See Kathleen J. Rutt, Note, *Regulating the Disposal of Municipal Solid Waste Incinerator Ash: The Companion Cases of Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc. and Environmental Defense Fund, Inc. v. City of Chicago*, 4 VILL. ENVTL. L.J. 207 (1993) for thorough factual recitation of the cases and brief analysis of these cases analogizing the ash problem to CERCLA problems of clean-up of hazardous contamination. Ms. Rutt’s Note concludes that the Seventh Circuit in Chicago reached the correct conclusion that ash was intended to be exempt from hazardous waste regulation in the circumstances of the case. This Note reaches the opposite conclusion and bases its analysis on statutory construction principles rather than on policy considerations. See also David C. Wartinbee, Ph.D., Comment, *Incinerator Ash May Not Be A Hazardous Waste, But The Story Doesn’t End There!*, 9 COOLEY L. REV. 115 (1992) which concludes that the debate over municipal incineration ash disposal may be a waste of time because the penalties a polluter incurs as a result of CERCLA liability include reclamation of any polluted area. See, e.g., B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960 (D. Conn. 1991). However, an argument still needs to be made for any regulation that will prevent pollution in the first place. Clean-up costs thousands, even millions of dollars, and it can take years to revitalize a polluted area. See, John Holusha, *Ruling on Ash May Increase Some Cities’ Disposal Costs*, N.Y. TIMES, Nov. 22, 1991, at D1; *Solid Waste: Hazardous or Not Interest Groups Want Incinerator Ash...
this Note outlines the development of the "household waste" exemption within RCRA and its 1984 clarification amendment. Section II examines the Second Circuit's *Wheelabrator* case, which held that municipal ash was exempt from hazardous waste regulation as a household waste. Section III reviews the Seventh Circuit's decision in *Chicago*, which held that municipal ash was within the purview of hazardous waste regulation. Section IV analyzes and contrasts these holdings and analyzes the Supreme Court's views on the use of legislative history in statutory construction. Finally, this Note concludes that the *Wheelabrator* court properly construed the "household waste" exemption by interpreting the ambiguous statutory language of section 3001(i) within the parameters set by the Supreme Court.

I. BACKGROUND

A. RCRA Subtitles C and D

RCRA and the EPA regulations promulgated thereunder constitute a comprehensive scheme of environmental legislation. This scheme divides solid waste into two classes for disposal purposes and classifies waste as either hazardous or non-hazardous. The first step in classification is to determine whether a substance, in this case waste ash, is considered a solid waste. In 1980, the EPA promulgated, pursuant to congressional authorization, several regulations which defined "solid waste" and "other waste material." The EPA defined solid waste as any "garbage, refuse, sludge" or any "other waste material" not otherwise exempted. 

Legislation From Congress, 20 Env't Rep. (BNA) 1650 (Jan. 26, 1990). Therefore, it is imperative that municipal ash be determined hazardous or benign for purposes of disposal so that municipalities can either get on with the development of incineration as a viable energy recovery source or abandon it. See also Bradley K. Groff, Note, Burned-If-We-Do, Burned-If-We-Don't: Treatment of Municipal Solid Waste Incinerator Ash Under RCRA's Household Waste Exclusion, 27 Geo. L. Rev. 555 (1993) for a discussion of the use of legislative history and policy issues in statutory construction of RCRA's section 3001(i).

17. This Note does not analyze policy or argue that policy is irrelevant to the general issue of whether the need for municipal incineration outweighs the need for environmental protection in municipal incineration circumstances. See supra note 16 for references which discuss exclusion of bottom ash based on policy considerations; see also infra note 130.

18. See supra note 1; see also infra notes 131-86.


“served its originally intended use and sometimes is discarded.”

Because of the continued confusion over when a material is sometimes discarded, in 1985 the EPA ultimately promulgated a straightforward definition of solid waste which provided that any “abandoned, recycled” or “inherently waste-like” material is discarded material, regardless of the method of disposal. Therefore, because municipal ash must be discarded or abandoned as a last step in the waste management process, it is disposed-of material and subject to regulation as a solid waste.

Once a substance is found to be a solid waste, the next step in regulation is to determine if the solid waste is hazardous. Subtitle C of RCRA strictly regulates hazardous solid wastes that are either “listed” or “characteristic” wastes. This is a two-step process. First, RCRA requires the EPA to “develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste. . . .” Second, the statute requires the EPA to promulgate regulations based on the criteria identifying the waste as “characteristic” or “listed” hazardous wastes. “Characteristic” waste is defined as any “abandoned” material includes solid wastes “disposed of,” “burned” or “incinerated” or “[a]ccumulated, stored, or treated. . . . before or in lieu of being abandoned.”


22. 50 Fed. Reg. 627 (1985). This regulation reiterated the statutory definition of solid waste as any “discarded material not otherwise excluded by regulation or by a variance.” See 40 C.F.R. § 261.2(a)(i)-(iii) (1992). Any “abandoned” material includes solid wastes “disposed of,” “burned” or “incinerated” or “[a]ccumulated, stored, or treated. . . . before or in lieu of being abandoned.”

23. See American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987). In American Mining, the question was whether the EPA definition of solid waste had improperly subjected to regulation as a solid waste American Mining material which was secondary, recovered material, captured and reinserted into the metal smelting process as an ongoing part of production. Id. at 1179, 1181. The court held that the EPA exceeded congressional intent to regulate “discarded material” in regulating secondary, reused material. Id. at 1186. The EPA interpreted the holding narrowly and excluded only those secondary materials that were recovered and reused. If any recycled material is discarded, i.e., disposed of, it is not excluded from solid waste regulation. 53 Fed. Reg. 519-21, 523, 526 (1988). This ruling was subsequently validated by the court in American Petroleum Institute v. EPA, 906 F.2d 729 (D.C. Cir. 1990).


26. 42 U.S.C. § 6921(a) (Supp. IV 1992). The criteria should be formulated “taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics.”

27. 42 U.S.C. § 6921(a) (Supp. IV 1992). These regulations indicate characteristic
wastes are those that meet an "inherent property" test as set forth in EPA regulations. These inherent property regulations provide that if, after testing, a waste is either ignitable, reactive, corrosive or toxic, it can be classified as a "characteristic" waste. Most "characteristic" wastes are classified due to their toxicity. Consequently, the EPA set forth a comprehensive detailed procedure for determining if a waste has a toxic characteristic.

"Listed" hazardous wastes are those that may exhibit toxic, ignitable, corrosive or reactive characteristics or that are automatically considered hazardous for other reasons. These "listed" hazardous wastes are divided into four groups. These groups are spent chemicals and by-products of various industrial processes, sludges and by-products of an entire single industry, and two categories including commercial chemicals and pesticides when discarded or spilled. EPA regulations establish the following three criteria to determine whether wastes are "listed" hazardous wastes: (1) wastes exhibiting one of the toxic characteristics of ignitability, reactivity, corrosiveness or toxicity; (2) wastes fatal in low doses; or (3) wastes exhibiting RCRA properties posing "a substantial present or potential hazard to human health or the environment when improperly ... managed."

A waste is further classified as either a "characteristic" or "listed" waste based on EPA "mixture and derived from" rules.

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30. 55 Fed. Reg. 26,987 (1990) (codified at 40 C.F.R. pt. 261, app. II (1992)). A non-liquid waste is subject to a leaching procedure which extracts toxic material from the waste and tests its level of toxicity against established EPA guidelines. Id. If the waste exceeds 100 times the maximum contaminant level set under the Safe Water Drinking Act or other appropriate safety legislation for that material, it is considered hazardous. See 42 U.S.C. § 300f-3 (1988); see also 45 Fed. Reg. 33,111 (1980); 55 Fed. Reg. 11,827 (1990).
32. See 40 C.F.R. § 261.11.
33. 40 C.F.R. § 261.31 (1992); "f-listed," "nonspecific source" wastes of which there are 39 as of 1992.
34. 40 C.F.R. § 261.32 (1992); "k-listed," "specific source" wastes of which there are almost 100 listed.
35. 40 C.F.R. § 261.33 (1992); "P" or "U" wastes which include over 250 products or residues.
which address disposed of mixtures and the waste derived therefrom. A material will be classified as hazardous if, although an essentially non-hazardous "mixture" upon disposal, the residue "derived" from the "mixture" after disposal exhibits hazardous characteristics. The residue remains a hazardous waste as long as it exhibits the hazardous characteristic.

A major problem in characterizing or listing municipal ash as a hazardous waste arises from the nature of the ash itself. Although municipal wastes are themselves non-hazardous, once incinerated they may produce a toxic ash and would intermittently fail EPA toxicity tests. A facility may take in essentially the same non-hazardous household wastes time and time again and never know which residue, if any, will test above the EPA toxicity limits.

If a facility is classified as a hazardous waste disposal facility by the EPA, the only way a material disposed of by the facility escapes Subtitle C regulation is if the facility petitions the EPA for "delisting" and shows the EPA that the material being disposed of is not, in fact, hazardous. Facilities seeking delisting must establish that (1) wastes do not fall within the "characteristic" classification, and (2) wastes do not exhibit any other characteristic that would cause the EPA to keep them "listed." In general, only materials with hazardous propensities below EPA testing levels are "delisted."

Notwithstanding this delisting procedure, the EPA has "declassified" certain solid wastes from Subtitle C regulation. These wastes are "declassified" despite their hazardous characteristics which place them over the EPA testing limits and otherwise would require regulation under RCRA Subtitle C. One important excul-
sion from regulation under Subtitle C exempts "household wastes," or municipal waste being burned in energy recovery facilities. Because Congress indicated that incineration would cease to develop as a viable energy recovery method if municipalities' "household wastes" were subject to the strict Subtitle C regime, the EPA further declassified certain hazardous solid wastes. Consequently, "household waste" is currently regulated under the less stringent standards of Subtitle D of RCRA.

B. The "Household Waste" Exclusion

The EPA issued Subtitle C regulations in three phases. Section 261.4 of the May 1980 regulations provided that "household wastes," unless mixed with other hazardous wastes, would be deemed non-hazardous wastes. "Household waste" means "any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households." The preamble to the 1980 regulations stated that "household waste," as a waste stream, was excluded in all phases of its management. Thus, residue remaining after incineration, because it is a part of the overall management process, is part of the waste stream and part of the exclusion.


The EPA further explained that if household waste was mixed with hazardous wastes, the mixture would be "deemed hazardous" and would be regulated under Subtitle C. Id.


48. 42 U.S.C. § 6941-6949a (1988). See supra note 6. Subtitle D's less stringent standards merely forbid disposing of solid wastes in open dumps and have not been the focus of any significant EPA regulations since the 1976 passage of RCRA. In 1989, as part of clean air legislation and RCRA reauthorization, reports recommended specific ash regulations, but these recommendations were not incorporated into legislation. See Ash Management and Disposal Act, Pub. L. No. 101-549 § 306, 104 Stat. 2399 (1990). For a further discussion of Subtitle D which focuses on recycling and operation of state landfills, see Sale, supra note 24, at 414.


53. Id. The EPA further explained that if household waste was mixed with hazardous wastes, the mixture would be "deemed hazardous" and would be regulated under Subtitle C. Id.

wastes," without specifically addressing municipal ash regulation. In 1985 the EPA promulgated a regulation identical to the language of section 3001(i). The preamble to that EPA regulation acknowledges the existence of toxic ash and interprets the "household wastes" statute to exclude municipal ash only where toxic characteristics are rarely found in ash residue. This left open the possible inclusion of toxic ash as a Subtitle C waste. This possible interpretation conflicted with the EPA's earlier interpretation that ash as part of the waste stream is a household waste and therefore exempt from regulation as a hazardous waste. However, the EPA further announced its intention not to consider the matter until serious questions arose about the ash. The EPA's position apparently stemmed from concern for the "highly beneficial nature of resource recovery facilities" as expressed by Congress in its RCRA statement of purposes.

In 1987, the EPA appeared to be changing its position. The Assistant Administrator for the Office of Solid Waste and Emergency Response, J. Winston Porter, testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances. In response to a question on the status of incinerator ash, Porter conceded that the EPA "may have been in error." Porter testified that the EPA interpretation of the household waste clarification was that Congress "probably intended to exclude these residues

55. 42 U.S.C. § 6921(i) (1988); see also supra note 9 and accompanying text.
58. Id. The preamble states:
   The statute is silent as to whether hazardous residues from burning combined household and non-household waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous waste is burned . . . . EPA does not see . . . 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.

Id.
59. Id. at 28,726.
61. Id.
from regulation under Subtitle C."62

Only months later, the EPA appeared again to reverse itself. In May of 1988, Sylvia Lowrance, Director of the EPA Office of Solid Waste, testified before the same Senate Subcommittee and restated the EPA's 1985 position that if ash exhibits hazardous characteristics, it would be regulated as hazardous waste.63

The 1990 Clean Air Act Amendments imposed a two year moratorium on municipal solid waste incineration ash regulation.64 Despite the existence of a proposed bill which would have specifically regulated ash under Subtitle D of RCRA, Congress expressly put the ash regulation problem on hold until it reauthorized RCRA during the 102nd Congress, a step it has yet to take.65 However, Congress also expressly stated that the moratorium would not "affect in any manner ongoing litigation," including the two cases contrasted in this Note.66

62. S. REP. No. 284, 98th Cong., 2d Sess. 61 (1983). Porter concluded that the primary intent of § 3001(i) was to encourage energy recovery and that the EPA's previous interpretation would be inconsistent with the exclusion where Congress had expressly stated "all waste management activities of a facility" were to be included. Id.

63. Id. at 33.

64. Pub. L. No. 101-549, 104 Stat. 2399 (1990). Congress decided to maintain the status quo on ash regulation despite the existence of a proposed bill which would have specifically regulated ash under Subtitle D of RCRA. Representative Thomas A. Luken, in his opening remarks at the hearing on the proposed legislation, recognized the ambiguity of the current statutory language as to whether Subtitle C or D should regulate ash. Hearings, supra note 60. Representative Luken further recognized the conflicting signals sent by the EPA and called for legislative action. Id. Although it is not entirely clear why Congress did not act on this bill, it could be argued that Congress was awaiting judicial decision on the two cases contrasted in this Note. Judicial resolution of any dispute between the circuits could focus the scope of further legislation. Should the Supreme Court take a position inconsistent with congressional intent, then Congress would act to make the language of the "household waste" exemption clearer. If Congress is satisfied with the outcome, it need not act further.

65. See Stephen Johnson, Recyclable Materials and RCRA's Complicated, Conflicting, and Costly Definition of Solid Waste, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,357, 10,358 n.10 (July, 1991). In the first three weeks of the first session of the 102nd Congress, over 11 amendments or reauthorization bills were introduced. Id. See also supra note 64.


The defendant in *Wheelabrator*, Wheelabrator Technologies, Inc. ("Wheelabrator"), operates a resource recovery facility which produces ash residue as a result of incinerating the trash of Westchester County, New York. Prior to the commencement of the suit against Wheelabrator, nine out of ten bottom ash samples taken from the incinerator failed the EPA toxicity test technically rendering the samples hazardous material. The Environmental Defense Fund ("EDF") contended that this ash was hazardous waste subject to RCRA Subtitle C. Wheelabrator contended that the ash fell within RCRA's "household waste" exclusion and therefore could be disposed of via non-hazardous Subtitle D regulation.

The United States District Court for the Southern District of New York rejected EDF's arguments, issued a memorandum of findings and conclusions and ordered further discovery. The district court ultimately ordered judgment for Wheelabrator, exempting its ash from Subtitle C regulation. The EDF appealed the decision to the United States Court of Appeals for the Second Circuit.

The Court of Appeals for the Second Circuit affirmed the district court's holding. The court of appeals found that Congress intended Wheelabrator's municipal ash residue to be excluded from hazardous waste regulation because ash was intended to be "household waste" as clarified under section 3001(i) of the 1984 amendments to RCRA.
The court of appeals relied on the district court's reasoning in its opinion. The district court considered the substantive issues relating to the creation and management of municipal ash residue as set out in RCRA section 3001(i). The court held that the section 3001(i) exclusion extends to "residue ash produced by the incineration of municipal solid waste."

The district court read the language of the statute in light of its legislative history. The court construed the plain language of section 3001(i) using the statute's definitions of "disposal," "hazardous waste generation" and "hazardous waste management." The term "disposal" is defined by the statute as "discharge, deposit, injection . . . or placing of any solid waste or hazardous waste into or on any land or water so that such . . . waste . . . may enter the environment or be emitted into the air or discharged into any waters . . . ." "Hazardous waste generation" means "the act or process of producing hazardous waste." "Hazardous waste management" means "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery and disposal of hazardous wastes."

EDF argued that "managing" rather than "generating" hazardous wastes was the focus of section 3001(i), rendering "generating" of the ash outside the purview of the exclusion. The court disagreed. The court read the term "management" with the term "disposal" to conclude that managing waste is not exclusive of generating waste because in managing waste, a facility must dispose of any residue that is generated.

The legislative history of section 3001(i) persuaded the district
court of the intended exemption. The court quoted extensively from a Senate committee report, a conference committee report, and EPA statements. The Wheelabrator court also quoted from post-legislative letters written by senators and a representative which interpreted that Congress did not intend to exempt ash with toxic characteristics from regulation as a hazardous waste. The court concluded, however, that subsequent interpretations of legislation are not useful in determining congressional intent. Congress' intent at the time it passed section 3001(i), as indicated in Senate and Committee reports, was to encourage energy recovery. Therefore, the reach of the exclusion must include the facilities that recover energy.

The district court supported its analysis with the Report of the Senate Committee on Environment and Public Works ("Report") which accompanied the proposed amendment. The Report indicated to the court that since section 3001(i) was a clarification of an EPA regulation, Congress was aware of the EPA interpretation which included ash in the exemption. Congress could have specifically clarified the EPA interpretation with regard to ash. The court concluded it would be an unfair reading of the statute to omit ash from the "household waste" exclusion without a clearer indication from Congress to do so.

The Report also included the term "generation" in its explanation of the exclusion, although RCRA itself does not. Given the fact that the legislation is ambiguous on its face, the court found the Report's reference to generation probative of whether Congress intended to include generation of waste, such as ash residue, within

86. Wheelabrator, 725 F. Supp. at 766-69; see supra notes 56-63 and accompanying text.
87. Wheelabrator, 725 F. Supp. at 769-70. EDF submitted letters of October, 1987, from senators and a representative in support of its argument. The court disagreed because the letters were written subsequent to the legislation and were "not even the contemporaneous views of the authors, much less of Congress as a whole." Id. at 770; see also infra note 113 and accompanying text.
89. Id. at 767.
90. Id. at 765 (quoting S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983)); see supra note 83.
92. Id. at 765-66.
the "household waste" exemption.94

The district court gave little deference to the EPA statements,95 regarding them as inconsistent and based on a questionable interpretation of the statute. The court accorded even less weight to the letters submitted by the senators and Representative Florio on EDF's behalf. In addition, the court found subsequent interpretations by some members of Congress "'hazardous' to the present purpose of statutory construction."96 The court concluded that the intent of Congress was clear at the time of the exclusion's passage. The Court of Appeals for the Second Circuit agreed with the district court that Congress intended to exempt municipal incineration ash from Subtitle C regulation in order to promote the energy recovery process itself.97

III. ENVIRONMENTAL DEFENSE FUND, INC. v. CITY OF CHICAGO98

The Northwest Waste-to-Energy Facility, owned and operated by the City of Chicago, has incinerated residential refuse since 1971. The incineration process, in turn, produces bottom ash residue.99 Between 1981 and 1987, thirty-five ash samples from the facility were tested for toxicity. Thirty-two of the samples exceeded toxicity limits as set forth in Subtitle C and EPA regulations.100 In Chicago, the EDF brought suit against the city of Chicago for RCRA violations. Chicago conceded that its incinerator's ash was "managed" as non-hazardous waste,101 but argued that such management was appropriate because the ash, even if it exhibited hazardous characteristics, was exempt under section 3001(i) of RCRA102 and thus subject only to Subtitle D regulation. The EDF contended that the City of Chicago violated RCRA by Chicago's disposal of hazardous waste in a non-hazardous Michigan landfill.103 The par-

95. Id. at 766-69. See supra notes 56-63 and accompanying text for the EPA's interpretations of the "household waste" exemption.
96. Wheelabrator, 725 F. Supp. at 770; see supra note 87.
98. 948 F.2d 345 (7th Cir. 1991), vacated, 113 S. Ct. 486 (1992), aff'd, 985 F.2d 303 (7th Cir. 1993), cert. granted, 113 S. Ct. 2992 (1993).
99. Id. at 345-46.
100. Id. at 346; see supra notes 26-30 and accompanying text.
101. Chicago, 948 F.2d at 345-46.
103. Chicago, 948 F.2d at 346.
ties filed cross motions for summary judgment. The district court issued a memorandum finding Chicago exempt from Subtitle C regulation pursuant to the section 3001(i) exclusion. However, the court denied both motions and ordered further discovery to determine if Chicago was in compliance with section 3001(i). EDF conceded that Chicago was in compliance and Chicago renewed its motion for summary judgment which was granted on August 20, 1990. EDF appealed the granting of summary judgment to the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit held that municipal solid waste ash was subject to Subtitle C regulation as a hazardous waste. The court explained that ash which was generated as a result of household waste management was subject to Subtitle C regulation if it exhibited hazardous characteristics as defined in EPA regulations. The Chicago court set out the legislative history of section 3001(i) and then chose not to rely on it, basing its opinion on the plain language of the statute. The Seventh Circuit found that the "definitive statement of the congressional intent" lies in the actual words of the statute which it considered the "end product of the rough-and-tumble of the political process." After setting out the language, purpose, and background of the statute, the court explained that "[w]hat we have to work with here is a statute subject to varying interpretations, a foggy legislative history, and a waffling

104. Id.
105. Id.
106. Id. at 352.
107. The Chicago and Wheelabrator courts examined the same legislative history, which is also set out in the background of RCRA in Section I of this Note. See also supra notes 83-96 and accompanying text.

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

Id.

The Seventh Circuit, in In re Sinclair, also spoke of the use of legislative history in construing statutes as "a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history . . . , because it becomes a crutch . . . , because it complicates the task of execution and obedience."

In re Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).
109. Sinclair, 870 F.2d at 1343.
administrative agency."\textsuperscript{110}

The Seventh Circuit focused on the language of section 3001(i) which provides that "[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 purpose of regulation under this subchapter."\textsuperscript{111} The court acknowledged that because of the statute's ambiguity, legislative history may be probative of congressional intent. However, in this case, the court found that the legislative history itself was not "explicit" as to Congress' intent to exempt ash. On this point the Chicago court expressly disagreed with the Wheelabrator court.\textsuperscript{112}

In support of its position, the Seventh Circuit relied on the post-enactment letter signed by Senators Stafford, Durenberger, Chafee, Burdick, Baucus, Mitchell, and the letter of Representative Florio which implied that members of Congress intended management and not generation of waste to be the focus of the exemption.\textsuperscript{113} The court also relied on Congressman Thomas Luken's opening remarks at a 1989 hearing on proposed legislation to regulate ash under Subtitle D.\textsuperscript{114} Congressman Luken indicated in his opening statement that Congress did not intend to exempt ash from toxicity analysis or from regulation under Subtitle C if the ash tested at hazardous, toxic levels.\textsuperscript{115} The Seventh Circuit considered this as further evidence that the Senate Report, relied on by the Second Circuit in Wheelabrator, was not as definitive as that court deemed it to be.\textsuperscript{116} The Seventh Circuit concluded that generation and management are not coextensive terms.\textsuperscript{117}

\textsuperscript{110} \textit{Chicago}, 948 F.2d at 350.


\textsuperscript{112} \textit{Chicago}, 948 F.2d at 348. The two sentence dissent of Judge Ripple states that he would affirm the district court's decision for the reasons stated in Wheelabrator. \textit{Id.} at 352 (Ripple, J., dissenting). See supra notes 73-74 and accompanying text for the opposite holding of the Wheelabrator court.

\textsuperscript{113} \textit{Chicago}, 948 F.2d at 348. The Senators' letter is reproduced in the opinion and indicates that Congress did not intend to exempt the ash from analysis for toxicity. Therefore, Congress must have intended that if the ash tested hazardous that it should be regulated under RCRA Subtitle C. \textit{Id.}

\textsuperscript{114} \textit{Hearings}, supra note 60; see supra note 64 for a discussion of the content of the hearings.

\textsuperscript{115} \textit{Hearings}, supra note 60; see supra note 64 and accompanying text.

\textsuperscript{116} \textit{Hearings}, supra note 60.

\textsuperscript{117} \textit{Chicago}, 948 F.2d at 351. The court explained that "[s]tatutory construction is a holistic endeavor: the only permissible meaning is that which is compatible with the
In analyzing the statutory language, the court focused on the phrase "or otherwise managing" and the fact that the other terms as defined in the statute do not include the concept of "generating" a different waste product altogether. The court found the "or otherwise managing" language of section 3001(i) to be the dispositive language of the statute. According to the court, "[o]r otherwise managing" indicated that "generating" a different waste was not within the exclusion. The court found the words of the statute to be specific in that "management" includes only those specific activities that are listed. The statute defines "management" using the terms "treatment" and "disposal." Neither definition incorporates the term "generation." Therefore the court held that "management" does not include "generation," that the section 3001(i) exclusion does not apply, and that municipal solid waste ash is subject to regulation under Subtitle C of RCRA. The court concluded that the bottom ash waste product is a different waste product because it has a completely different chemical and physical composition from the trash that began the process. The court found it inconsistent that the generation of hundreds of tons of hazardous wastes that qualify as "characteristic" wastes were intended to be excluded from Subtitle C regulation when a stated purpose of RCRA is to encourage the careful management of hazardous materials which are dangerous to human health.
The Supreme Court granted certiorari on November 16, 1992. In a Summary Disposition, the Court vacated the Seventh Circuit’s judgment and remanded the case for further consideration in light of a September 28, 1992 EPA memorandum, once again interpreting the “household waste” exemption. In the memorandum, the EPA stated that its regulations intended to exempt ash from regulation as a hazardous waste. On January 29, 1993, the Seventh Circuit reconsidered the case on remand from the Supreme Court. The court affirmed its previous holding and held that “ash generated in the combustion of municipal waste is subject to the regulatory scheme governing hazardous waste set forth in [RCRA],” notwithstanding the EPA’s conflicting interpretation. Therefore, the Second and Seventh Circuits were still in disagreement.

On June 21, 1993, the Supreme Court granted certiorari. Arguments were heard on January 19, 1994.

where excess waste from developed nations generally ends up. See C. Russell H. Shearer, Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste, 23 ENVTL L. 141 (1993). Therefore, it seems logically imperative that the United States determine what it will or will not consider hazardous waste for disposal purposes. Any non-hazardous waste that can be safely disposed of on United States soil can also alleviate the amount of waste that may be criminally shipped out of the country in an effort to circumvent proper disposal methods for hazardous waste.

126. Memorandum of William K. Reilly, Administrator, Environmental Protection Agency, dated September 18, 1992, 61 U.S.L.W. 3369 (November 17, 1992). At the suggestion of the Bush administration, the Court sidestepped the question of whether municipal waste ash should be regulated as a hazardous waste, and sent the case back to the Seventh Circuit. The outcome was uncertain because the Seventh Circuit had warned the Supreme Court that it was not likely to change its position on EPA deference and had asked the Supreme Court for full review of the case. Supreme Court Remands Major Waste Disposal Case, UPI, November 16, 1992, available in LEXIS News Library, UPI file.
128. Id.
130. 62 U.S.L.W. 3419 (U.S. Dec. 21, 1993) (No. 19-1639); see also Hazardous Waste: U.S. Supreme Court Agrees to Review RCRA Application to City Incinerator Ash, DAILY REPORT FOR EXECUTIVES (BNA), June 22, 1993, at A118. Whether the Clinton administration’s change in EPA leadership will have any effect on the Supreme Court’s analysis remains to be seen. The new EPA head Carol Browner was the former secretary of Florida’s DEP and an attorney. She has received high praise from environmental groups for her “aggressive, proactive approach to regulation and her vigorous enforcement of the law.” During confirmation hearings, Browner stated that the “EPA can ease the burden on the business community without compromising the environment.” Theodore L. Garrett, The Changing Environmental Guard at EPA: What to Expect, SONREEL NEWS, May-June 1993, at 2.
IV. Analysis

The disagreement in statutory construction that has arisen between the Second and Seventh Circuits over the interpretation of an environmental statute is not unique. Courts have long struggled with the use of legislative history in statutory construction. Recently, the pre-World War Two textualist philosophies have re-emerged, creating renewed vigor in the oldest of controversies concerning the benefits and drawbacks of using legislative history in statutory construction. The Wheelabrator and the Chicago courts reached opposite holdings due to the method chosen to construe the statute. The Wheelabrator court, finding the statutory language ambiguous, utilized what it thought to be the most authoritative legislative history, rejected what it thought to be the least authoritative history and held that the municipal bottom ash was part of the "household waste" exemption. The Chicago court's analysis included consideration of non-authoritative post-legislative history. The post-legislative history the court considered was at odds with the pre-legislative history. As a result, the Seventh Circuit rejected all the legislative history as confusing and ultimately resorted to the textual or literal approach to statutory construction. The Chicago court then held that the municipal bottom ash that is toxic should be regulated as a hazardous waste.

The Second and Seventh Circuits' decisions represent two distinct approaches to statutory construction. The Wheelabrator court's approach used authoritative legislative history to glean congressional intent.

131. The basic canons of statutory construction are: 1. Plain language; 2. Give effect to the entire statute; 3. Read the text in its contemporary context; 4. If ambiguity exists, look to legislative history; and 5. Provide a reasonable interpretation avoiding absurd results. For a thoroughly enjoyable analysis of these basic concepts, see Justice John Paul Stevens, The Shakespeare Canon of Statutory Construction, 140 U. PA. L. REV. 1373 (1992).


133. Chicago, 948 F.2d at 352; see supra notes 107-24.

134. Chicago, 948 F.2d at 352. The Chicago court, while textually construing the statute, also looked at statistics which indicated that hundreds of tons of ash were produced annually by the incineration process. Id. As a matter of policy, the court concluded Congress could not have meant hundreds of tons of a chemically and physically different composition than that which entered the incinerator to be "household waste." Id.; see supra note 16 and accompanying text.

135. See supra note 131 and accompanying text for an explanation of the canons of statutory construction which include the use of legislative history if the language of a statute is ambiguous.
proach which is necessary where the legislative history is unclear as to congressional intent.136 These extremes have fostered a multitude of intermediate theories ranging from the “soft” plain meaning rule137 to formalism,138 historicism139 and imaginative reconstruction.140 The canons of statutory construction themselves include recourse to legislative history if the statute’s language is ambiguous and the legislative intent is clear.141 The Wheelabrator and Chicago courts agreed that legislative history could be useful in determining congressional intent if the legislative history is clear. However, the Chicago and Wheelabrator courts parted company on what legislative history is useful in statutory construction. The Wheelabrator court found the legislative intent clear. The Chicago court chose not to consider any legislative history because the court found the legislative intent unclear. This resulted in the court’s literal construction of the statute.

An analysis of the Supreme Court’s views on the use of legislative history in statutory construction suggests that the Supreme Court supports the use of legislative history within certain defined parameters. The Wheelabrator court’s construction of the statute is consistent with these parameters.

A. Plain Meaning Approach

According to the Supreme Court, if the language of a statute is clear, a court cannot replace that language with “unenacted legislative intent.”142 The Supreme Court has indicated that a court


137. See infra text accompanying note 156 for the definition of the soft plain meaning rule.

138. See infra notes 151-53 and accompanying text for an explanation of the formalist attitude toward use of legislative history in statutory construction.

139. See infra text accompanying note 150 for an explanation of the historicist approach to the use of legislative history in statutory construction.

140. See Eskridge, infra note 145 at 630-36.

141. See Stevens, supra note 131.

142. INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring). The Supreme Court has been influenced in its past two terms by Justice Scalia’s strict textual approach to statutory construction. But the Court has not relinquished the traditional approaches, including use of legislative history where the language of a stat-
should begin statutory analysis with what the statute actually says. Adhering to a statute's literal meaning lends credence to and respect for the institutions of bicameralism and separation of powers because it limits the judiciary to the statute's words. Literalism, or as more recently labeled, "textualism," also supports the "principal rationale of congressional discipline." Literalism allows a statute to be articulated from its four corners. In addition, literalism promotes precision and consistency while preventing uncertainty and pliability of statutory language.

Textualists posit that once the plain meaning of a statute has been established, the intent of the statute should only be gleaned from further examination of the statute itself, official authoritative interpretations of other provisions of the statute, and canons of statutory construction. Textualists, in the three different theoretical frameworks of realism, historicism, and formalism, criticize the use of legislative history in statutory construction. Realists contend that legislative history is not representative of anyone's intent as far as how the current issue should be decided. They further assert that judges have no way of really knowing what Congress would do if confronted directly with the problem facing the court. When using legislative history, a court merely guesses what Congress would do if it were solving the instant issue.

Historicists criticize the use of legislative history in statutory construction because they argue that it is impossible to recreate a past event and discern another's intent at the exact moment of the past event. Current interpretation of past events is always clouded by current social attitudes and contemporaneous views of the facts, the role of the judiciary, and by society's expectations at any time in history.

Formalists argue that use of legislative history does a disservice.
to our democratic form of government.151 Formalists see unelected judges, without constraints, as usurping the role of lawmakers if they can interpret language from any source and replace the text of a statute with their own interpretation of it.152

Most recently, however, formalism embraces the less severe position that legislative history may be invoked cautiously, yet still avoided where possible.153 Recent formalism is the apparent theory behind the Chicago court's approach to statutory construction.

Although the Supreme Court has moved toward a textualist position in recent years, it has never suggested that there is no place for legislative history in statutory construction.154 The Court has repeatedly exhibited a tendency to adhere to the traditional "soft" plain meaning rule.155 The "soft" plain meaning rule allows the use of legislative history as the best evidence of the purpose of the statute where the statutory language is ambiguous or in direct conflict with the intentions of the drafters.156 The "soft" plain meaning rule has been manipulated by many courts so that virtually any document which explains, refers to or is impliedly relevant to the statute at issue can be used to construe the statute and to determine congressional intent.157

The Supreme Court has recognized that statutory construction problems arise for a court when a statute cannot be construed literally due to its ambiguous language. The Supreme Court has also identified typical solutions to basic statutory construction problems. First, if the literal interpretation of the statute results in a direct conflict with clear congressional intent, the court would be overreaching to not consider legislative history.158 Second, where literal interpretation of the statute produces "absurd results," judges must find a rational construction of the statute using, among other things,
the statute's legislative history.\textsuperscript{159} Third, if the language of a statute is ambiguous, it cannot be interpreted literally. Therefore, courts must look to legislative history in an attempt to clear up the ambiguity.\textsuperscript{160} Although myriad legislative materials are referred to by courts as legislative history, the Supreme Court has recognized that most should be afforded little weight in statutory construction.\textsuperscript{161} Supreme Court cases suggest a hierarchy of legislative history authority to be used in statutory construction.\textsuperscript{162}

**B. Most Authoritative Legislative History**

The Supreme Court has recognized the most authoritative source of congressional intent to be committee reports.\textsuperscript{163} Committee reports allow clear insight into the intent of those who drafted the statute's language. Conference committee reports are even more probative of the intent of both the Senate and the House on a particular bill. The conference committee knows virtually everything there is to know about the bill before it is voted on and recommended to Congress or killed in committee.\textsuperscript{164} The court may also give significant weight to rejected proposals for legislation if the rejection occurred in committee before enactment of the subsequently accepted version of the statute. The Court has found rejected language of an earlier proposal evidence of what Congress discarded as possible statutory language.\textsuperscript{165}

Sponsor statements are also given substantial weight by the Supreme Court in referring to legislative intent when construing a statute. Sponsors are more likely than any other congressional member to know the legislation's details.\textsuperscript{166} Where a sponsor state-

\textsuperscript{159} See Stevens, supra note 131, at 1383.

\textsuperscript{160} Id.

\textsuperscript{161} See infra notes 162-86 and accompanying text.

\textsuperscript{162} See Eskridge supra note 145 at 642-46 for a thorough discussion of a proposed hierarchy of legislative authority and explanation of the proposed weight afforded to each.

\textsuperscript{163} Zuber v. Allen, 396 U.S. 168, 186 (1969); Thornburg v. Gingles, 478 U.S. 30, 43-44 n.7 (1986) (stating committee reports are the "authoritative source for legislative intent"); Garcia v. United States, 469 U.S. 70, 76 (1984) (stating the most authoritative source for finding the legislature's intent lies in the committee reports on the bill).


\textsuperscript{165} Tanner, 343 U.S. at 122-25.

ment is ambiguous, the Court also has expressed a willingness to look at floor and hearing colloquy.167

C. Least Authoritative Legislative History

Although a major tenet of the textualist rationale is to give substantial deference to administrative agency interpretation,168 in a number of cases the Supreme Court has clearly indicated that conflicting administrative agency interpretations of a statute169 and subsequent legislative history interpreting the statute should be afforded little, if any, weight in statutory construction.170 In fact, the Court has stated that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."171 However, where an agency position on an issue is equivocal, the courts of appeals have been divided with respect to the deference owed to the agency interpretation.172


168. See Russell L. Weaver, Evaluating Regulation Interpretations: Individual Statements, 80 Ky. L. J. 987 (1991-92) for a background discussion of deference principles; see also Stever, infra note 172.

169. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1986) and cases cited therein (rejecting agency interpretation where there is "inconsistency of the positions the [EPA] has taken through the years.").


172. See Donald W. Stever, Jr., Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation—Thoughts on Varying Judicial Application of the Rule, 6 W. NEW ENG. L. REV. 35 (1983) for an in depth analysis of deference to agency interpretation of statutes. Professor Stever contrasted two cases in which the courts were faced with an inconsistent EPA position on the meaning of a statute. Id. at 62-67. In National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), the EPA refused to place hydroelectric dams under the permit requirement of the Clean Water Act even though it was argued that dams, by changing the physical and chemical properties of the stream water, harmed wildlife in similar ways as pollutants. Because the EPA had sharply disagreed internally on the issue, the district court interpreted the statute itself, ascertained congressional intent and ordered the dams brought within the permit requirement. Id. The court of appeals reversed, stating that if the issue is one of policy implications, great deference should be afforded the agency position. Id. at 169.

The Supreme Court has set out guidelines regarding the amount of deference which should be given to an agency interpretation of a statute. If an agency interpretation of a statute is to be afforded weight in statutory construction, the interpretation must be "rational and consistent with the statute." The Supreme Court will consider several factors in determining what is "rational and consistent with the statute." First, the Court will ask whether Congress addressed the issue. If it did, the Court may accede to Congress if Congress used explicit language which became the agency regulation. If not, the Court will consider whether the agency resolved the issue. If the agency resolved the issue, the Court must give deference to the agency interpretation if the agency interpretation is a rational and consistent construction of the statute. Finally, the Court will consider whether Congress expressly authorized the agency to promulgate the regulation that is the subject of the interpretation. If such power was authorized, the agency interpretation may be controlling unless it is arbitrary, capricious, or directly contradicts the statute.

In addition, the Court has indicated that a post enactment pronouncement of the entire legislature may be afforded significant weight in statutory construction. In contrast, little weight should be afforded to subsequent remarks, pronouncements, or reports of

§§ 7470-7479 (1988), which imposes more stringent controls under the "stationary source" term than Part D of the Act and which initially gave rise to the controversy in the case. Although Part D of the Act did not define the term, the EPA defined it for Part D purposes. The Part D definition created a conflict with the term "major emitting facility" which appeared to be an identical concept, that is, defining the "thing that is to be regulated." See Stever at 66, n.171. However, the District of Columbia Circuit Court had previously decided that the two terms were not identical and a dual definition of a term for Part C and D purposes would constitute "an exercise of statutory interpretation" on the EPA's part. The EPA later amended its position and made the two definitions identical by regulation. When the court in Natural Resources Defense Council was faced with this inconsistent EPA position, the court gave no deference to the agency at all. Natural Resources, 685 F.2d at 726. Professor Stever concluded that the court's inconsistent application of deference to the agency is due to the lack of criteria for according deference. Stever, at 67.

174. Id.
176. Id. at 843.
177. Id. at 843-44.
individuals or groups.\textsuperscript{179} For example, where Congress has passed a statute to explain an earlier statute, the post-enacted statute can be given significant weight in construing the earlier law.\textsuperscript{180} Conversely, a single senator or representative's opinion of what statutory language means, spoken or written after the passage of the statute, should be given little or no weight in construing the statute.\textsuperscript{181}

Furthermore, the Court has considered a post-enactment pronouncement of a legislative committee with respect to previously enacted legislation to be significant. If the committee pronouncement was made within five years of the enacted legislation and the committee is the very one which reported the bill that became the law, significant weight may be afforded to the committee pronouncement.\textsuperscript{182}

The Supreme Court affords little, if any weight, to post-enactment pronouncements of individual legislators in statutory construction. Such pronouncements include opinions of legislators, even in floor debate on proposed legislation following an enactment,\textsuperscript{183} or interpretations of a group of legislators attempting to promote later legislation.\textsuperscript{184} The Court has even held that a senator's subsequent correction of his own error during floor debate is

\begin{quote}
179. Gozlon-Peretz, 111 S. Ct. at 847; see infra note 180 and cases cited therein.

180. See Gozlon-Peretz, 111 S. Ct. at 847 (stating that the view of a later Congress, while not definitive of intent of an earlier enactment, has persuasive value); see also, Bell v. New Jersey, 461 U.S. 773, 784 (1983); Seatrain Shipbuilding Corp., v. Shell Oil Co., 444 U.S. 572, 576 (1980) (stating that views of a subsequent Congress cannot override the enacting legislature but are entitled to significant weight if the enacting legislature is obscure).

181. See infra notes 183-86 and accompanying text.

182. See infra notes 183-86 and accompanying text.


184. See United States v. Wise, 370 U.S. 405 (1962) (concluding that the interpretation of a previous statute by a group of congressmen seeking to promote later legislation should be given no weight in construing the earlier statute).
\end{quote}
afforded no weight in statutory construction. 185

These developed parameters of the Court allow lower courts to gauge their use of legislative history when construing a statute to determine congressional intent. Based on these parameters, the Supreme Court has moved toward the conclusion that, as the Wheelabrator court put it, subsequent legislative history forms a "hazardous basis for inferring intent." 186

D. Application of Supreme Court Views to the Wheelabrator and City of Chicago Cases

Both the Second Circuit in Wheelabrator and the Seventh Circuit in Chicago agreed that the statutory language of section 3001(i) is ambiguous. Both courts also agreed that legislative history is useful in statutory construction where the language of the statute is ambiguous and the legislative history is clear. 187 The courts disagreed, however, as to what legislative history to consider in determining whether the legislative history of section 3001(i) is clear.

The Wheelabrator court relied primarily on the Senate Report accompanying section 3001(i). The court further relied on the EPA's pre-enactment interpretation of its own household waste exclusion. 188 As a result of this reliance, the court concluded that bottom ash was intended to be exempt from Subtitle C regulation. The court disregarded, as irrelevant and non-authoritative, the post-enactment EPA interpretations of the statute, 189 individual legislators' post-legislation interpretations, 190 and post-enactment proposed legislation language, 191 in deciding that ash was exempt from hazardous waste regulation.

The Chicago court found at first blush that the Senate Report indicated that "generation" of ash was included in the original exemption. 192 However, after considering the Senate Report, all of

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185. See Chandler v. Roudebush, 425 U.S. 840 (1976) (noting such a "belated correction is not probative").
187. Id. at 765-66; see supra notes 84-97.
188. See supra note 58.
190. See supra note 113.
191. See Hearings, supra note 60.
192. See supra notes 118-24 and accompanying text for the Seventh Circuit's
the conflicting EPA interpretations (both authoritative and non-authoritative), post-enactment interpretations, and proposed legislation language, the Seventh Circuit was left confused as to legislative intent. As a result, the court was forced to rely on a textual construction of the statute. In so doing, the Chicago court found the term "management" dispositive because the term "generation" was not used in the actual language of the statute. The court interpreted "management" from a policy standpoint. The court found that the exemption's purpose is to "manage" household wastes and that a stated purpose of RCRA is to encourage the careful management of hazardous wastes that are dangerous to human health. The court then concluded that Congress could not have meant the "generation" of hundreds of tons of hazardous ash, dangerous to human health, to be included within the exemption.

The Seventh Circuit should not have considered all of section 3001(i)'s legislative history and would not have been left confused if it had considered the Supreme Court's rules of statutory construction. The Supreme Court has indicated that pre-enactment interpretations or explanations of statutory language are most authoritative in construing a statute. The court need not have rejected all legislative history on the matter and would not have been confused by what appeared to be a "waffling" legislative history if the court had considered only the Senate Report and the pre-enactment interpretation of the bill. These two authoritative sources for use in construing section 3001(i) should have clarified the exemption's language for the court. The Seventh Circuit's approach did not comport with the Supreme Court's parameters for statutory construction because the Seventh Circuit did not disregard non-authoritative analysis of the terms "generation," which is not specifically used in section 3001(i), and "management."

193. Id.

194. See supra notes 16 and 134 for some discussion of policy considerations that are inherent in all hazardous waste issues. This Note does not address the policy arguments that could be made on either side of the issue. Rather, this Note focuses on the Second and Seventh Circuits' methods of statutory construction and whether the courts adhered to the Supreme Court's parameters for using legislative history in statutory construction. See Sale, supra note 24, at 437-39, for further discussion of the interpretation of § 3001(i) regarding the use of the terms "management" and "generation" as pre- and post-Combustion regulation terms. The author concludes that § 3001(i) must apply both pre- and post-Combustion processes so that the language of § 3001(i) has meaning and so that municipal incineration is encouraged. Id.

195. See supra note 124 and accompanying text.

Authoritative legislative history. The Seventh Circuit's consideration of conflicting EPA positions on the issue, post-enactment legislators' interpretations and post-enactment proposed legislation was in conflict with the Supreme Court guidelines which categorize these pieces of legislative history as the least authoritative in statutory construction. The Supreme Court has consistently stated that EPA interpretations which are inconsistent should be given little or no weight.\footnote{Wheelabrator, 725 F. Supp. at 768-69; see INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1986). It could be argued that the EPA is the only vehicle with which Congress can specify exact requirements of its overall legislation, in the name of efficiency and expediency, in passing any complex environmental law which will constantly need refining and redefining of its major policy provisions.} Likewise, post-enactment pronouncements of intent, unless issued by the entire Congress, are of little weight in construing a statute.\footnote{United States v. Clark, 445 U.S. 23, 33 n.9 (1980) (stating the views of some members of Congress "as to the construction of a statute adopted years before by another Congress have very little, if any significance"); United States v. United Mine Workers, 330 U.S. 258 (1947) (refusing to give any weight to individual legislator's pronouncements in 1947 concerning the meaning of a statute passed in 1932). The Court pointed out, however, that more weight could be given if a legislator had been a member of the very committee that had recommended passage of the bill. \textit{Id.}} This discounts the Seventh Circuit's consideration of the senators' and Representative Florio's letters which the court partially relied on in finding that the legislative history of section 3001(i) was unclear.\footnote{Chicago, 948 F.2d at 348. \textit{See supra} note 113 and accompanying text.} If the Supreme Court's legislative history guidelines were used appropriately, the Second and Seventh Circuits could have arrived at a consistent and predictable result, even in this circumstance of muddled statutory intent.

The Supreme Court has made it clear that committee reports, such as the Senate Committee Report on section 3001(i), are to be given significant weight as the most authoritative legislative history for use in statutory construction.\footnote{See supra notes 163-67 and accompanying text.} Furthermore, the Supreme Court has held that post-enactment pronouncements and interpretations of legislation are to be afforded little, if any, weight in statutory construction.\footnote{See supra notes 180-85.} The \textit{Wheelabrator} court found that post-enactment EPA interpretations of the statute,\footnote{See supra notes 58-63.} individual legislator's letters\footnote{See supra note 113.} and post-enactment proposed legislation that had failed,\footnote{See supra note 64.} all which indicated that ash should not be exempt from regulation as a hazardous waste, were irrelevant and non-authorita-
tive for purposes of statutory construction due to the "post-enactment" timing of those pieces of legislative history.\textsuperscript{205} The Second Circuit's reasoning comports closely with the Supreme Court parameters for use of legislative history in statutory construction.\textsuperscript{206} Consequently, the Second Circuit's conclusion that ash was intended to be exempted from regulation as a hazardous waste by section 3001(i) is quite compelling.

First, the \textit{Wheelabrator} court utilized the canons of statutory construction reasonably in its analysis.\textsuperscript{207} In order to give full effect to the statute's purpose, the \textit{Wheelabrator} court recognized that RCRA is an "entire scheme of legislation."\textsuperscript{208} The court reconciled the three purposes of RCRA to regulate and manage both hazardous and non-hazardous solid wastes while protecting human health and promoting conservation through energy recovery.\textsuperscript{209} The court realized that regulating ash as a hazardous waste would, in effect, emasculate municipalities' attempts to promote incineration which is regarded by Congress as an important step in achieving conservation through energy recovery.\textsuperscript{210}

The \textit{Wheelabrator} court also reasonably construed RCRA as a whole.\textsuperscript{211} The court acknowledged that proper deference is given to an EPA regulation when that regulation is internally consistent with the scheme of RCRA as a whole. Such was not the case in \textit{Wheelabrator}, however, because the EPA interpretations were inconsistent. Although RCRA mandates regulation and although the regulations are express directives, the purpose of the regulations is to make the legislation clear and operative.\textsuperscript{212} The court found that shifts in the EPA position between 1980 and 1987 regarding the exclusion of bottom ash from hazardous waste regulation could not allow RCRA to operate effectively.\textsuperscript{213} Therefore, the court interpreted the statute in light of the Supreme Court parameter affording less agency deference when there are conflicts with a previous

\begin{footnotes}
\textsuperscript{205} \textit{Wheelabrator}, 725 F. Supp. at 769-70.
\textsuperscript{206} See supra notes 131-86 and accompanying text.
\textsuperscript{207} See Stevens, supra note 131, for a description of the basic canons of statutory construction.
\textsuperscript{208} \textit{Wheelabrator}, 725 F. Supp. at 767; 42 U.S.C. § 6902 (1988); see supra note 1 and accompanying text.
\textsuperscript{210} \textit{Wheelabrator}, 725 F. Supp. at 768.
\textsuperscript{211} See Stevens, supra note 131.
\textsuperscript{212} See supra notes 168-77 for the Supreme Court parameters for using agency interpretations of its own regulations in statutory construction.
\textsuperscript{213} \textit{Wheelabrator}, 725 F. Supp. at 767; see supra notes 56-63.
\end{footnotes}
interpretation, if the court chooses to consider it at all.\footnote{214} The Second Circuit chose to consider only the EPA's pre-enactment interpretation in the bill's Preamble, as the EPA interpretation of the language in the bill.\footnote{215} This consideration of the Preamble comported with the Supreme Court parameter that pre-legislative preambles and reports are among the most authoritative for purposes of using legislative history in statutory construction.\footnote{216} The Preamble of section 3001(i) accompanied the Senate Report into Congress before it voted on the bill. The \textit{Wheelabrator} court concluded that Congress intended the Preamble interpretation to be the intent of the statutory language as passed.\footnote{217} Because it disregarded non-authoritative legislative history, and considered the most authoritative history, the \textit{Wheelabrator} court seems to have arrived at the more compelling conclusion.

In using Supreme Court parameters for use of legislative history to determine the congressional intent of section 3001(i), only pre-legislative agency interpretation and the Senate Report accompanying the exemption should have been afforded weight.\footnote{218} The Senate Report and the pre-legislative agency interpretation both indicated that municipal bottom ash is part of the "household waste" stream and therefore excluded from regulation as a hazardous waste under section 3001(i).\footnote{219} From an analysis of Supreme Court directives and 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.

\textbf{Conclusion}

The \textit{Wheelabrator} court chose to sift through all of the available legislative history and to extract that which should have been

\footnote{214} See Stever, supra note 172 and accompanying text.
\footnote{215} \textit{Wheelabrator}, 725 F. Supp. at 766-69. See supra notes 84-90 and accompanying text.
\footnote{216} \textit{Wheelabrator}, 725 F. Supp. at 770; see also supra note 163.
\footnote{217} \textit{Wheelabrator}, 725 F. Supp. at 764; see also supra notes 90-92 and accompanying text. Common sense allows the inference that Congress' inadvertence or even outright mistakes have resulted, on occasion, in less than crystal clear legislation. In this case, the term "generation" is expressly included in the Senate Report accompanying the 1984 household waste exclusion clarification. It is reasonable to infer that what the EPA said to clarify the previous ambiguity in the statute language was what Congress intended, although inadvertently Congress did not change the terms "management" and "generation." Rather, as the \textit{Wheelabrator} court put it, they are "coterminous." \textit{Id.}
\footnote{218} See supra notes 162-166.
\footnote{219} See supra notes 162-166.
afforded weight in construing section 3001(i). The court then ignored the irrelevant history and gave the authoritative history proper weight in construing congressional intent.

Applying settled principles of what is appropriate and authoritative legislative history for consideration in statutory construction allows the courts to sift through the irrelevant and focus on the relevant authority. The Wheelabrator court ably coordinated the legislative and judicial branch functions of making the law and interpreting it by affording proper weight to authoritative legislative history in construing RCRA’s section 3001(i) “Household Waste” exemption to exempt municipal ash from hazardous waste regulation. Until Congress can be regarded as infallible, it will make errors in language and it will create ambiguous terms in legislation. The use of legislative history to discern true congressional intent is better than the educated guesses of the courts. Only Congress, through additional legislation, can change the scope of the language of a statute to reflect a new or different intent. The Supreme Court has provided guidelines for the use of legislative history in statutory construction which the courts should use. It is Congress’ task to notice an unintended judicial construction of a statute and to rectify congressional error or ambiguity with legislative action.

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