INCINERATOR ASH IS HAZARDOUS WASTE

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Report: On May 2, 1994, the U.S. Supreme Court ruled that the Resource Conservation and Recovery Act (RCRA) does not exempt ash produced by municipal waste incinerators from stringent hazardous waste regulations. The U.S. Environmental Protection Agency and one federal appeals court had previously interpreted RCRA as exempting the ash produced from incinerating municipal solid waste. Under the Supreme Court's decision, incinerator ash that contains hazardous constituents exceeding specified levels now must be managed, stored, treated, and disposed of as a hazardous waste.

Analysis: The Supreme Court's decision resolves a long-standing question on the scope of the RCRA statute; whether the "household waste exclusion" provided an exemption from the hazardous waste regulatory program for ash that is produced from the combustion of household trash and non-hazardous solid waste. As noted by the Court, RCRA's household waste exclusion exempts from RCRA requirements the management and incineration or treatment of non-hazardous solid waste. The Court, however, clarified that the exemption does **not** extend to the ash remaining after incineration of municipal solid waste; "... while a resource recovery facility's management activities are excluded from (RCRA) Subtitle C regulation, its generation of toxic ash is not."

The Supreme Court's decision is the result of extensive efforts by the Environmental Defense Fund (EDF) to force regulation of incinerator ash as RCRA hazardous waste. In **Environmental Defense Fund v. Wheelabrator Technologies, Inc.,** 725 F.Supp. 758 (S.D.N.Y. 1989), EDF filed suit arguing that a waste-to-energy facility (an incinerator that uses trash combustion to generate electricity), in Peerskill, New York should be required to treat its ash as hazardous. At the same time, EDF filed suit against the City of Chicago to treat ash from the Northwest waste-to-energy plant in Chicago as hazardous waste, the case that ended up before the Supreme Court.

In the New York case, the U.S. District Court found that ash produced by the incineration or combustion of ordinary trash was exempt from RCRA hazardous waste regulation. The EDF appealed that decision to the U.S. Court of Appeals for the Second Circuit, but the Appeals Court affirmed the District Court holding that municipal solid waste ash was non-hazardous waste. (See **EDF v. Wheelabrator**, 931 F.2d 211 (2d Cir. 1991). The U.S. Supreme Court refused to hear EDF's appeal of the New York case.

At the U.S. District Court level, the City of Chicago was successful in its arguments that Congress intended to exclude incinerator ash from the definition of hazardous waste. **EDF v. Chicago,** 727 F.Supp. 419 (N.D. 111. 1989). EDF appealed the District Court decision to the U.S.

Court of Appeals for the Seventh Circuit. The Seventh Circuit noted that "what we have to work with here is a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency," and reversed the District Court. **EDF v. Chicago,** 948 F.2d 345 (7th Cir. 1991).

On appeal, the U.S. Supreme Court remanded the case back to the Seventh Circuit for reconsideration because EPA had issued a new memorandum declaring that municipal solid waste ash was not subject to RCRA regulation. Noting that "EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation," the Seventh Circuit refused to change its position. According to the Appeals Court, ash produced by the combustion of solid waste and household trash should be treated as hazardous waste if it exhibits the characteristics of hazardous waste. The City of Chicago sought relief from the U.S. Supreme Court, but the Seventh Circuit's decision was upheld.

The Court's ruling that ash can be regulated as hazardous waste means that the City of Chicago may be forced to manage as hazardous waste over 100,000 tons of ash produced each year by the Northwest waste-to-energy plant. Nationwide there are approximately 150 similar waste-to-energy plants and incinerators fueled by household municipal waste that will be affected by the high Court's decision. Ash produced by the combustion or incineration of non-hazardous trash and other solid waste now must be tested in accordance with the RCRA regulations to determine whether it exhibits the "characteristics of hazardous waste." This

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testing employs the Toxicity Characteristic Leaching Procedure (TCLP) test. If leachate from the incinerator ash exceeds specified concentrations of TCLP chemicals (including toxic metals and pesticides), the ash is considered a hazardous waste subject to RCRA management, treatment, and disposal standards. The cost of disposing incinerator ash as a hazardous waste is at least five times the cost of disposing non-hazardous incinerator ash. Additional costs of compliance with the RCRA testing, storage and recordkeeping requirements will add to the substantial increase in disposal costs faced by owners and operators of municipal solid waste incinerators and waste-to-energy facilities.

In response to the U.S. Supreme Court's ruling, the EPA is required to apply for the first time RCRA regulations to existing municipal waste incineration facilities. The agency issued on June 7, 1994 (59 **Federal Register** 29372) an interim strategy which outlines specific steps owners and operators must take to come into compliance with RCRA. First, owners and operators must file before December 7, 1994, the Part A permit application for storage of hazardous ash on site and should file a RCRA Section 3010 Notification of Hazardous Waste Activity form. In the alternative, owners and operators can operate as RCRA generators and may accumulate and treat ash on site in tanks or containers for up to 90 days without obtaining a RCRA permit or interim status. In those states where the RCRA program has been developed as independent state law, the Supreme Court's decision has created complex legal issues. Owners with facilities located in states with state RCRA programs (in contrast to state-administered federal programs) should refer to the EPA's June 7, 1994 interim policy statement for additional detail and guidance. **[illegible]**

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