

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF CHICAGO, ET AL. Petitioners v.
ENVIRONMENTAL DEFENSE FUND, ET AL.

CASE NO: No. 92-1639

PLACE: Washington, D.C.

DATE: Wednesday, January 19, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF CHICAGO, ET AL. :
Petitioners :
v. : No. 92-1639
ENVIRONMENTAL DEFENSE FUND, :
ET AL. :
- - - - -X

Washington, D.C.

Wednesday, January 19, 1994

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:10 a.m.

APPEARANCES:

LAWRENCE ROSENTHAL, ESQ., Deputy Corporation Counsel,
Chicago, Illinois; on behalf of the Petitioners.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae.

RICHARD J. LAZARUS, ESQ., St. Louis, Missouri; on behalf
of the Respondents.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 92-1639, the City of Chicago v. The
5 Environmental Defense Fund.

6 Mr. Rosenthal.

7 ORAL ARGUMENT OF LAWRENCE ROSENTHAL

8 ON BEHALF OF THE PETITIONERS

9 MR. ROSENTHAL: Mr. Chief Justice and may it
10 please the Court:

11 Incinerators that recover energy from the
12 burning of municipal solid waste, known as resource
13 recovery facilities, received an exemption from Federal
14 hazardous waste regulation under a 1984 amendment to the
15 Resource Conservation and Recovery Act. The question
16 presented here is whether that exemption ceases to have
17 effect once these incinerators actually burn the waste
18 sent there for incineration.

19 The 1984 amendment is entitled, Clarification of
20 Household Waste Exclusion. On its face, it requires some
21 understanding of what the household waste exclusion was,
22 and what Congress was seeking to clarify in 1984.

23 Accordingly, I will begin by examining the regulatory
24 framework that confronted Congress when it enacted the
25 statute, and I will then discuss the statute's purpose,

1 history, and its text.

2 I will leave the question of what deference is
3 owed to the views of the Environmental Protection Agency
4 on this statute to the United States.

5 In 1976, Congress first enacted RCRA, creating a
6 comprehensive scheme for the disposal of solid waste.
7 RCRA divides solid waste into two categories, hazardous,
8 and nonhazardous. It creates a far more demanding,
9 expensive, and cumbersome scheme for the disposal of
10 hazardous waste.

11 In the statute, Congress delegated to the
12 Environmental Protection Agency the authority to define by
13 regulation what substances should be deemed hazardous.
14 Household waste poses special problems within this
15 regulatory framework. Although the vast majority of
16 household waste is nonhazardous, occasionally people do
17 throw away things that technically qualify as hazardous --
18 the used flashlight battery or the occasional can of paint
19 thinner.

20 QUESTION: Mr. Rosenthal, you seem to
21 acknowledge, then, that at the end of the day the ash may
22 contain material that under the ordinary definition would
23 be considered hazardous waste.

24 MR. ROSENTHAL: Given the posture we are in
25 today, yes, I think the Court --

1 QUESTION: Okay.

2 MR. ROSENTHAL: -- has to take that as given.

3 QUESTION: And would you explain the scope of
4 your position? You represent the city which operates its
5 own resource recovery facility.

6 MR. ROSENTHAL: That's correct.

7 QUESTION: And what does it do with the ash at
8 the end of the day?

9 MR. ROSENTHAL: The city contracts first with a
10 hauler to take the ash to a landfill and second with the
11 landfill, at which the ash is disposed.

12 QUESTION: And the landfill is out of State.

13 MR. ROSENTHAL: At one point in this case it
14 was. Currently, the ash is being disposed of at lined
15 monofill in Joliet, Illinois.

16 QUESTION: Not owned or operated by the city.

17 MR. ROSENTHAL: That's correct.

18 QUESTION: A private landfill.

19 MR. ROSENTHAL: It has a contract with the city.

20 QUESTION: Now, do you take the position that
21 the plain language of the statutes mean that there is an
22 exemption all the way down the line, even in the private
23 landfill and with regard to what the owner of the private
24 landfill does with the ash?

25 MR. ROSENTHAL: I do, Justice O'Connor, and the

1 reason for that is because that is in fact what the
2 household waste exclusion was when originally promulgated,
3 and what was continued by Congress --

4 QUESTION: I ask that because the statute, 6921,
5 refers to the exclusion for the resource recovery
6 facility, and what it does in treating, storing,
7 disposing, or otherwise managing the waste, and so do you
8 think it's clear from the plain language of the statute
9 that the exemption extends to down the line private
10 landfills?

11 MR. ROSENTHAL: I think it is both from the
12 language of the statute and when it's placed in the
13 context of what Congress was trying to clarify. Of
14 course, in --

15 QUESTION: Well, as I understood it, you make a
16 plain language argument, and I just wondered what the
17 plain language was that you thought covered the private
18 landfill.

19 MR. ROSENTHAL: Well, it is the deeming clause,
20 because the statute says that the resource recovery
21 facility shall not be deemed to be treating, storing,
22 disposing or otherwise managing hazardous waste.

23 If you think that the hazardous waste
24 regulations apply when the garbage arrives at the landfill
25 because of the fortuity that we don't use our own

1 landfill, then at that point, as they dump the waste off
2 the truck, you would be deeming the city, or EDF does deem
3 the city to be disposing of hazardous waste at that point,
4 but the statute prohibits that result. It says that a
5 resource recovery facility shall not be deemed to be
6 disposing of hazardous waste, so --

7 QUESTION: It seems to me you wouldn't be
8 deeming it to dispose of hazardous waste because it was
9 disposing of hazardous waste. You don't have to deem a
10 darn thing. What the statute is saying is that at least
11 at a certain stage they shall not be deemed. The statute
12 is written in such a way as to say, don't treat them as if
13 they are doing this.

14 MR. ROSENTHAL: That's correct, and what that
15 means, I take it, is that if you think that the resource
16 recovery facility -- in this case EDF argues that as the
17 employees of the resource recovery facility are sweeping
18 out the ash from the incinerator and trying to figure out
19 what to do with it, the employees are supposed to treat
20 that ash as hazardous waste and ship it and dispose of it
21 under those regulations.

22 QUESTION: Well, there may be a period of
23 uncertainty as to when one regime ends and another begins,
24 but I don't see how you can read this as defining the ash
25 as nonhazardous waste as opposed to directing that the

1 recovery facility shall not deemed to be dealing with it,
2 and if you do not read this -- and in its plain language
3 it is not a definition of hazardous waste, nor is it a
4 provision saying ash is not, then at most, it seems to me,
5 you can get by plain language is that you don't treat the
6 ash as hazardous waste until it leaves the hands of the
7 recovery facility, but at that point, I don't see how
8 anything in this statute by its terms covers the ash.

9 MR. ROSENTHAL: Of course, the only defendant in
10 this case is the resource recovery facility, because I
11 take it even EDF doesn't think that Congress intended to
12 create an exemption where if the resource recovery
13 facility disposes of the material on site at its own
14 landfill, adjacent to the incinerator, Congress would
15 treat all that as exempt, but the fortuity that you
16 instead use an independent contractor off-site, that would
17 trigger a different result.

18 EDF apparently doesn't even think that
19 distinction makes any sense, and I think especially when
20 you put the plain language into the regulatory context, it
21 becomes quite clear, because when EPA defined by
22 regulation what was hazardous in 1980, it bowed to the
23 practical reality.

24 QUESTION: Mr. Rosenthal, one question about
25 this chronology. At what point did the testing occur that

1 showed that there was a risk of contamination to
2 groundwater because the residue might leach out of the
3 landfill? That was not -- that testing occurred, didn't
4 it, after this original EPA regulation that you say drives
5 the whole -- first the regulation, and then the statute,
6 and then EPA's subsequent interpretation?

7 MR. ROSENTHAL: EDS did the testing. The city
8 has never --

9 QUESTION: When did that occur chronologically?
10 Was it after the original EPA regulation?

11 MR. ROSENTHAL: It was. It was from 1981 to
12 1987, the tests relevant to this facility.

13 QUESTION: So was it appreciated that the ash,
14 as distinguished from the household waste that went to the
15 incinerator, would have hazardous potential?

16 MR. ROSENTHAL: The city had always taken the
17 position that the ash was not hazardous waste under the
18 EPA regulation. EDF questioned that, and that led to the
19 test that in turn led to this litigation. In 1980, when
20 the regulation was promulgated, it said that the entire
21 household wastestream was excluded, up to and including
22 the ash, and it was explicit. EPA was explicit in
23 excluding the ash.

24 QUESTION: But your answer is that the testing
25 occurred after that initial exclusion, not before.

1 MR. ROSENTHAL: That's correct. That's correct.
2 Then, in 1984, this statute was enacted. The statute, of
3 course, is entitled, "Clarification of Household Waste
4 Exclusion." Not "modification," or "repudiation" --
5 "Clarification of Household Waste Exclusion."

6 Congress expressly referred to and incorporated
7 an existing construct, which was a wastestream exemption.

8 QUESTION: Well, Mr. Rosenthal, from '85 to '92,
9 was the official position of the EPA to the effect that
10 the ash was subject to subtitle C regulation?

11 MR. ROSENTHAL: The official position in -- EPA
12 put out a statement in 1985 which by 1987, when Mr. Porter
13 testified before Congress they were already saying, our
14 position doesn't really make a lot of sense.

15 QUESTION: Well, is your answer yes, or no?

16 MR. ROSENTHAL: I'm not sure. I think my answer
17 is that their official position was that they saw no
18 intent on the statute to reach the ash, but that they
19 weren't going to do anything about it.

20 QUESTION: And what happened during that
21 interval? Did they enforce subtitle C? Did the city
22 comply with subtitle C?

23 MR. ROSENTHAL: Never. The city never complied
24 with subtitle C, took the position throughout that period
25 of time that it wasn't applicable, the United States never

1 brought an enforcement action against the city or any
2 other resource recovery facility, and after the
3 congressional moratorium on new EPA regulations expired we
4 found Administrator Reilly's ruling on this subject, which
5 repudiated the 1985 statement.

6 In short, given this context, a principle of
7 statutory construction comes into play which I think is
8 quite useful in resolving this case, that principle being
9 that Congress is deemed to approve of existing
10 administrative practices or constructions when it
11 legislates absent clear evidence to the contrary, and the
12 reason I think that principle is useful is because when I
13 look for the clear evidence to the contrary, I cannot find
14 any.

15 I cannot find any in the plain language of the
16 statute, which again is entitled, "Clarification of
17 Household Waste Exclusion." Congress thought it was
18 clarifying something that was not previously clear, and in
19 two respects undisputed in this case, it was clarifying.

20 QUESTION: How broad is this principle of which
21 you speak, Mr. Rosenthal, that Congress is deemed to
22 approve existing administrative construction when it
23 legislates? I take it it's when it legislates about the
24 precise matter with which the administrative construction
25 dealt?

1 MR. ROSENTHAL: And of course, we need go no
2 further in this case than that.

3 QUESTION: But first answer my question, will
4 you, before commenting on it?

5 MR. ROSENTHAL: In cases like North Haven Board
6 of Education v. Bell, the Court has applied this principle
7 even when the Congress amends other portions of the
8 statute, but not the pertinent portion of the statute.

9 Here, of course, we need not guess, because
10 Congress explicitly put into the statute the Household
11 Waste Exclusion. It is --

12 QUESTION: Well, may I interrupt you there? You
13 say Congress explicitly put into it. Was -- I don't have
14 the text of the prior EPA reg in front of me. Was the EPA
15 reg a deemer clause which referred to the resource
16 recovery facility as not being deemed to be dealing in
17 hazardous waste?

18 MR. ROSENTHAL: It was not, because it was
19 issued pursuant to EPA's delegated power to define what
20 hazardous waste is, so it is written in terms of the
21 definition of hazardous waste. It does not use the word,
22 "deeming," but I do take it that when Congress tells us
23 that what it thinks it is doing is clarifying the
24 Household Waste Exclusion, Congress should be taken at its
25 word.

1 QUESTION: Well, maybe -- Congress sometimes
2 engages in the use of euphemism, and if in fact what
3 Congress did was to come up with a text which was in some
4 significant way different from what it purported to be
5 clarifying, we've got to give some significance to the
6 text, and it seems to me that one big significance is, EPA
7 said, ash isn't hazardous. Don't treat it that way.

8 Congress is saying, when a recovery facility is
9 doing certain things, it will not be deemed to be -- I.e.,
10 pretend it's not -- dealing with hazardous waste. That's
11 a very different provision.

12 MR. ROSENTHAL: Well, when you start -- I think
13 it is appropriate to take Congress at its word. Congress
14 knows how to --

15 QUESTION: Well, which word, the word of the
16 text, or the word of the title?

17 MR. ROSENTHAL: Well, of course, Congress
18 enacted --

19 QUESTION: What if we find that the plain
20 language of the text is less a clarification than a
21 modification?

22 MR. ROSENTHAL: Well, of course, Justice Souter,
23 Congress enacted all those words, and I think they all
24 have to be taken at their word.

25 We start with, I think, a strong presumption

1 that Congress should be read simply to be clarifying the
2 existing regulatory construct. If we can find clear
3 evidence further down in the statute that Congress
4 misrepresented the statute in its title, maybe there would
5 be a different result, but I don't think there is clear
6 evidence further down.

7 QUESTION: Well, aren't you confusing ratifying
8 with clarifying?

9 MR. ROSENTHAL: I'm trying not to, because it is
10 clear that Congress did clarify in two respects that are
11 not in dispute, which I think is one of the reasons why
12 the language does not precisely track EPA's household
13 waste exclusion.

14 QUESTION: But if you say, if Congress says
15 we're clarifying something, that suggests that the meaning
16 may have been indeterminate before, and that Congress may
17 be giving it at least a partially new meaning, whereas if
18 you say ratifying, that means that Congress is approving
19 the previous administrative construction.

20 MR. ROSENTHAL: I quite agree, and it is our
21 view that Congress was clarifying, not ratifying. In
22 fact, it was quite unclear under EPA's household waste
23 exclusion whether, if a facility also received
24 nonhazardous commercial and industrial waste in addition
25 to household waste, it would still qualify for the

1 household waste exclusion. That was entirely unclear.
2 Congress clarified that by making it explicit, broadening
3 the exemption to say, if you also except nonhazardous
4 commercial and industrial waste, you qualify.

5 Absent some very clear indication that Congress
6 was not serious and should not be taken at its word when
7 it said it was clarifying, Congress should not be deemed
8 to have worked such a fundamental and far-reaching change
9 in the prior regulatory framework, and indeed, if one is
10 looking for evidence of an intent to change the law -- not
11 to clarify it, but to change, to dramatically narrow the
12 previous household waste exclusion, one certainly cannot
13 find it in the legislative history.

14 In fact, EDF's position on the legislative
15 history, of course, is ignore it, because if you do look
16 at the legislative history, it addresses this problem
17 clearly and expressly, and far from evincing an intent to
18 dramatically narrow the exclusion, it embraces the
19 exclusion. It states that it recognizes it is a
20 wastestream exclusion, goes on to say that resource
21 recovery facilities should be fit within the household
22 waste exclusion, and it further states that economic
23 impediments to the success of the resource recovery
24 process should be removed.

25 So if you did enforce at the landfill, if you

1 will, you would have created a huge economic disincentive
2 to the resource recovery process without any evidence that
3 Congress intended to create this massive new regulatory
4 burden.

5 QUESTION: The statute, counsel, has two
6 definitions, a definition of disposal, and a definition of
7 hazardous waste generation. In your view, are these
8 discrete categories or is there some overlap between the
9 two?

10 MR. ROSENTHAL: I'm not sure I understand your
11 question, Justice Kennedy.

12 QUESTION: Well, it seems to me -- let me put it
13 this way -- that it's essential to your case to show that
14 the facility that treats the household waste is disposing
15 of the waste when it stores the ash on-site, or when it
16 ships it off, but then in other instances, other
17 facilities would be said to be generating a hazardous
18 waste when it did that.

19 MR. ROSENTHAL: Well, of course, hazardous
20 disposal is a defined term. It says, "putting the waste
21 in land or water so that it could be exposed to the
22 environment," and in my view there is really only one
23 point in the process at which this ash is disposed of, and
24 that's when it goes to the landfill. That -- and as
25 administrator Reilly notes in his ruling on the subject,

1 ordinarily the only hazardous waste that these facilities
2 dispose of is the ash.

3 QUESTION: But hazardous waste generation is
4 also a defined term, and it does not seem to me that your
5 argument takes that into account, or that if it does, your
6 position must be that one of these exempt facilities can
7 be said to be disposing of wastes when other facilities
8 would be generating it.

9 MR. ROSENTHAL: Well, I --

10 QUESTION: It seems to me that you're saying
11 that there's an overlap between what the statute treats as
12 two discrete categories.

13 MR. ROSENTHAL: Well, what we have here is a
14 situation where the precise act by which the ash is
15 generated, incineration, is already covered by the
16 statute, because that act is treatment within the meaning
17 of the statute, and Congress put treatment in, so it would
18 have been surplusage to also put generation in. Indeed,
19 EPA's own household waste exclusion didn't use the term,
20 generation.

21 QUESTION: Well, if you had another facility
22 that was not exempt, it would be proper for the Government
23 to say that the creation of the ash was hazardous waste
24 generation, would it not? In other words, it's only
25 because of this particular construction that you give to

1 the exemption that the term, hazardous waste generation,
2 seems to become irrelevant. I don't quite understand how
3 you can do that consistent with the statutory scheme.

4 MR. ROSENTHAL: If the act of generating is
5 already exempt under another term that Congress put into
6 the statute, and in my view it is, it's already exempt
7 because it's treatment.

8 QUESTION: But the legislative report did
9 include both words, did it not?

10 MR. ROSENTHAL: It did. I take it that the
11 author of that report, out of an abundance of caution,
12 because it was clear to the author of that report that
13 everything was exempt, put the word in, but the drafter of
14 the statute evidently worried that if surplusage was put
15 into the statute, that might create some mischief, track
16 the household waste exclusion, which itself did not use
17 the term, generation.

18 And I think if you look at the statute's
19 underlying purpose, this becomes even clearer, because of
20 course, Congress has told us what its purpose is. It
21 enacted a purpose provision in RCRA. It had two relevant
22 purposes -- to encourage resource recovery, and reduce the
23 Nation's need for landfill space, and as Administrator
24 Reilly recognized, those purposes would be dramatically
25 undercut if the exemption didn't extend to ash.

1 Indeed, on EDF's view, this entire statute is
2 meaningless, because EDF believes that only the incoming
3 wastestream is exempted by the statute, but the incoming
4 wastestream was already exempt prior to the enactment of
5 this statute. All the incoming household waste was exempt
6 from household waste regulation under the EPA regulation,
7 and nonhazardous commercial and industrial waste by
8 definition was exempt, so on EPA's view, this statute is a
9 completely empty gesture. I submit that that is not a
10 sensible way to construe it.

11 QUESTION: A couple of times, referring to the
12 landfill, you said the fortuity that the city didn't own
13 the landfill, is that -- is it common that the landfill is
14 independently owned and operated?

15 MR. ROSENTHAL: It is frequent. I don't know
16 which pattern is more common, but it is certainly frequent
17 that landfill space is owned by an independent contractor.

18 QUESTION: Mr. Rosenthal, even on the least
19 generous view of EDA's position, the statute is not
20 completely useless, is it, because it does clarify the
21 significance of receiving nonhazardous industrial waste?

22 MR. ROSENTHAL: It does not clarify that at all
23 if it only deals with the incoming wastestream, because
24 that incoming wastestream was already exempt because it is
25 by definition nonhazardous.

1 QUESTION: You mean, it was already exempt even
2 if it included both household and industrial nonhazardous?

3 MR. ROSENTHAL: If it included -- if the
4 incoming wastestream included only household waste and
5 nonhazardous commercial and industrial waste, nothing in
6 that incoming wastestream would be subject to hazardous
7 waste regulation under RCRA, prior to 1984.

8 This leads me, if there are no further
9 questions, to the EPA's view, and on that I will defer
10 myself to the United States.

11 QUESTION: Very well, Mr. Rosenthal.
12 Mr. Minear, we'll hear from you.

13 ORAL ARGUMENT OF JEFFREY P. MINEAR

14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

15 MR. MINEAR: Mr. Chief Justice and may it please
16 the Court:

17 Chicago and EDF each argue that this case is
18 controlled by the plain language of the statute, but they
19 reach very different conclusions as to what that language
20 means. As their disagreement suggests, section 3001(i)
21 does not squarely resolve the precise issue before the
22 Court. The statute says nothing specific about ash
23 residues, and the statute is ambiguous on the more general
24 question of whether it grants an exemption covering all of
25 the facility's operations, including ash disposal.

1 The practical results of this case closely
2 parallel Chevron itself, where the issue was whether the
3 Clean Air Act regulates stationery sources on a plant-
4 wide or component-by-component basis, and as in Chevron,
5 the Court should look for guidance from the administrative
6 agency that is the expert in this field and that is
7 charged with administering the statute.

8 The EPA's views are highly relevant in this
9 situation, because RCRA gives --

10 QUESTION: Isn't this situation a little bit
11 different from Chevron? Here what was issued was an
12 interpretive bulletin, wasn't it?

13 MR. MINEAR: It is actually a memorandum issued
14 from the director, the Administrator of EPA, to the
15 regional administrators directing them how they should
16 enforce the act. In EPA parlance, that would be an
17 interpretive rule.

18 Now, Chevron itself also involved an
19 interpretive rule. The only difference between the two
20 situations was the Chevron case involved an interpretive
21 rule that was subject to notice and comment. However, it
22 is our view that notice and comment does not have any
23 bearing on the question of whether the interpretation is
24 entitled to deference. The question instead is whether
25 this is an authoritative interpretation of the Agency, and

1 that in fact it is. It comes directly from the
2 administrator himself.

3 QUESTION: Mr. Minear, I'm troubled, still, by
4 the fact that the statute that we are asked to interpret
5 deals with what we do with a resource recovery facility
6 and what conduct of that facility is exempt from
7 subtitle C --

8 MR. MINEAR: Yes, Your Honor.

9 QUESTION: -- and the EPA memorandum seems to be
10 addressed more to whether ash itself should be treated as
11 a hazardous waste, which presumably would take it all the
12 way down the line, and I'm having some difficulty with
13 understanding how we interpret the statute as applied,
14 ultimately, to the private landfill.

15 MR. MINEAR: One of the problems in this area
16 obviously is that EPA's household waste exclusion, which
17 it passed as a legislative rule in 1980, exempts a
18 wastestream from the time that the household waste is
19 picked up at curbside until it finds its ultimate
20 destination in an incinerator or a landfill.

21 Section 3001(i) is in fact a facility or process
22 exemption instead, and EPA has attempted to reconcile
23 these two by in fact saying that we look at the matter
24 this way, and this is set forth in footnote 9 of our brief
25 on page -- footnote 6 at page 19. The incinerator that

1 receives the waste, it has the exemption up to the time it
2 burns it, obviously. The exemption is section 3001
3 exemption allows it to mix household waste with
4 nonhazardous commercial waste.

5 The question then arises, what about the ash
6 that results from this? If the ash is nonhazardous, then
7 there is no question there has been no generation of a
8 hazardous waste, and it could be sent to the landfill.

9 On the other hand, if the ash does test
10 positive, is hazardous, the question is, what do we do
11 then, and that is the question that EPA has in fact
12 answered through its interpretive memorandum. It's
13 indicated that in that situation the household -- the
14 facility, the resource recovery facility, preserves the
15 exemption. The exemption continues to apply to the
16 wastestream and it can send it on to a landfill.

17 That's --

18 QUESTION: Well, what about when it's in the
19 landfill? Maybe it covers the city -- the resource
20 recovery facility until it dumps it out on the ground, but
21 then what?

22 MR. MINEAR: Well, the statute itself is
23 ambiguous on this, and that -- for that reason, the EPA
24 has made the interpretation that the exemption continues
25 to apply, just as if household waste alone was

1 incinerated. Keep in mind --

2 QUESTION: Do we have to decide that here? I
3 mean, I guess we don't have the landfill before us. We
4 have the resource recovery facility. How much do we have
5 to decide here?

6 MR. MINEAR: That's right. You don't ultimately
7 have to decide it, but I think it's important to
8 understand that issue in deciding what this regulation in
9 fact does, what the household waste exclusion does, what
10 the clarification itself does, and I think that's a
11 relevant consideration. It's obviously something that EPA
12 has considered in reaching its formulation of the issue,
13 and --

14 QUESTION: Mr. Minear, isn't it crucial to the
15 city to know whether they have to pay \$453 a ton to the
16 landfill?

17 MR. MINEAR: Yes, that's right, and EPA, as I
18 say, has now clarified that in the interpretive memorandum
19 that Administrator Reilly issued. They made clear that
20 the exemption continues to apply to the ash.

21 QUESTION: In answer to Justice O'Connor's
22 question, though, I take it that what you said is, well,
23 to decide this case, you can leave it hanging whether that
24 \$453 price tag has to be picked up by the City of Chicago.

25 MR. MINEAR: Technically, this case is only

1 against the resource recovery facility, and that is all I
2 meant to imply by whether you could decide the issue, you
3 needed to decide the issue in this case. The question is
4 whether the resource recovery facility can take advantage
5 of that exemption, and it leaves open -- this case does
6 not necessarily involve the landfill itself.

7 QUESTION: Mr. Minear --

8 QUESTION: But the landfill has to be paid by
9 somebody, and that somebody is the City of Chicago.

10 MR. MINEAR: That is correct.

11 QUESTION: May I ask, just -- maybe it's in the
12 papers and I just forgot it. How many of these facilities
13 are there in the country now?

14 MR. MINEAR: There's about 150 resource recovery
15 facilities.

16 QUESTION: Has the EPA ever proceeded against
17 any of them?

18 MR. MINEAR: No, it has not.

19 QUESTION: Mr. Minear, why was there no need for
20 notice and comment for this interpretive regulation?

21 MR. MINEAR: I think it's important to remember
22 that this regulation is -- or this statement by the Agency
23 is a statement of nonregulation. It's stating that it
24 will not regulate this particular waste disposal practice.
25 A 1985 statement that was issued as part of the -- another

1 regulation that also did not have notice and comment
2 indicated that the statute was silent on this issue and
3 that further technical studies need to be done, but it
4 would not be imposing any additional regulations, and in
5 fact --

6 QUESTION: Is that the requirement for notice
7 and comment?

8 MR. MINEAR: No, it is not. Notice and comment
9 is required in those cases other than interpretive
10 regulations, but in fact, in many cases of interpretive
11 regulations the Agency utilizes notice and comment,
12 because it's very helpful in the process.

13 QUESTION: All of them that are interpretive
14 regulations the Agency was just doing voluntarily.

15 MR. MINEAR: In many cases, it is. It is useful
16 for the Agency to have notice and comment to get a full
17 panoply of views so it can reach a reasoned determination
18 on a particular matter.

19 QUESTION: Mr. Minear, with respect to the
20 question whether the ash stream itself is exempt for as
21 far as it may go, would you explain to me by reference to
22 the text of the statute what is ambiguous about it? The
23 parties disagree, but that doesn't necessarily make an
24 ambiguity, and what in the text is ambiguous about the
25 question whether the ash stream is or is not forever

1 exempt?

2 MR. MINEAR: I think there's even disagreement
3 about the ambiguity, but let me point to two sources of
4 ambiguity. One is the grammatical ambiguity, the opening
5 phrase here, "resource recovery facility recovering energy
6 from" --

7 QUESTION: You're reading from the beginning of
8 3001(i)?

9 MR. MINEAR: That is correct. It is unclear
10 whether recovering energy is a true participle or fused
11 participle, using Henry Fowler's Modern English Usage, and
12 that does lead to some ambiguity. Does this say, a
13 resource recovery facility that recovers energy, or is it
14 really focusing on the gerund, recovering energy itself?

15 QUESTION: Well, but that ambiguity goes to the
16 question of what resource recovery facility is covered.
17 How does that ambiguity affect the question whether the
18 ash stream which is generated by whatever recovery
19 facility generates it is forever exempt?

20 MR. MINEAR: Because if Congress is only
21 concerned with the recovering energy from the mass burning
22 of waste, it presumably is only concerned with the
23 incineration process and not other parts of the facilities
24 operations.

25 QUESTION: No, but let's -- I'm worried -- I'm

1 concerned about not the problem of where the exemption
2 stops and starts within the facility, if you will, I'm
3 concerned with whether there is an exemption that survives
4 the point at which the ash leaves the facility and goes to
5 a landfill, and as to that, which raises the question
6 whether the ash is exempt or the facility is exempt, as to
7 that, where is the ambiguity?

8 MR. MINEAR: On that point, the statute in fact
9 is silent. In this situation, it's important to mention
10 the context --

11 QUESTION: Well, it's silent, isn't it, in the
12 sense that it doesn't talk about ash, it just talks about
13 recovery facilities?

14 MR. MINEAR: That's right, but it's meant to
15 clarify EPA's regulation, the household waste exclusion,
16 which did indicate that treated waste -- in other words,
17 ash -- would continue to be exempt, so in fact --

18 QUESTION: Well, it's a very strange
19 clarification. If the EPA reg was clear and explicit and
20 the statute is silent, it seems to me rather odd to accept
21 the claim of the statute that it's clarifying as distinct
22 from changing.

23 MR. MINEAR: This might help to clarify the
24 issue. If household waste alone was burned in the
25 resource recovery facility, the ash from that product

1 under the 1980 regulation would in fact be exempt, and
2 this just simply goes on to the question of whether the
3 combined waste then would be exempt as well.

4 QUESTION: Thank you, Mr. Minear. Mr. Lazarus,
5 we'll hear from you.

6 ORAL ARGUMENT OF RICHARD J. LAZARUS

7 ON BEHALF OF THE RESPONDENTS

8 MR. LAZARUS: Mr. Chief Justice, and may it
9 please the Court:

10 The city and the United States this morning are
11 making different, yet equally implausible, claims. The
12 city claims that section 3001(i)'s plain meaning exempts
13 from subchapter C hazardous waste regulation facilities
14 that that provision never mentions, and generator
15 requirements that that provision never mentions.

16 Now, the United States agrees with us that the
17 plain meaning provision doesn't support the city's
18 construction, but then reaches the same result through its
19 own, equally flawed analysis.

20 Both the city and the United States, however,
21 are wrong for precisely the same reason, and that reason
22 is section 3001(i)'s plain meaning. Section 3001(i) means
23 just what it says, no more and no less. It exempts
24 certain activities of a particular kind of resource
25 recovery facility from subchapter C. It does not purport

1 to exempt any activities of any other kind of facility,
2 nor does it purport to exempt the resource recovery
3 facility from the distinct generator requirements of
4 subchapter C.

5 Let's look at section 3001(i), the language of
6 it, and consider precisely what the city is arguing.
7 Right now, in Joliet, Illinois, there is a private
8 landfill disposal operator that is disposing of 180,000
9 tons of hazardous ash in a landfill that Congress deemed
10 not to have the safeguards necessary for the disposal of
11 hazardous waste.

12 Now, the city claims that that private landfill
13 operator is exempt from subchapter C. Where in the
14 language of section 3001(i) do they find that intent? Is
15 that landfill operator ever mentioned in section 3001(i)?
16 No.

17 QUESTION: Well, Mr. Lazarus, did you bring this
18 lawsuit -- did your organization?

19 MR. LAZARUS: Yes, it did.

20 QUESTION: Well, if you were concerned about the
21 private landfill operator, why didn't you join the private
22 landfill operator?

23 MR. LAZARUS: Because it was essential in this
24 case, Your Honor, to prove that there was a violation by
25 the resource recovery facility itself.

1 RCRA is a complicated statute, but the pieces of
2 it are very clearly defined by Congress in the statutory
3 definition, and they fit together, ultimately, we think to
4 present a clear picture, and let me explain, Your Honor.

5 It's quite clear in section 3001(i) that
6 Congress did not create what is deemed a wastestream
7 exemption. They did not exempt any facilities other than
8 the resource recovery facility itself. There's no way you
9 can read that statute to create a subchapter C regulation
10 for any other facility.

11 Because Congress is not creating a wastestream
12 exemption, Congress also clearly omitted from section
13 3001(i) any exemption from the distinct generator
14 requirements under section 3002, which are distinct from
15 the treatment storage and disposal requirements which they
16 are exempt from under 3004.

17 QUESTION: Well, does the Government, or the
18 petitioner speak correctly, then, when it says that you
19 would not challenge the legitimacy of the storage of the
20 ash on the resource recovery facility's site?

21 MR. LAZARUS: No, they do not. The Court does
22 not have to reach that issue here.

23 QUESTION: Well, what is your position?

24 MR. LAZARUS: On that issue, our position is
25 that section 3001(i) was regulating one kind of activity

1 from the resource recovery facility, and that is the
2 recovery process itself. Let me give you an example.

3 QUESTION: So that if the ash were stored on
4 site, that would be a violation of the act --

5 MR. LAZARUS: Right --

6 QUESTION: -- or would be outside the exemption.

7 MR. LAZARUS: -- and that would be distinct from
8 our generator argument and our downstream argument, but
9 let me explain why. If the city, for instance, as
10 suggested by Mr. Rosenthal, put a disposal facility on
11 site, they couldn't claim that exemption, because section
12 3001(i) only exempts a resource recovery facility. It
13 doesn't purport to exempt any other activity that they
14 might attempt to engage in there.

15 QUESTION: So at what point does the facility
16 lose its exemption with respect to the treatment of the
17 waste?

18 MR. LAZARUS: It loses its exemption at the
19 moment the incineration resource recovery process is over.
20 The statute -- what it's doing, it means that although the
21 city is clearly treating the hazardous waste, and would
22 otherwise be subject to 3004 of RCRA, it doesn't have to
23 seek a section 3004 permit, because it is deemed not to be
24 a RCRA-permitted facility under subchapter C.

25 QUESTION: So the phrase, disposing of, applies

1 simply to the waste that it receives and not to the ash
2 that it generates.

3 MR. LAZARUS: That's right. What the statute
4 deems is that a particular activity will not be considered
5 to be management of a hazardous waste.

6 QUESTION: But what good does that do the city,
7 if it's as narrow as you say? They're obviously not going
8 to store the stuff right in the RCRA itself. They're
9 going to have to dispose of it somewhere.

10 MR. LAZARUS: Chief Justice Rehnquist, it does
11 the city an incredible amount of good. They don't have to
12 try to obtain a permit under section 3004 of RCRA, which
13 includes RCRA's most rigorous performance requirements for
14 the treatment, corrective action, financial assurance
15 requirements -- two-thirds of the incinerated -- two-
16 thirds, excuse me, of the facilities that are subject to
17 section 3004 after Congress passed it in 1984 closed
18 rather than try to get those permits. One-half of them
19 were denied the permits when they tried. The city doesn't
20 have to achieve that. Every --

21 QUESTION: But household waste was already
22 excluded --

23 MR. LAZARUS: Well, Your Honor --

24 QUESTION: -- before this amendment.

25 MR. LAZARUS: Yes. Your Honor, but before the

1 1984 amendment there was absolutely no codification ever
2 in the statute to that effect, and the cities were making
3 investments. In addition, there was no allowance for them
4 to mix it with other kinds of waste, and no allowance for
5 their inadvertent receipt of hazardous waste.

6 QUESTION: Mr. Lazarus, the difference between
7 that \$42 a ton price tag and \$453 is enormous. Are you
8 taking the position that these would be economically
9 feasible operations if the disposal had to be in
10 accordance with subchapter C?

11 MR. LAZARUS: Yes, absolutely, Your Honor.
12 There's no doubt in our mind, and in several States they
13 manage their ash under subchapter C in their States rather
14 than --

15 QUESTION: Because of State regulation?

16 MR. LAZARUS: Yes. They choose to do it under
17 subchapter C rather than D, and actually that's in the
18 record in this case. District court docket number 73, an
19 affidavit submitted to that effect.

20 But let me explain why it will still be
21 economical. There are significant volume reduction
22 benefits and energy benefits, but most importantly, if
23 this fiction is eliminated, the city will quite quickly
24 have an incentive to take the rational steps, and the most
25 simple steps they can take is that the ash, which is

1 hazardous, the ash which tends to flunk EPA's toxicity
2 characteristic analysis, is the fly ash. That's where the
3 heavy metals go. That's 10 percent by weight of the ash
4 which is produced. The bottom ash -- the bottom ash does
5 not tend to be hazardous.

6 Currently, because the city lacks any economic
7 incentive, they mix the two, producing 100 units of ash
8 that flunks the EPA toxicity characteristic analysis
9 instead of 10 units of that ash. They could quickly
10 reduce their cost by tenfold just by not affirmatively
11 mixing the two, and that --

12 QUESTION: Do they reach the RCRA segregated?

13 MR. LAZARUS: Excuse me?

14 QUESTION: Does the kind of ash that proves to
15 be hazardous, does the metal that makes up that come
16 separately to the RCRA from the household ash?

17 MR. LAZARUS: It comes from the household ash
18 and it also can come from the nonhazardous industrial and
19 commercial waste, and that's because although the
20 industrial and commercial waste may be nonhazardous, they
21 may contain hazardous constituents, and those hazardous
22 constituents, because of the incineration process, do two
23 things:

24 1) they become concentrated in the ash, and
25 2) they now become on -- become placed on a material --

1 that is, ash -- with a very significant surface,
2 percentage of surface on it and the surface matter of ash,
3 and the concentration which together caused the ash to
4 flunk EPA's toxicity characteristic analysis, which looks
5 to whether a substance is likely to leach in a landfill,
6 and it's because it's ash, because it's concentrated.

7 So the hazardous waste here could well come not
8 just from the household waste, the hazardous ash could
9 well come from the commercial industrial waste which has
10 hazardous constituents.

11 QUESTION: May I ask, just -- the chemistry and
12 the amounts involved are hard for me to follow, but I
13 assume there is some hazardous waste in the incoming
14 stream of waste that is exempt, and you agree that
15 that's exempt.

16 MR. LAZARUS: That's right. We don't contest
17 that here, that's right.

18 QUESTION: If we assume that the process of
19 incineration produces a new ash that contains no larger
20 percentage of hazardous materials than the incoming
21 stream, would they then be subject to subchapter C?

22 MR. LAZARUS: Yes, they would, because they
23 would have generated a hazardous waste.

24 QUESTION: Even if they have not enhanced the
25 hazardous percentage of the total amount of garbage

1 processed?

2 MR. LAZARUS: Yes, because -- they have,
3 obviously, in this case, Your Honor.

4 QUESTION: Isn't it inevitable, then, that no
5 matter what they do, that because they start with some
6 hazardous waste, they're going to end up with some
7 hazardous waste?

8 MR. LAZARUS: But they're going to end up with
9 much, much less, Your Honor, in terms of the volume of it.
10 There's things that they could do, Your Honor, to try to
11 avoid that.

12 QUESTION: I understand they could do something
13 better, but --

14 MR. LAZARUS: Well, they could try source
15 separation in the first instance. They could try to avoid
16 putting the kinds of --

17 QUESTION: No, but just, even doing what they
18 do, which is not the best, as I understand it, do they
19 increase the ratio of hazardous to nonhazardous waste in
20 the stream of garbage that they process?

21 MR. LAZARUS: Oh, yes, they do, Your Honor. If
22 you look at --

23 QUESTION: But you say that's not legally
24 required, but you say they just --

25 MR. LAZARUS: They certainly do, and let me

1 explain. There are 180 million tons of municipal solid
2 waste produced each year. Less than 1 percent of that
3 would qualify as hazardous waste.

4 If you look to the ash that's produced, because
5 of the concentration, because of the ash material, as in
6 this case, 32 out of 35 samples flunk EPA's toxicity
7 characteristic analysis. This is a fundamental chemical
8 transformation, and that is the concentration and the
9 material, and that's why it flunks EPA's toxicity
10 characteristic analysis.

11 It's one thing for Congress, Your Honor -- it's
12 one thing for Congress to have exempted a waste where, out
13 of 180 million tons, less than 1 percent is hazardous, and
14 not to require the municipality to sort through that.
15 It's a very different policy view, and it's an essential
16 distinction, we believe, not to exempt a substance, when
17 once you have isolated the part which is hazardous, which
18 is on an ash material, which has the toxicity
19 characteristic analysis, not to exempt that.

20 When Congress wanted, Your Honor -- when
21 Congress wanted to create a wastestream exemption in RCRA,
22 Congress did it explicitly, and they did it with
23 procedural safeguards.

24 QUESTION: Mr. Lazarus, you're not questioning
25 that EPA originally in 1980 had a wastestream exemption?

1 MR. LAZARUS: No, we're not questioning that.
2 It wasn't a wastestream exemption, though, that actually
3 would have applied to this case, because as EPA recognized
4 in 1985, in their preamble statement, right after RCRA's
5 enactment, that hazardous waste -- excuse me, that
6 exclusion only applied to the incineration of household
7 waste.

8 It didn't apply to the incineration of household
9 waste mixed with other kinds of waste, and that's why EPA
10 said in 1985 that under EPA's then-existing regulations
11 this ash would not be exempt, but wholly apart from that,
12 wholly apart from the gratuity in this case, that we don't
13 have a mixture, we think that Congress addressed the issue
14 for the first time in 1984 in 3001(i).

15 QUESTION: And silently changed what had been a
16 wastestream exemption into a facility exemption.

17 MR. LAZARUS: Well, not silently, Your Honor. I
18 think as Mr. Rosenthal said, this is not a question of
19 congressional silence, this is a question of the plain
20 meaning of the words of the statute, and the plain
21 meanings of the words of the statute creates one kind of
22 exemption, and that's a facility exemption.

23 And if you look at the question presented in
24 this case, presented by both the United States and by the
25 City of Chicago, the question presented is whether section

1 3001(i) of RCRA exempts the act. It's a wastestream
2 exemption premised on one provision. They aren't arguing
3 for facility exemption, they're arguing for a wastestream
4 exemption.

5 QUESTION: How about the city's argument that
6 when Congress legislates it's presumed to have ratified a
7 prior administrative construction?

8 MR. LAZARUS: Your Honor, in this case, first of
9 all that doesn't apply, because section 3001(i) -- excuse
10 me, the prior administrative construction wouldn't have
11 covered this situation, and that is a situation of the
12 mixture, and whatever presumption might exist, Your Honor,
13 that presumption is clearly overcome by the plain meaning
14 of the statute, which did not adopt the word and the
15 language of that prior regulation. That prior regulation
16 was written as a wastestream exemption. Section 3001(i)
17 is written as a facility exemption.

18 QUESTION: What do you mean by the term,
19 mixture?

20 MR. LAZARUS: Before 1984, a resource recovery
21 facility which mixed household waste with nonhousehold
22 waste, waste from commercial industrial sources, had no
23 benefit from the household waste exclusion.

24 One of the things section 3001(i) did was
25 allowed them to mix the two, and allowed for the

1 inadvertent receipt of hazardous waste by allowing for
2 certain kinds of procedural safeguards, and gave basically
3 some kind of protection for municipalities so that they
4 could avoid regulation under section 3004, which was the
5 RCRA permit requirements.

6 QUESTION: Now, you say the cost estimates if we
7 agree with petitioner are incorrect?

8 MR. LAZARUS: Yes. Yes, Your Honor. The cost
9 estimates are in --

10 QUESTION: What do we have in the record to
11 clarify that for us?

12 MR. LAZARUS: Well, Your Honor, in the record,
13 there's really nothing in the record to support their
14 claims or our claims. We're both dealing with extra-
15 record material. We think that the support that we have
16 given in this case in which we've tried to rely in our
17 brief on EPA reports and legislative reports bear out our
18 position.

19 One reason we don't have an administrative
20 record, Your Honor, is also one reason why we don't think
21 EPA's view should be entitled to any deference. There's
22 no administrative record in this case, there's no record
23 evidence, because EPA has never promulgated a legislative
24 rule on this issue. The record would no doubt be much
25 better if there had been a legislative rule.

1 QUESTION: Well, does EPA need to promulgate a
2 rule if it decides not to regulate something?

3 MR. LAZARUS: In a case like this, Your Honor,
4 where EPA had said in a prior interpretive rule in 1985
5 that its existing legislative rule made this ash subject
6 to subchapter C regulation, if the EPA is going to change
7 its interpretation of an existing legislative rule, it
8 should do it by a legislative rule, it shouldn't do it by
9 an interpretive rule, and this memorandum in this case is
10 at best an interpretive rule, because even interpretive
11 rules are supposed to be published in the Federal Register
12 under the Administrative Procedure Act, and this rule was
13 not.

14 Let me turn the Court's attention, though, just
15 for a moment to section 3001(b)(2) and (b)(3), because I
16 think those provisions truly became highlighted in
17 petitioner's reply brief, show that Congress knew how to
18 create a wastestream exemption when it wanted to.

19 In section 3001(b)(2) and (b)(3) --

20 QUESTION: Where do we find these?

21 MR. LAZARUS: Actually, they're cited in their
22 reply brief.

23 QUESTION: The yellow brief?

24 MR. LAZARUS: Yes. They're cited in the reply
25 brief -- let me see if I can --

1 QUESTION: They're just cited?

2 MR. LAZARUS: Yes. They actually do not give
3 the text of --

4 QUESTION: And you don't give the text in your
5 brief?

6 MR. LAZARUS: No, we did not, Your Honor. It
7 wasn't actually until I saw their citation of them I
8 decided to see what support they gave for the city's
9 petition -- city's position, and I realized that actually
10 those provisions supported our position and not the
11 city's, and so at that -- up to that point we had never
12 cited those provisions, because we thought they were so
13 obviously distinct, when the city relied upon them, it
14 occurred to me that actually that distinction helped our
15 case more than I had taken advantage of in our opening
16 brief.

17 In those provisions, in section 300(b)(2) and
18 (b)(3), Congress created explicit wastestream exemptions,
19 and that is, for waste associated with the exploration,
20 production, and development of oil and natural gas, and
21 waste from the combustion of coal, in those provisions,
22 Congress, with respect to coal combustion, specifically
23 refers in the statute to fly ash and bottom ash, but at
24 the same time that Congress authorized in those provisions
25 EPA to create a wastestream exemption, Congress imposed

1 significant procedural safeguards because of the
2 environmental risk associated with a wastestream exemption
3 as opposed to a facility exemption.

4 In particular, Congress required EPA to study
5 the effects of a wastestream exemption applied to those
6 wastes. Congress required EPA to hold a public hearing on
7 that issue. Congress required EPA to receive public
8 comment on that issue. Congress required EPA, if it
9 decided to exempt those wastes as a wastestream from
10 subchapter C, to make a formal determination to that
11 effect, and to report that determination to Congress.

12 Now, what the city is seeking in this case is a
13 wastestream exemption far broader than that created by
14 Congress when it specifically addressed the issue, and
15 without any of the procedural safeguards that Congress
16 deemed necessary prior to the creation of a wastestream
17 exemption. We simply don't believe, Your Honor, that the
18 statutory language comes anywhere close to supporting the
19 city's contention.

20 You have to put the pieces of the RCRA puzzle
21 together. You have to look at the clear definitions of
22 the terms, generation, management, disposal, and section
23 1004. There is only one facility -- there is only one
24 facility that is disposing of hazardous waste in this
25 case, and that facility is the private landfill operator

1 in Joliet, Illinois.

2 We are not claiming that the city is disposing
3 of hazardous waste, because if you're disposing of
4 hazardous waste, you have to be discharge, depositing,
5 injection, dumping, spilling it or leaking it or placing
6 it on the land or water, and there's only one facility
7 which is doing that, and that facility does not enjoy the
8 benefit of subchapter C, and the city is violating the
9 distinct generator requirements under section 3002.

10 Because one of those requirements, in addition
11 to the testing requirements, the determination of whether
12 it's a hazardous waste, the labeling requirement, and the
13 manifest trapping system requirement, which is so
14 essential at the gatekeeper to let the downstream
15 facilities comply with subchapter C, is that the city --
16 also, as a generator, one of the requirements under
17 section 3002 is that the generator assure that the waste
18 is ultimately disposed not by them but by somebody else at
19 a RCRA-permitted facility under section 3004, and that is
20 the distinct generator requirement.

21 The pieces fit very nicely together. The
22 statute is very clear. This is not a statute where we
23 have to guess at the meaning of the terms. There are
24 40 terms defined in section 1004 of RCRA, very clearly,
25 very carefully defined.

1 QUESTION: Suppose the city segregated the waste
2 as you suggest so that it initially put the stuff in piles
3 where the more hazardous stuff was in one pile, and left
4 it there, and then it started to seep out into the land,
5 would that be a violation of the act?

6 MR. LAZARUS: Well, Your Honor, actually, under
7 our reading of the statute, actually under the way the
8 resource recovery facility works, it's actually not -- you
9 don't have to segregate it. It's already separate. The
10 fly ash and the bottom ash are actually --

11 QUESTION: No, no -- no, I have a different
12 hypothetical. Suppose that they take the refuse as it
13 comes to them and separates it into two piles, one pile
14 has a lot of the hazardous stuff in it, and it just lets
15 that pile sit for 6, 8 months. Is that a violation of the
16 act, or are they within the exemption?

17 MR. LAZARUS: Since we believe that the
18 exemption does apply to the waste that they receive in the
19 first place --

20 QUESTION: What is it about the statute that
21 triggers the loss of the exemption when the ash is
22 created? What are the words that you want me to look to?

23 MR. LAZARUS: Because under the words of the
24 statute, the only activities that are referred to in
25 section 3001(i) are the receiving and burning of the waste

1 and the recovering of energy from the mass burning.

2 QUESTION: No. It talks about treating,
3 storing, disposing --

4 MR. LAZARUS: Right, but the only thing that it
5 says does not amount to treating, storing, or disposing,
6 or otherwise managing, is the resource recovery facility
7 recovering energy from the mass burning. That's the only
8 activity which is said to be deemed not to be management,
9 and that's why that facility does not have to obtain a
10 section 3004 --

11 QUESTION: Tell me where I'm supposed to --

12 QUESTION: Is the subject of the activity --

13 QUESTION: -- where it says, receives and burns?

14 MR. LAZARUS: Under section -- subsection 1(A),
15 such facility receives and burns only, and describes
16 there. Now, Your Honor --

17 QUESTION: Is the subject of the --

18 QUESTION: No, but that describes the facility,
19 not the act. The acts are, treating, storing, disposing,
20 otherwise managing.

21 MR. LAZARUS: Yes, but that is saying that
22 certain acts shall not be considered to be treating,
23 storing, disposing, and we think the act which is not
24 considered to be treating, storing, is the recovering
25 energy from the mass burning.

1 QUESTION: Yes, but those terms just modify the
2 word, recovery facility.

3 MR. LAZARUS: Well, we think --

4 QUESTION: They're modifiers describing what
5 kind of recovery facility shall not be deemed --

6 MR. LAZARUS: That's right, and it's that
7 activity which shall not be deemed to be managing.

8 Now, of course, Your Honor, the Court does not
9 have to reach that distinct issue to rule in our favor,
10 because what we're claiming here is not that they're
11 treating, storing, disposing, or otherwise managing.
12 We're claiming that they're violating the generator
13 requirements.

14 QUESTION: You assume that the subject of the
15 sentence is a resource recovery facility recovering
16 energy, and maybe the subject is a resource recovery
17 facility.

18 MR. LAZARUS: Well, Your Honor, it seems quite
19 clear to us that if the city changed the nature of their
20 facility and said, well, this isn't just going to be a
21 resource recovery facility, this is now going to be a
22 landfill disposal facility, that they wouldn't be entitled
23 to the benefit of section 3001(i), that Congress was not,
24 in intending to promote resource recovery facilities by
25 exempting from 3004, allowing the city to put a different

1 kind of facility there, such as a disposal facility.

2 QUESTION: No, it has to be recovering energy
3 from mass burning, but it may be doing other things as
4 well.

5 MR. LAZARUS: No, Your Honor, we think that the
6 only thing that 3001(i) addressed was an exemption --

7 QUESTION: Well, you think that, but I'm not
8 sure that the language is clear on that point.

9 MR. LAZARUS: Well, I think -- Your Honor, I
10 think the language was quite clear, and in all events the
11 language was quite clear that in no event are they
12 entitled to any exemption from the generator requirements,
13 and in no event is any other kind of facility entitled --

14 QUESTION: Well then, storing the household
15 waste prior to its combustion isn't covered, because that
16 is not a resource recovery facility recovering energy.
17 It's not doing anything. It's just sitting there.

18 MR. LAZARUS: Your Honor, I -- in terms of
19 receiving it, we believe that there is enough language in
20 the statute to support the notion that if they're doing
21 that because --

22 QUESTION: Not if we agree with the argument
23 you've just made.

24 MR. LAZARUS: Well, we think that -- I pointed
25 out a moment ago that we have an elaboration upon the

1 receiving -- Your Honor, if this Court were to rule that
2 they weren't entitled to the exemption, either, which is
3 an issue not presented in this case, I would probably have
4 to talk to my client, and maybe they might agree with that
5 reading. That is not, however, the position that is
6 raised in this case, and is not the contention that we're
7 addressing.

8 QUESTION: You don't want us to go so far as to
9 agree with the logic of what you've said, right?

10 (Laughter.)

11 MR. LAZARUS: I would not object to this Court
12 giving section 3001(i) a narrow reading. The fact is,
13 there is a settled canon of statutory construction in this
14 Court which we think is applicable here, and that is when
15 we're talking about a remedial statute, that exemptions of
16 the remedial statute should be narrowly and not broadly
17 construed.

18 QUESTION: And how do we tell a remedial statute
19 from a nonremedial statute?

20 MR. LAZARUS: Well, I think in this case, when
21 you have a statute designed to protect human health and
22 the natural environment, that is the paradigmatic case of
23 remedial statute.

24 I see my time is up. Thank you very much.

25 QUESTION: Thank you, Mr. Lazarus.

1 Mr. Rosenthal, you have 2 minutes remaining.

2 REBUTTAL ARGUMENT OF LAWRENCE ROSENTHAL

3 ON BEHALF OF THE PETITIONERS

4 MR. ROSENTHAL: Thank you.

5 I'd like to first turn to the question whether
6 what we have here is a wastestream exemption, because no
7 one should mistake the boldness of what EDF is asking this
8 Court to hold.

9 EDF is asking this Court to hold that Congress
10 was misrepresenting when it crafted this statute, that
11 Congress in fact wasn't clarifying anything, that that is
12 a misrepresentation, that Congress intended to
13 dramatically narrow the scope of the exemption that these
14 facilities receive if they mix in, to use Mr. Lazarus'
15 words, any nonhazardous commercial and industrial waste.

16 The interesting thing about the record in this
17 case is it shows that 99 percent of what this facility
18 receives is household waste. On EDF's view, because the
19 city mixes in 1 percent, or less than 1 percent,
20 nonhazardous commercial and industrial waste, Congress
21 would have intended a dramatically different result, would
22 have intended to end the wastestream exemption.

23 It is, as one of Justice Ginsburg's questions
24 noted, it is the resource recovery facility itself that
25 must find a way to dispose of the ash. When that ash is

1 on-site, it is the resource recovery facility's problem.
2 How are you going to dispose of it? Are you going to have
3 to dispose of it as hazardous waste, and pay \$453 a ton,
4 according to EPA's estimates, or can you dispose of it at
5 a more feasible cost of \$42 a ton as nonhazardous waste?

6 For all these reasons, I ask the judgment be
7 reversed. Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you,
9 Mr. Rosenthal. The case is submitted.

10 (Whereupon, at 11:10 a.m., the case in the
11 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

CITY OF CHICAGO, ET AL. Petitioners v. ENVIRONMENTAL DEFENSE FUND, ET AL.

No. 92-1639

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

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