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TOO-STRICT LIABILITY: MAKING LOCAL GOVERNMENT ENTITIES PAY FOR WASTE DISPOSAL SITE CLEANUP

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I. INTRODUCTION

LANDFILL site remediation is an unfortunate by-product of the continuing urban sprawl and generation of refuse by an industrial society. Landfill waste can be composed of an almost limitless variety of substances, and may be generated by a similar number of sources. Waste may be deposited at such landfill sites by various operators, private transporters, and local government entities such as municipalities. When contamination at a landfill necessitates cleanup measures, one bottom line question always arises: who should pay?

In consideration of this question, it is appropriate to look to New Jersey law. The state of New Jersey has served as a testing ground for the development of national environmental policy, especially that which pertains to hazardous waste site remediation and mitigation. In New Jersey alone, there are approximately one hundred sites which have been identified by the United States Environmental Protection Agency (EPA) for inclusion on the federal Superfund National Priorities List (NPL) for remediation of hazardous waste contamination.¹ The liability of municipalities for contaminated site remediation is significant on a national scope, since of the 1219 proposed and final sites that EPA has designated for inclusion on the NPL, EPA identifies 320 sites as involving municipalities or municipal wastes.²

In 1990, the United States Congress will address the reauthorization of the Comprehensive Environmental Response,

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1. EPA National Priorities List, 40 C.F.R. Part 300, App. B (1989).

2. Superfund Program: Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071 (1989) (proposed Dec. 12, 1989).

Compensation and Liability Act (CERCLA, or "Superfund").³ Potential modifications in environmental policy related to landfill remediation are being debated in New Jersey today, and the outcome of such discussion will undoubtedly affect consideration of this problem on the national level.

In 1977, the New Jersey legislature addressed the problem of environmental protection by enacting the Spill Compensation and Control Act (the "Spill Act").⁴ The Spill Act grants litigants the right to recover damages for environmental contamination created by spills of waste materials, including pollution from hazardous waste disposal sites.⁵ Because the Spill Act is similar to CERCLA in both its provisions and functioning, it is submitted that the Spill Act may provide an illustration for how environmental cleanup legislation on both the state and national level can be improved.

Under the Spill Act, the New Jersey Department of Environmental Protection (NJDEP) is empowered to ascertain the responsible parties for pollution damage and to issue directives for remediation.⁶ NJDEP notifies the responsible parties and their insurers of required remediation measures, and may either: (1) direct the responsible parties to perform or arrange to perform the required remediation; or (2) authorize the payment for the remediation out of the Spill Compensation Fund, which the responsible parties are required to reimburse.⁷

The Spill Act makes no distinction for local government entities such as municipalities. The Spill Act holds municipalities strictly liable for cleanup costs and damages as it would hold owners and operators of hazardous waste dump sites, private transporters of hazardous waste, and industrial hazardous waste

3. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-75 (1982 & Supp. V 1987), amended by Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-75 (Supp. V 1987).

4. Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 to 23.11z (West 1982 & Supp. 1989) (authorizing creation of the Spill Compensation Fund).

5. For a comprehensive review and critique of the Spill Act, see McCarter, *New Jersey Clean Up Your "Act": Some Reflections on the Spill Compensation and Control Act*, 38 RUTGERS L. REV. 637 (1986).

6. N.J. STAT. ANN. § 58:10-23.11f(a) (West 1982).

7. The Spill Act provides that "[w]henver any hazardous substance is discharged, the department may, in its discretion, act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal, of such discharge." *Id.*

generators.⁸ A municipality may use a landfill for disposal of household or municipal waste or own a landfill site at which hazardous waste was illegally disposed. If hazardous waste contaminates a municipally-utilized landfill, the municipality may face the same liability for its disposal of household trash as would a chemical manufacturer that disposed of toxic compounds at the same location. A municipality which owned a landfill site at which toxic substances were dumped illegally without the municipality's knowledge might also similarly share liability with the dumper. The standard of strict liability, applied jointly and severally to the municipality, could result in forcing local taxpayers to bear the costs of remediation of a site and high insurance premiums.

Liability of municipalities under both the Spill Act and CERCLA is not expressed according to common law.⁹ In the context of CERCLA, this has meant that governmental entities are not excluded from the definition of potentially responsible parties that may be held liable for hazardous waste remediation costs. Governmental entities such as municipalities are included in the CERCLA definition of potentially responsible "persons" that may be held liable for response costs under section 107 for violations of that Act.¹⁰ The Spill Act similarly defines potentially responsible "persons" to include governmental entities ("the State of New Jersey and any of its political subdivisions or agents").¹¹ The common law trend has been to apply strict liability under CERCLA to both states¹² and municipalities¹³ for release of any hazardous substance.

8. The Spill Act subjects "persons" who are "owners" and "operators" to liability, and includes "public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, individuals, the United States, the State of New Jersey and any of its political subdivisions or agents" among those defined as persons. *Id.* § 58:10-23.11b(o). The CERCLA definition of potentially liable "person" includes "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (Supp. V 1987).

9. Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 236-42 (1988) (discussing common law liability of municipalities under CERCLA).

10. 42 U.S.C. § 9601(21) (Supp. V 1987). For the CERCLA list of potentially responsible "person," see *supra* note 8.

11. N.J. STAT. ANN. § 58:10-21.11b(o) (West 1982).

12. See *Pennsylvania v. Union Gas*, 109 S. Ct. 2273 (1989) (state not accorded sovereign immunity to protect against liability for cleanup costs from damage partly caused by state's excavation).

13. See, e.g., *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348 (D. Del. 1985) (political subdivision held liable for response costs for remediation at sites owned and operated by subdivision).

The application of state sovereign immunity to protect local government entities such as municipalities from liability under CERCLA has been rejected by at least one district court.¹⁴ NJDEP has expressed an intention to follow this policy, and hold municipalities liable under the Spill Act for remediation costs at terminated landfills.¹⁵ Such a situation exists in the case of the Gloucester Environmental Management Services (GEMS) landfill, which provides the context for our examination of the equity of imposing strict liability on municipalities under the Spill Act and, by analogy, CERCLA. The GEMS Landfill case presents a complex, multi-faceted situation which involves a variety of environmental and litigation issues, ranging from proper cleanup procedure to jurisdictional issues to insurance claim disputes. This article will, however, confine itself to an examination of the application to municipalities of the strict liability standard to impose costs for cleanup of hazardous wastes.

This discussion reviews the remediation of a landfill site, detailing the process which led to the issuance of both NJDEP directives authorizing site remediation, and a settlement agreement under which over one hundred parties identified as responsible agreed to pay the costs of remediation. Some of the parties to the settlement, namely municipalities that had disposed of municipal solid waste at the landfill, face the inequitable prospect of being held strictly liable for any further remediation costs that may be required, subject to the same level of liability as the industrial generators, waste transporters and operators of the same landfill site, regardless of the relative damage caused by their waste. In our discussion, we suggest the implementation of a fault-based standard of liability for local government entities to sharpen the Spill Act and similar legislation, so that these measures may be used more effectively as a weapon against polluters.

14. Ferrey, *supra* note 9, at 248-49 n.327 (citing *United States v. Conservation Chemical Co.*, 9 Chem. & Radiation Waste Litigation Rep. 945, 948 (W.D. Mo. Mar. 13, 1985).

15. Letter from Anthony J. Farro, Director of the New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation, to James J. Florio (Aug. 30, 1988). The letter states, "[t]he EPA Office of Waste Programs Enforcement is currently exploring making municipalities liable under Superfund, solely on the basis of the disposal of residential trash at a Superfund site." *Id.*

II. GLOUCESTER ENVIRONMENT MANAGEMENT SERVICES LANDFILL: AN ILLUSTRATION OF MUNICIPAL LIABILITY

The GEMS site is similar to most closed landfills throughout the country. Landfills traditionally accept solid and liquid wastes from various sources, including local governments and private industry. Upon identification of hazardous pollution at these landfill sites, remediation costs are distributed among all users of the landfill site regardless of the severity of environmental damage; under CERCLA, there is no allocation of response costs to polluters based on the type and amount of pollution they generated or the damage traceable to that pollution.¹⁶ Liability for hazardous waste cleanup may inure not only to those parties who stand to profit from their waste generating activities or to those responsible for the pollution problem which necessitated the closure and cleanup of a site, but to comparatively blameless government entities. The principle that the polluter should pay may be distorted to include as equally liable the local governmental entities whose involvement with waste disposal is necessitated as part of the government function. The GEMS landfill provides an illustration of such a situation.

A. THE GEMS LANDFILL CONTAMINATION

The GEMS site was utilized as Gloucester Township, New Jersey's municipal landfill from the 1950's through 1980.¹⁷ The landfill had various operators until its closure by EPA in November 1980, due to periodic health and sanitation code violations.¹⁸

The landfill covers approximately sixty acres, at a height of eighty to one hundred and twenty feet above the original ground level, with a disposal capacity of sixty million cubic yards.¹⁹ The location of the landfill is in an area not isolated from the community. Residential developments, a motorbike recreation area, and

16. Ferrey, *supra* at 236. It must be noted that differentiation of types or sources of pollution is not precluded under CERCLA. See Superfund; Municipal Interim Settlement Policy, 19 Fed. Reg. 51,071 (proposed Dec. 12, 1989) for a proposed policy which takes such factors into account when determining notification of potentially responsible parties.

17. New Jersey Dep't of Env'tl. Protection v. Gloucester Env't Management Services, 719 F. Supp. 325, 328 (D.N.J. 1989).

18. Remedial Investigation Report, Volume I, § V, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S719 (July 1985) (section V reviews site conditions, physical, chemical and biological contaminants, potential receptors, and exposure effects from the GEMS landfill).

19. *Id.* at 5-5.

two businesses surround the landfill site, which is clearly visible to local inhabitants.²⁰ Residential housing developments are as close as 300 to 500 feet from the outer edge of the landfill.²¹

The landfill site is located above the Cohansey-Kirkwood aquifer, which provides area residents with their water supply.²² Because of groundwater contamination plumes, NJDEP required special review prior to potable well installation.²³ Following NJDEP Division of Water Resources' preliminary geophysical investigations, organic hazardous chemicals were detected at shallow depths in previously untainted private wells, in leachate, and in stream samples.²⁴ Further, runoff had contaminated the nearby Holly Run Stream and Briar Lake.²⁵

Until its closure in 1980, the landfill served as a waste disposal facility for numerous national and multinational industrial, chemical, fuel, energy, and electronics corporations.²⁶ Local government agencies in New Jersey, New York, Pennsylvania, Connecticut, Delaware, and Maryland also used the landfill for waste disposal.²⁷ As a result of the various sources and types of waste, site contamination is both severe and diverse. Hazardous sub-

20. *Id.*

21. *Id.*

22. *Feasibility Study*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S719 (July 1985) (discusses surface water hydrology, geology, and hydrogeology); *Focused Feasibility Study*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S710 (July 1985) (details volatile organic concentrations in groundwater).

23. *Fact Sheet on Potable Well Installations in Vicinity of GEMS Landfill*, New Jersey Department of Environmental Protection (Sept. 1985).

24. *Focused Feasibility Study*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S719 (July 1985).

25. *See Fact Sheet on GEMS Landfill*, New Jersey Department of Environmental Protection (Apr. 1986); *Fact Sheet on GEMS Landfill*, New Jersey Department of Environmental Protection (Apr. 11, 1985) (information distributed as part of Public Information Program of New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation).

26. Those companies using the landfill for waste disposal include: American Cyanamid Company; A.T. & T. Technologies; B.P. American; Borden, Inc.; Certainteed Corporation; Chevron Corporation; Chrysler Corporation; E.I. DuPont Corporation; General Electric Company; Glidden Coating, Inc.; Gulf Oil Corporation; Manor Care, Inc.; Merck and Company; Morton Thiokol, Inc.; Nabisco Brands, Inc.; Owens Corning Fiberglass; Philadelphia Newspapers; PSE & G Company; RCA Corporation; Rohm & Haas Company; Shell Oil Company; Sherwin Williams Company; Sun Chemical Corporation; Texaco, Inc.; Waste Management, Inc.; Western Electric Company; and Westinghouse Electric Company. *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Aug. 17, 1988) (provides complete listing of all transporters, generators and distributors).

27. *Most of Cost of Cleanup of GEMS Landfill Covered Under Settlement with 104 Parties*, 19 Env't Rep. (BNA) 2069 (Feb. 3, 1989).

stances disposed in the landfill include volatile organic and toxic inorganic compounds, asbestos, and polychlorinated biphenyls (PCBs).²⁸ Further, toxic compounds found in chemical solvents have been identified in leachate, soil, water, and air samples.²⁹ The GEMS site was ordered closed in 1980,³⁰ and measures for site remediation (and protracted litigation) followed.

B. REMEDIATION STUDIES

EPA included GEMS on the NPL for Superfund cleanup in 1983.³¹ EPA joined forces with NJDEP in 1984 under CERCLA and hired a firm to conduct a feasibility study at the GEMS landfill site.³² The study, completed in 1985, reviewed public health and environmental concerns, screened remedial action technologies, and compared remedial action alternatives.³³ Other studies at the landfill site had been undertaken as early as 1979.³⁴

28. Some highly toxic industrial wastes at the site were identified and traced to specific sources. Documents indicated that "small package lots of laboratory chemicals, PCB small capacitors and PCB spill cleanup debris [and] asbestos materials" were dumped at the landfill. *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation at 22 n.161 (Aug. 17, 1988). Directive Four also discloses that the site was used to dispose of one thousand cubic yards of asbestos insulation waste. *Id.* at 26 n.187. Directive Four similarly identifies a transporter as disposing at the GEMS site various chemical solvents, including methylene chloride, toluene, methyl ethyl ketone, n-butyl alcohol, methanol and ethylene. *Id.* at 23 n.163.

29. *Feasibility Study*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S710 (July 1985) (discusses surface water hydrology, geology, and hydrogeology affected by chemical waste); *Focused Feasibility Study*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S719 (July 1985) (details the volatile organic concentrations in the groundwater).

30. 719 F. Supp. at 328.

31. EPA National Priorities List, 40 C.F.R. Part 300, App. B (1983).

32. *Id.* The Remedial Planning Office of NUS Corporation, on behalf of EPA conducted the Feasibility Study/Remedial Investigation. *Feasibility Study*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S719 (July 1985); *Focused Feasibility Study*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S719 (July 1985).

33. *Remedial Investigation Report, Volume I*, EPA Work Assignment No. 15-2M29.0, NUS Project No. S719 (July 1985).

34. Since 1979, various groups have performed analyses on the landfill, including NJDEP, the New Jersey Health Department, EPA, and Camden County government; the results of these analyses revealed the continuing release of hazardous substances from the landfill into the surrounding environment. *Remedial Investigation Report, Volume I*, EPA Work Assignment No. 15-2M29.0, Contract No. 68-01-6699, NUS Project No. S719 (July 1985) (citing studies); *GEMS Landfill Monitoring Study, Gloucester Township New Jersey*, Camden County Solid Waste Advisory Council (Apr. 29, 1983). Residential well testing began in 1980, with eighteen monitoring wells installed in 1981. Additional studies by NJDEP, EPA, and Camden County Government were completed in 1982, 1984 and 1985, and

In early 1983, EPA installed a sand berm and fence around the landfill, which were designed to restrict leachate flow to nearby homes and to restrict public access to the landfill and contaminated surface water.³⁵ Air sampling taken in and around the landfill site in September 1983 showed the area's air quality to be similar to many industrial areas in New Jersey, but not an immediate danger to residents.³⁶ From 1983 to 1984, hydrological studies concluded that lowering the ground water table would reduce the leachate runoff from the landfill into the adjacent housing development.³⁷ Additional leachate studies, which discussed improvements to Holly Run and pretreatment methods were completed in late 1984.³⁸

C. RECOMMENDED REMEDIATION AND ENFORCEMENT PLANS

The Spill Act gives NJDEP the authority to issue directives ("Directives and Notices to Insurers") to pinpoint the exact steps necessary for remediation of contaminated landfill sites and to notify the parties that NJDEP will hold them financially responsible for the site remediation.³⁹

The recommendations derived from the studies for site

periodic testing has continued. *Fact Sheet on Potable Well Installations in Vicinity of GEMS Landfill*, New Jersey Department of Environmental Protection (Sept. 1985).

35. *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation at 34 (Aug. 17, 1988).

36. *Id.*

37. *Id.*; *GEMS Landfill Monitoring Study, Gloucester Township, New Jersey*, Camden County Solid Waste Advisory Council (Apr. 29, 1983).

38. The results of these studies were detailed in *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Aug. 17, 1988); *Directive and Notice to Insurers, Number Three*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (June 4, 1987); *Directive and Notice to Insurers, Number Two*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (July 10, 1986); *Directive and Notice to Insurers, Number One*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Mar. 4, 1986); *GEMS Landfill Monitoring Study, Gloucester Township New Jersey*, Camden County Solid Waste Advisory Council (Apr. 29, 1983)(documents on file at Gloucester Township Municipal Building).

39. N.J. STAT. ANN. § 58:10-23.11f (West 1982). The Spill Act provides "[w]henver any hazardous substance is discharged, the Department may, in its discretion, act to remove or arrange for the removal of such discharge or may direct the dischargers to remove or arrange for the removal of such discharges." *Id.* The Spill Act further provides "[a]ny person who has discharged a hazardous substance . . . which the department has removed or is removing . . . shall be strictly liable, jointly and severally, without regard to fault, for cleanup and removal costs." N.J. STAT. ANN. § 58:10-23.11g(c) (West 1982). *See, e.g.*, Department of Transp. v. PSC Resources, 175 N.J. Super. 447, 419 A.2d 1151 (1980)

remediation formed the basis for the four Directives issued between 1986 and 1988 by NJDEP. These Directives set out the process required for remediation of the GEMS landfill and named the potentially responsible parties that NJDEP would hold liable for payment.⁴⁰ The studies segregated the remediation plan into two phases. Phase I remediation called for site regrading, clay cap construction, and installation of a final gas collection and treatment system.⁴¹ Phase II called for the construction of an on-site leachate pretreatment facility and decontamination of Holly Run Stream and Briar Lake.⁴²

Directive One, issued on March 4, 1986, required thirty-six respondents to erect a perimeter fence around the landfill and

(discusses NJDEP's response to past transgressions similar to that involved in GEMS landfill).

40. 719 F. Supp. at 331. NJDEP issued the following directives: *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Aug. 17, 1988); *Directive and Notice to Insurers, Number Three*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (June 4, 1987); *Directive and Notice to Insurers, Number Two*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (July 10, 1986); *Directive and Notice to Insurers, Number One*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Mar. 4, 1986).

41. Directive Four sets out the specific tasks required for remediation of the GEMS site:

a. Construction of a landfill cap with regrading of existing landfill side slopes. The cap will consist of a multimedia cap on the top of the landfill, clay and soil on the sides, and a cap foundation with a toe drain.

b. Construction of an active gas collection and treatment system.

c. Construction of a ground water pumping and treatment system.

The treatment preference for collected leachate is pretreatment and discharge to the Publicly Owned Treatment Works (POTW) the Gloucester Township Municipal Utilities Authority. Implementation is pending approval of the State of New Jersey and the local POTW. If such approval is not obtained, complete treatment will be provided on-site followed by discharge to adjacent surface waters.

d. Holly Run and Briar Lake remediation.

e. Construction of surface water controls.

f. Implementation of a monitoring program.

g. Construction of a security fence.

h. Implementation of the leachate collection system, which will also relocate and isolate Holly Run and provide limited runoff controls. Uncertainty over the disposition of the leachate collection system and its interaction with the Gloucester Township Municipal Utilities Authority, caused the remediation to split into two phases.

i. Continued operation and maintenance as needed to ensure system security and environmental effectiveness.

Directive and Notice to Insurers, Number Four, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation at 34-35 (Aug. 17, 1988).

42. *Id.* at 35; 719 F. Supp. at 328.

connect several area residents to safer water supply.⁴³ Included among the named respondents were the operators of the landfill, some haulers and generators, and municipalities. Directive One also isolated some residents from direct contact with the landfill.⁴⁴

Immediately following the issuance of Directive One, NJDEP officials met with respondents (those named in Directive One), at which time NJDEP notified the respondents of its intention to hold the respondents strictly liable for damages from the landfill.⁴⁵ Accordingly, NJDEP initiated provisions requiring the respondents to pay for site surveys and draft designs for mitigation.

Directive Two, issued on July 10, 1986, four months after Directive One, added twenty additional respondents to the Directive One list.⁴⁶ Some respondents raised constitutional challenges after NJDEP issued each of the first two Directives.⁴⁷ These claims became moot as some of the named parties satisfied the directives and NJDEP agreed to file an amended complaint joining all remaining respondents named in the Directives.⁴⁸

Directive Three, issued on June 10, 1987, required the respondents to pay for the selected site mitigation alternative.⁴⁹ In the ten months following the issuance of Directive Three, respondents filed a number of lawsuits objecting to the State orders.⁵⁰ At all times, however, NJDEP insisted that respondents would be required to pay all site mitigation costs.

Directive Four, issued on August 17, 1988, provided a detailed list of respondents and their insurers, as well as a listing of various solid, liquid, and hazardous wastes dumped at GEMS.⁵¹

43. *Directive and Notice to Insurers, Number One*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Mar. 4, 1986).

44. *Id.*

45. *New Jersey Dep't of Env'tl. Protection v. Gloucester Env'tl. Management Services, Inc.*, No. 84-0152 (D.N.J. 1989).

46. *Directive and Notice to Insurers, Number Two*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (July 10, 1986).

47. 719 F. Supp. at 331.

48. *Id.*

49. *Directive and Notice to Insurers, Number Three*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (June 4, 1987).

50. *Amadei Sand & Gravel, Inc. v. New Jersey Dep't of Env'tl. Protection*, No. 87-3086 (D.N.J. 1987) (cited in 719 F. Supp. at 331); *ICI Americas Inc. v. New Jersey Dep't of Env'tl. Protection*, No. 87-3110 (D.N.J. 1987) (cited in 719 F. Supp. at 331).

51. *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Aug. 17, 1988). Immediately preceding the publication of this article, DEP named an ad-

Pursuant to the Spill Act, NJDEP notified insurers of their obligation to pay for the cleanup.⁵² If the parties named in Directive Four failed to meet that Directive's deadline for beginning work, NJDEP had the power to engage its own contractor through public bidding, pay the contractor from the Spill Fund, and seek treble costs from the respondents.⁵³

D. THE SETTLEMENT AGREEMENT

The Spill Act empowers the administrator to promote and arrange settlements which are final and binding.⁵⁴ Clearly, it is to the advantage of all concerned to settle, both to avoid depleting Spill Fund money and to prevent costly litigation for which responsible parties face the prospect of treble damages. Thus, NJDEP postponed the Directive Four deadline in an effort to work out a settlement among the named parties.⁵⁵ During a series of conferences and negotiations, NJDEP officials and liaison counsel successfully negotiated a settlement agreement in which the parties agreed to pay \$32.5 million into a trust fund to cover the cost of the Phase I remediation.⁵⁶ One hundred and four parties participated in the settlement agreement, entered into on January 24, 1989, including the former operator of the landfill, forty-eight chemical waste generators, fifty-three waste transporters, and Gloucester Township, the municipality which owned the landfill site.⁵⁷ Under the terms of the settlement, the respondents agreed to pay the entire amount necessary to complete Phase I remediation.⁵⁸ According to Acting NJDEP Commissioner Christopher Daggett, "[t]his is the only major multi-party superfund landfill settlement in the country to date at which the potentially responsible parties have agreed to do all of the work that the government was seeking."⁵⁹

ditional two hundred parties as responsible for the GEMS pollution, who will be liable for Phase II cleanup costs. *N.J. Names 200 More Parties in Dump Cleanup*, Philadelphia Inquirer, Apr. 24, 1990, at 7-B, col. 2 (city ed.). This now brings the total of individuals, companies, and municipalities liable for Phase II costs to three hundred and thirty. *Id.*

52. N.J. STAT. ANN. § 58:10-23.11s (West 1982).

53. 719 F. Supp. at 331.

54. N.J. STAT. ANN. § 58:10-23.111 (West 1982).

55. 719 F. Supp. at 331.

56. *Id.* at 332; New Jersey Dep't of Env'tl. Protection v. Gloucester Env'tl. Management Services, Inc., No. 84-0152 (D.N.J. Jan. 24, 1989).

57. 19 Env't. Rep. (BNA) 2069 (Feb. 3, 1989).

58. *Id.*

59. *Id.*

E. THE PROBLEM OF PHASE II AND SUBSEQUENT REMEDIATION

The settlement agreement provides funds which cover only the cost of Phase I remediation. NJDEP has concluded that continuing damage at the GEMS site necessitates further remediation. The necessary remediation work which NJDEP has identified to be performed for Phase II includes the building of a groundwater pumping and treatment system and decontamination of Holly Run Stream and Briar Lake.⁶⁰ In order to achieve these remediation goals, NJDEP will certainly look to all the respondents who participated in the Phase I settlement, having reserved the right to direct the settling parties to perform Phase II.⁶¹ Thus, in Directive Four, NJDEP stated its belief that those parties involved in the Phase I remediation settlement will be responsible for the continuing damage, and that NJDEP intends to hold those respondents jointly and severally liable for further cleanup at the landfill site.⁶² If no settlement can be reached to cover the costs of Phase II remediation, NJDEP may issue further directives assigning liability to parties based on their acquiescence in the Phase I settlement. The Spill Act provides NJDEP with the sanction of treble damages to compel compliance among those parties it holds responsible in NJDEP directives.⁶³ Again, among those involved in the settlement are local government entities such as municipalities. In the Phase I settlement, NJDEP opened the door for strict liability for local government entities, with the result that such liability allocation may become part of its enforcement policy.⁶⁴ According to Directive Four, "any claims

60. 719 F. Supp. at 328; *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation (Aug. 17, 1988).

61. 19 Env't. Rep. (BNA) 2069 (Feb. 3, 1989).

62. Directive Four states NJDEP's conclusion that "the identified respondents are responsible for the discharge of hazardous substances" and that those hazardous substances "are continuing to discharge into the waters and/or land of the State of New Jersey," and asserts that "the Respondents are strictly liable, jointly and severally, without regard to fault, for all costs of the cleanup and removal of the hazardous substances discharged at, around and from the GEMS Landfill." *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation at 37-38 (Aug. 17, 1988). See *Lansco, Inc. v. New Jersey Dep't of Env'tl. Protection*, 138 N.J. Super. 275, 350 A.2d 520 (1975), *aff'd* 145 N.J. Super. 433, 368 A.2d 363 (1976), *cert. denied* 73 N.J. 57, 372 A.2d 322 (1977) (established State's right to obtain damages based on injury to environment).

63. N.J. STAT. ANN. § 58:10-23.11f(a) (West 1982). Responsible parties are also subject to revocation or suspension of any operator's license or permit held. *Id.* (West Supp. 1989).

64. Letter from Anthony J. Farro to James J. Florio, *supra* note 15.

for costs of cleanup or damages by the State may be brought directly against the bond, insurer, or any other person providing evidence of financial responsibility.”⁶⁵

In light of the diverse industrial pollution at the GEMS site, it is unclear whether the actual responsibility of the municipalities involved extends to the continuing damage for which Phase II remediation is intended to correct. Under the standard of strict liability in both the Spill Act and CERCLA, there is no need to determine degree of fault, only that there was a discharge of hazardous substance and that the local government is “in any way responsible.”⁶⁶ It is evident that under the policy of strict liability for local government entities, municipalities can conceivably be held liable for (and made to pay) the entire cost of a cleanup if the municipality discharged municipal waste or owned the site which functioned as a municipal landfill. The municipality would then be required to bear the costs of litigation to recover appropriate response costs from industrial polluters. Rather than leave municipal liability to the discretion of agency enforcement policy, a legislative response is warranted.

III. THE DUBIOUS UTILITY OF STRICT LIABILITY FOR LOCAL GOVERNMENT ENTITIES

Starting in 1988, the EPA Office of Waste Program Enforcement initiated the idea of imposing strict liability for municipalities under Superfund, based on the theory of strict liability for the disposal of residential trash at a Superfund site.⁶⁷ NJDEP applied

65. Directive Four draws this conclusion based on the Spill Act, quoting the language of N.J. STAT. ANN. § 58:10-23.11s (West 1982), providing that “[a]ny claims for costs of clean-up, civil penalties or damages by the State, and any claim for damages by any injured person, may be brought directly against the bond, insurer, or any other person providing evidence of financial responsibility.” *Directive and Notice to Insurers, Number Four*, New Jersey Department of Environmental Protection, Division of Hazardous Site Mitigation at 39 (Aug. 17, 1988). See also *Lansco*, 138 N.J. Super. 275, 350 A.2d 520 (1975) (affirming validity of claims by state for damages based on injury to environment).

66. N.J. STAT. ANN. § 58:10-23.11g(c) (West 1982).

67. See Ferrey, *supra* note 9, for a discussion of municipal strict liability under CERCLA for cleanup costs for hazardous waste discharges. Both the Spill Act and CERCLA leave the enforcement policy regarding municipal liability to the discretion of the enforcement agency. The application of strict liability is a policy which the legislation allows, but is not necessarily that which a given enforcement agency will adopt. For example, EPA’s most recently proposed interim settlement policy with regard to municipal liability for hazardous waste cleanup is as follows: “[w]hen the source of the municipal waste is believed to come from households, regardless of whether household hazardous waste may be present, the general policy is to exclude such municipal wastes from the Superfund settlement process, unless the Region obtains site-specific informa-

this interpretation to the Spill Act and, accordingly, it affects the GEMS case. If the interpretation holds, a significant portion of the total cleanup costs for GEMS and, by extension, of the private lawsuits relating to the landfill, may be paid for by the residents of Gloucester and Camden counties and not by the parties responsible for the dumping of hazardous chemical wastes. By extending the strict liability provision to municipal defendants, judicial or administrative interpretations of the Spill Act spread the cost of remediation to those other than polluters.

For example, under present interpretations, a municipality which is the hauler or ultimate disposal agent for solid waste that turns out to be hazardous is subject to strict liability. The municipality itself, however, is not the source of the pollution. The collection and disposal of municipal solid waste has long been a traditional local government function. In *Jackson Township Municipal Utilities Authority v. Hartford Accident and Ins. Co.*,⁶⁸ Justice Havey stated,

A municipal utilities authority, in the collection of waste and deposit of waste in the township landfill, designated as authorized to accept the waste, is carrying out its public function. Viewed from the standpoint of the municipal utilities authority, the function of depositing the waste may have been intentional but it was never expected or intended that the waste would seep into the aquifer resulting in damage or injury to others.⁶⁹

Unlike the chemical manufacturer or industrial enterpriser who discharges, disburses, or deposits hazardous waste material and who knows, or may be expected to know, that the waste would pollute,⁷⁰ the state or local government unit discharging its function as a sovereign in collecting and disposing of waste is neither in a position to know nor is expected to know that the waste would pollute. Nonetheless, while the state or local government unit is the party least able to control the amount or even

tion that the municipal solid waste or sewage sludge contains a hazardous substance from a commercial, institutional, or industrial process or activity." Superfund; Interim Municipal Settlement Policy, 54 Fed. Reg. 51,072 (proposed Dec. 12, 1989). The EPA policy also includes a limited exception, for municipal generators to be brought into the settlement process when the privately-generated waste at a site is insignificant compared to the municipal solid waste.

68. 186 N.J. Super. 156, 451 A.2d 990 (1982).

69. *Id.* at 164, 451 A.2d at 994.

70. *Id.*

the type of waste generated, the state or local government unit is subject to the same liability as the chemical manufacturer or industrial enterpriser.⁷¹ In order that liability be imposed on the parties best able to control the risk,⁷² rather than on the public entity performing the traditional government function, the allocation of liability under the Spill Act must be sharpened.

Designed to focus on the problem of cleaning up hazardous waste disposal sites, the Spill Act allows the mechanical imposition of liability for the remediation of hazardous waste disposal sites.⁷³ As the GEMS litigation and ultimate settlement has made clear, in resolving remediation matters, the court focuses on the amount, rather than the type, of waste disposed at the site by each applicable party. Dispensation such as this places a disproportionate burden on the governmental entity which has the least control over the amount of waste generated, and does not consider the distinction in types of waste generated.

The policy reasons supporting an amendment to the Spill Act are clear, grounded in the principles of enterprise liability and risk spreading, and well established in the strict liability context of defective product litigation.⁷⁴ In comparing the governmental entity and the amount of waste generated by its residents to the for-profit industrial enterprises which are, or should be, aware of the amounts and types of waste generated by those enterprises, the amendment of the Spill Act to provide conditional immunity to governmental enterprises is justified. For example, while a large multinational industrial enterprise would be able to incorporate the remediation costs into the price of its products on an international basis, a governmental entity is limited both by the number of taxpaying residents and by the dollar amount those residents are able to pay.

The scope of the Spill Act should reflect the sound policy

71. See *supra* note 8 for Spill Act and CERCLA definitions of "persons" subject to liability, including state political subdivisions.

72. The policy of allocating liability to the party best situated to control the risk is one which is well-established in New Jersey law. See, e.g., *O'Brien v. Muskin Corp.*, 94 N.J. 169, 179, 463 A.2d 298, 303 (1983); *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 398-99, 451 A.2d 179, 185 (1982); *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 205, 447 A.2d 539, 547 (1982); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305, 312 (1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 379, 161 A.2d 69, 81 (1960) (illustrating tort concept of allocation of risk on party best situated to control that risk).

73. See N.J. STAT. ANN. § 58:10-23.11f (West 1982).

74. See *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 205, 447 A.2d 539, 547 (1982).

reasons to limit the liability of governmental entities which, in the course of having discharged fundamental and traditional governmental functions, generated and disposed of many tons of residential waste. Limiting the scope of the liability of governmental entities in the context of Superfund is really no different from preserving the traditional tort immunities that governmental entities presently enjoy.⁷⁵

Comparable to other state statutes, the governmental immunity should not be absolute,⁷⁶ and the governmental entities must not be excused from strict compliance with administrative requirements of the Spill Act.⁷⁷ Moreover, the scope of immunity should extend only to those governmental entities that do not (or did not) own or operate a facility⁷⁸ and thereby do not derive financial benefit from "hosting" such a facility.⁷⁹

Accordingly, a more rational scheme of cleanup cost allocation would call for two levels of liability. Those who have been in a position to profit from the generation or transport of hazardous waste should pay on the basis of strict liability. Those who have merely handled or disposed of this hazardous waste out of public necessity, such as municipalities and counties, are to be held liable only if plaintiffs can demonstrate that the handling or disposal activities were carried out negligently.

This standard would serve three purposes. First, it would create a fund for remediation by passing along the costs of remediation to those who caused the necessity of such cleanup action, namely those who profited from the generation or transport of hazardous waste and those who made profits from the

75. See, e.g., New Jersey Tort Claims Act, N.J. STAT. ANN. § 59:1-1 to 12-3 (West 1982 & Supp. 1989).

76. See, e.g., N.J. STAT. ANN. § 59:4-2 (West 1982) (public entities are liable for dangerous conditions of public property if action entity took to protect against condition or failure to take such action is palpably unreasonable).

77. The practical effect of amending the Spill Act to redefine the terms "owner, operator or person" to exclude governmental entities where the term applies to liability for the costs of remediation will not result in private haulers abandoning the collection of municipal residential waste if the amendment contemplates allowing private haulers under contract with public entities to share the governmental entity's immunity if the hauler strictly complies with the contract. See *Rodriguez v. New Jersey Sports & Exposition Auth.*, 193 N.J. Super. 39, 472 A.2d 146 (1983), cert. denied, 96 N.J. 291, 475 A.2d 586 (1984).

78. The Spill Act definition of "owner" or "operator" includes not only owners and operators, but also persons who charter vessels, and lease or contract major facilities. N.J. STAT. ANN. § 58:10-23.11b(n) (West 1982).

79. *Id.* The Spill Act definition of "owner or operator" does not include those persons who acquired ownership or control involuntarily through bankruptcy, tax delinquency or abandonment.

products which resulted in that generation or transport. Second, negligence standards would discourage careless or ill-advised practices by transporters and disposal agents of hazardous waste. Finally, this scheme makes sense from the point of view of public finance. A private entity can choose to cease operations in a business which generates or transports hazardous waste. A municipality or county, however, cannot make such a choice. Thus, taxpayers are saddled with enormous liability or insurance premium costs for which their elected officials have no alternatives. The law should continue to hold accountable those elected officials and their agents who mishandle hazardous waste, but it should not penalize those who are forced to handle hazardous waste because that task falls within the boundaries of their public responsibilities.

The addition of a fault-based standard of liability for local government entities provides some equitable fine-tuning to environmental legislation such as the Spill Act by placing the financial burden of hazardous waste cleanup on those responsible for generating the hazardous waste or causing the spill. With this standard, the polluters will pay for the cleanup, and municipalities would be assigned liability when they deserve it. The Spill Act, though not perfect, is an aggressive and progressive tool for good environmental policy. Through modifications and fine-tuning, the Spill Act will continue to provide legislators and governmental entities with the opportunity to correct past environmental transgressions in a format that is equitable, just, and harmonious.

