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MUNICIPAL LIABILITY UNDER SUPERFUND AS GENERATORS OF MUNICIPAL SOLID WASTE: ADDRESSING THE PLIGHT OF LOCAL GOVERNMENTS

INTRODUCTION

The ever-burgeoning problem of how to deal with hazardous waste sites, along with the concomitant issue of upon whom to impose the cleanup costs, continues to be of national importance in the 1990s.¹ At the federal level, the chief remedial scheme is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² CERCLA establishes a trust fund, the "Superfund"³ to finance the

1. In the early 1980s, hazardous waste sites drew national attention when the horror stories of Love Canal, Times Beach, and Valley of the Drums surfaced. See, e.g., Wayne Biddle, *Toxic Chemicals Imperil Flooded Town in Missouri*, N.Y. TIMES, Dec. 16, 1982, at A17 (describing the discovery of chemical dioxin and other hazardous chemicals at Times Beach, Missouri); Maryann Bird, *Issue and Debate Battle of Toxic Dumps: Who Pays for Cleanup?*, N.Y. TIMES, July 11, 1980, at B4 (discussing the problem of toxic waste cleanup); Robert A. Kittle, *Living With Uncertainty: Saga of Love Canal Families*, U.S. NEWS & WORLD REP., June 2, 1980, at 32 (describing the incident at Love Canal).

2. 42 U.S.C. §§ 9601-9675 (1988). Though enacted in 1980, Congress reauthorized CERCLA in October 1986 for an additional five years by the Superfund Amendments and Reauthorization Act (SARA). See 42 U.S.C. § 9611(a) (1988). As an amendment to the 1990 budget, Congress extended the 1991 expiration date for another four years. *White House Launches Superfund Review, Worrying Environmentalists*, INSIDE E.P.A., July 12, 1991, at 1, 7.

CERCLA and its amendments are also known as "Superfund." These terms are used interchangeably throughout this Note.

3. 42 U.S.C. § 9611 (1988). A tax on the petroleum and chemical industries was the

cleanup of abandoned or inactive hazardous waste sites.⁴ CERCLA allows the government to identify “potentially responsible parties” (PRPs) and sue them to recover the cleanup costs.⁵ PRPs include generators or transporters of hazardous substances as well as owners or operators of landfills where such substances have been, or could be released.⁶

The U.S. Environmental Protection Agency (EPA) has typically ex-

primary funding for the original \$1.6 billion Superfund. General appropriations comprised only one-eighth of the total fund. Steven Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 223 (1988). SARA increased the amount to \$8.5 billion over a five year period, in addition to expanding Superfund’s tax base. *Id.* at 223-24. See also 42 U.S.C. § 9611(a) (1988).

4. Hazardous waste sites become Superfund sites, and therefore eligible for funding, when listed on the National Priorities List (NPL). 42 U.S.C. § 9611(a)(2) (1988). CERCLA mandates to the President the power to prioritize the nation’s worst toxic waste sites by considering the relative risk of danger to the public health or welfare or the environment, the population at risk, the dangerous potential of the hazardous substances, and the potential for contamination of the drinking water. 42 U.S.C. § 9605(a)(8)(B) (1988). A waste site is listed on the NPL if it receives a score of 28.5 under EPA’s Hazard Ranking System (HRS). Rena Steinzor, *Local Governments and Superfund: Who Will Pay the Tab?*, 22 URB. LAW. 79, 79 n.1 (1990) (explaining the NPL and the criteria for site selection). The comprehensive method of calculating the HRS score evaluates four pathways: ground water migration, surface water migration, soil exposure, and air migration. 40 C.F.R. pt. 300, app. A (1991). Currently, the NPL contains 1188 sites. 40 C.F.R. pt. 300, app. B (1991).

5. 42 U.S.C. § 9607(a) (1988). Section 104 of CERCLA authorizes the President to take emergency measures to counteract a release or threatened release of a hazardous substance into the environment. 42 U.S.C. § 9604 (1988). If EPA does not use its authority under § 104 to clean up a site, it may issue an administrative order, under § 106, to require the PRPs to organize cleanup action of the site. 42 U.S.C. § 9606(c) (1988). Pursuant to § 107, if EPA exercises its cleanup authority at a site, it may then sue any PRPs to recover the costs. 42 U.S.C. § 9607(a) (1988).

6. 42 U.S.C. § 9607(a) (1988). This section provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, . . . and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Gov-

exercised its discretion to impose liability for the cleanup costs by focusing on the private sector.⁷ As the nation enters its second decade of litigation under Superfund, however, governmental units are finding themselves more vulnerable.⁸ In an effort to find another party to shoulder the costs of Superfund liability, industrial PRPs are suing local governments for contribution.⁹ Municipalities have traditionally collected and transported household trash or municipal solid waste (MSW),¹⁰ or have made arrangements for the collection and disposal of such waste through private contracts.¹¹ In providing these services, industrial PRPs assert that municipalities are liable under CERCLA as

ernment or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

7. See Steinzor, *supra* note 4, at 81 (noting the heavy burden placed on the manufacturing industry). Cf. Ferrey, *supra* note 3, at 199 (discussing the inequity of EPA's exercise of discretion in exempting public entities from liability).

8. See Steinzor, *supra* note 4, at 80-84 (explaining the trend toward imposing liability on local governments).

9. *Id.* at 81 ("Until recently, the brunt of Superfund's heavy liability burden has been born [sic] by the manufacturing sector . . . [which has] begun to search for fellow 'deep pockets' to help shoulder multi-billion dollar cleanup costs."). See *infra* note 24 for a list of suits pending against municipalities.

10. EPA defines municipal solid waste as "solid waste generated primarily by households, but [possibly including] some contribution of wastes from commercial, institutional and industrial sources as well." Superfund Program; Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071, 51,074 (1989) [hereinafter *EPA Interim Policy*]. As EPA explains, MSW generally consists of large volumes of non-hazardous substances (e.g., yard waste, food, glass, and aluminum) and may contain small amounts of household hazardous waste (e.g., pesticides and solvents), as well as small quantities of generator waste (i.e. waste contributed by generators who produce less than 100 kilograms per month of hazardous waste and less than 1 kilogram per month of acutely hazardous waste, as defined under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988)). *Id.*

Reference to MSW in this Note is done with EPA's definition in mind.

11. See Hon. James J. Florio et al., *Too-Strict Liability: Making Local Government Entities Pay for Waste Disposal Site Cleanup*, 1 VILL. ENVTL. L.J. 105, 118 (1990) ("The collection and disposal of municipal solid waste has long been a traditional local government function.").

waste generators and transporters.¹²

The third party lawsuits brought by industrial PRPs against municipalities attempt to equate MSW with industrial waste.¹³ MSW, however, contains very low percentages of hazardous waste.¹⁴ Although approximately twenty percent of the sites listed on the Superfund National Priorities List (NPL)¹⁵ are municipal landfills,¹⁶ virtually all

12. Although beyond the scope of this Note, municipalities may also be held liable as past or present owners or operators of landfills containing hazardous substances. *See, e.g.,* N.J. Dep't. of Env'tl. Prot. v. Gloucester Env'tl. Mgt. Servs., 719 F. Supp. 325 (D.N.J. 1989) (state suing township, and other parties, as owner of landfill); *United States v. Serafini*, 706 F. Supp. 354 (M.D. Pa. 1989) (government suing to recover cleanup costs of dump site operated by city); *New York v. City of Johnstown*, 701 F. Supp. 33 (N.D.N.Y. 1988) (state suing two cities to recover response costs of each one's landfill); *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986) (government suing county and other parties to recover response costs); *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D. Ind. 1982) (government suing city that was part owner of waste site).

These cases illustrate the complexity of litigation involving municipal owners and operators. For a thorough discussion of municipal liability as owners and operators, see Steinzor, *supra* note 4, at 105-13.

13. As one researcher noted, "[t]he home garbage pail is a leaking sieve of toxic and potentially toxic chemical agents." Ferrey, *supra* note 3, at 202. *See also id.* at 201-10 (listing the hazardous constituents of the municipal waste stream and suggesting that these constituents are capable of contaminating groundwater and causing other hazards much like industrial waste). The list of hazardous household waste products includes household cleaners, paint products, chemical drain openers, batteries, pesticides and herbicides, alcohols, oils and greases, polishes and waxes, along with cosmetics and dyes. *Id.* at 205.

14. *See* B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960, 964 n.8 (D. Conn. 1991) (noting that most studies indicate that MSW contains not more than 1% hazardous waste by weight), *aff'd* 958 F.2d 1192 (2d Cir. 1992). *See also* Ferrey, *supra* note 3, at 210 & nn.55-56 (noting survey results that indicate hazardous wastes constitute a maximum of 0.1% to 0.5% by weight of MSW).

15. *See* 40 C.F.R. pt. 300, app. B (1991). *See also supra* note 4 for discussion of how sites become listed on the NPL.

16. EPA Interim Policy, *supra* note 10, at 51,071. *See also* Steinzor, *supra* note 4, at 79 ("Roughly 20% of the 1,226 sites on the Superfund National Priorities List (NPL) are municipal landfills.").

EPA characterizes "municipal landfills" as those sites "that have accepted [MSW] for disposal, regardless of the amount, or that are owned or operated by a municipality, regardless of whether the landfill is primarily composed of municipal or non-municipal waste." *EPA Interim Settlement Guidance for Generators and Transporters of Municipal Solid Waste*, U.S. EPA, OSWER Directive 9834.13-1a, 6 (March 1992) [hereinafter *EPA Interim Settlement Guidance*] (citing Superfund Program; Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071-76 (1989)). Municipal landfills may be owned or operated by municipalities, or they may be privately owned or operated and have received MSW for disposal. *EPA Interim Policy*, *supra* note 10, at 51,074.

have been contaminated by the co-disposal of industrial waste with MSW.¹⁷ Indeed, very few are facilities where strictly municipal garbage was disposed.¹⁸ With the cost of cleaning up hazardous waste sites estimated at \$750 billion,¹⁹ consumers will be forced to pay at least \$2,000²⁰ in the form of price increases on industrial products. If the scope of parties held liable for the cleanup of toxic waste sites is broadened to include municipalities, local taxpayers will be forced to bear the costs in the form of raised taxes as well.²¹

Contrary to the intent of Superfund,²² the third party lawsuits have

17. See *EPA Interim Settlement Guidance*, *supra* note 16, at 6 (“The [EPA] believes that co-disposal of MSW with industrial wastes has occurred at virtually all of the municipal landfills on the NPL.”).

18. Rena I. Steinzor & Matthew F. Lintner, *Should Taxpayers Pay the Cost of Superfund?*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,089, 10,089 (Feb. 1992) (citing Letter from Don R. Clay, EPA Assistant Administrator for Solid Waste and Emergency Response, to the Honorable Esteban Torres (Aug. 29, 1991)).

19. *Study Finds Potential Hazardous Waste Cleanup Costs May Top \$1.5-Trillion*, INSIDE E.P.A., Jan. 3, 1992, at 13 (citing a study done by the University of Tennessee). Two recent studies estimated the cleanup costs to total \$1 trillion. See Frank Viviano, *Superfund Wallowing in Financial Mire*, MILW. J., June 16, 1991, at J1, J3 (citing an estimate given by Salomon Brothers, a brokerage firm, and Hirschhorn and Associates, an environmental consulting firm).

20. Viviano, *supra* note 19, at J3. See also Barnett M. Lawrence, Comment, *Liability of Corporate Officers Under CERCLA: An Ounce of Prevention May Be the Cure*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,377, 10,377 (Sept. 1990) (“Estimates of hazardous waste cleanup costs now reach . . . \$2,000 for every man, woman, and child in the United States.”).

21. Robert Tomsho, *Pollution Ploy: Big Corporations Hit by Superfund Cases Find Way to Share Bill*, WALL ST. J., Apr. 2, 1991, at A1 (discussing the trend of corporations to bring contribution suits against “municipalities and other governmental entities that can raise money via taxes”).

22. As Senator Lautenberg, Chairman of the Senate Superfund Subcommittee, declared: “I say without reservation that the original statute never intended [municipal and small business generators or transporters] be sued . . . [W]e are being true to the intent of the law when we prevent industrial polluters from trying to shift their cleanup costs to innocent cities, towns, and small businesses.” 138 CONG. REC. S8629 (daily ed. June 23, 1992) (statement of Sen. Lautenberg).

Congress chose to place the burden on industry rather than the taxpayer because it felt that “society should not bear the cost of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner-operator who has profited or otherwise benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created. . . . [R]elieving industry of responsibility establishes a precedent seriously adverse to the public interest. . . .” *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983) (citing S. REP. NO. 848, 96th Cong., 2d Sess. 98 (1980)).

continued to proceed against hundreds of municipalities.²³ With the degree of liability and the allocation of costs still undetermined, the issue of municipal liability under Superfund now confronts the EPA, the courts, and the legislature.²⁴

This Note analyzes the issue of municipalities' liability under CERCLA as generators of MSW.²⁵ Part I examines the statutory provisions of RCRA and CERCLA, with a focus on municipal liability for the disposal of MSW under those schemes. Part II analyzes EPA's policies on municipal liability. Part III surveys the case law addressing municipal liability under Superfund. Part IV discusses recent congressional proposals to amend CERCLA to limit municipal liability under contribution actions. Part V attempts to put the issue of municipal

23. See 138 CONG. REC. S8630 (daily ed. June 23, 1992) (statement of Sen. Lautenberg) (indicating that at least 450 municipalities in 11 states are currently involved in lawsuits).

24. The trend to get municipalities involved in the liability scheme is exemplified in actions involving 9 landfills. The list of suits pending includes:

(1) Operating Industries Landfill, Monterey Park, California (64 corporations named as PRPs filed third party suit against 29 cities),

(2) Los Angeles-Long Beach Harbor, California (2 companies suing 115 local governments based on ownership of the pipelines into which the companies poured hazardous substances),

(3) Beacon Heights Landfill and Laurel Park Landfill, Naugatuck Borough, Connecticut (private party PRPs suing 24 local governments for contribution),

(4) Helen Kramer Landfill, Mantua Township, New Jersey (companies suing 18 local governments for their disposal of MSW),

(5) Charles-George Reclamation Landfill, Tynsborough, Massachusetts (corporate parties suing 12 municipalities for contribution),

(6) Gloucester Environmental Management Services Landfill (GEMS), Gloucester Township, New Jersey (company PRPs bringing third party suit against 50 local governments),

(7) Moyers Landfill, Eagleville, Pennsylvania (companies suing 7 local governments for cleanup costs),

(8) Ludlow Sand and Gravel Landfill, Clayville, New York (39 cities sued for disposing of trash), and

(9) Mid-State Disposal Site, Cleveland Township, Wisconsin (11 municipalities attempting to settle with PRPs). Keith Schneider, *Industries Battle Cities on Funds For Toxic Waste*, N.Y. TIMES, July 18, 1991, at A1, A9 (listing the waste sites and parties currently involved in litigation). See also Tomsho, *supra* note 21, at A14 (tracing the events and parties at the New York Ludlow Landfill).

25. Liability of municipalities as transporters of MSW is closely intertwined with the subject matter of this Note. Because the activities that trigger generator liability could similarly trigger transporter liability, suits against municipalities could be based on either or both of the theories. Liability of municipalities as transporters is therefore mentioned intermittently throughout this Note. For a general discussion of liability of municipalities as transporters under Superfund, see Steinzor, *supra* note 4, at 128-30.

liability into perspective by addressing the conflicting positions of industries and local governments, while also considering the policies underlying Superfund. Part VI discusses the possible approaches for apportioning costs of Superfund liability. This Note concludes that effectuating the intent and policy goals of Superfund requires action at the national level. Because Congress never intended to hold local governments, much less individual citizens, to a standard of strict, joint and several liability for the disposal of household waste, equity calls for the clarification of the municipal liability issue.

I. STATUTORY PROVISIONS REGULATING HAZARDOUS WASTE

The primary statutory schemes for the handling, transporting, and disposing of hazardous waste are codified in the Resource Conservation and Recovery Act (RCRA)²⁶ and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²⁷ Enacted in 1976, RCRA authorized the regulation of hazardous waste from the time of its creation to the time of its disposal.²⁸ RCRA failed, however, to address the problem of abandoned or inactive waste sites.²⁹ In response to the regulatory gaps left by RCRA, Congress in 1980 enacted CERCLA to address the concerns of hazardous waste disposal.³⁰ The purpose of the legislation was two-fold: First, to provide for the recognition of nationwide hazardous waste sites, known as

26. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (1988).

27. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601-9675 (1988).

28. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.A.N. 6119, 6120 (“[RCRA] provided a prospective cradle-to-grave regulatory regime . . .”).

29. *Id.* at 22 (“[RCRA] is prospective and applies to past sites only to the extent that they are posing an imminent hazard.”). *See also* United States v. Shell Oil Co., 605 F. Supp. 1064, 1071 (D. Colo. 1985) (“[d]eficiencies in RCRA have left important regulatory gaps”) (quoting H.R. REP. NO. 1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.A.N. 6119, 6126); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984) (“It was the precise inadequacies resulting from RCRA’s lack of applicability to inactive and abandoned hazardous waste disposal sites that prompted the passage of CERCLA.”), *aff’d in part and rev’d in part on other grounds*, 810 F.2d 726 (8th Cir. 1986); United States v. A & F Materials Co., 578 F. Supp. 1249, 1252 (S.D. Ill. 1984) (“RCRA does not apply to the thousands of dormant sites that are not currently posing an imminent hazard.”).

30. H.R. REP. NO. 1016, *supra* note 28, at 17-18.

Superfund sites,³¹ and second, to provide a scheme for responsive action to protect the public health and environment from the dangers posed by those sites.³²

CERCLA delegates to EPA broad authority to contain and clean up any hazardous substances,³³ pollutants, or contaminants that a facility³⁴ releases or threatens to release.³⁵ EPA or a state regulatory agency may take necessary action to protect human health and the environment,³⁶ or it may order a private party to do so.³⁷ Once EPA, a state, or a private party undertakes a project, EPA may recoup the response costs from the parties responsible for the release.³⁸

31. *Id.* at 17. See also *supra* note 4 for an explanation of how hazardous sites are identified and ranked.

32. H.R. REP. NO. 1016, *supra* note 28, at 17.

33. CERCLA does not define hazardous substances separately. Instead, the definition incorporates by reference the pertinent provisions of other environmental acts. See *infra* note 51 for the statutory language defining hazardous substances.

34. "Facility" is defined as "(A) any building, structure, installation, equipment, pipe or pipeline . . . , or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601 (9) (1988).

35. CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." 42 U.S.C. § 9601 (22) (1988).

36. 42 U.S.C. § 9604(a)(1) (1988). EPA, with authority delegated by the President, has the discretion to take short term removal actions to protect the public from the hazardous substances, or it may undertake a more comprehensive scheme. See 42 U.S.C. § 9601(23)-(24) (1988).

37. The EPA may issue a compliance order against a PRP, enjoining it from further threatening the public health, welfare, or environment. 42 U.S.C. § 9606(a) (1988). If the PRP complies with the order and takes action to clean up the site, it may seek recovery costs from the fund provided it can show, by a preponderance of the evidence, that it was not liable. 42 U.S.C. § 9606(b)(2) (1988). Failure to comply with the order may result in a maximum fine of \$25,000 per day per violation. 42 U.S.C. § 9606(b)(1) (1988).

38. 42 U.S.C. § 9607(a) (1988). EPA may use money from Superfund for the cleanup effort. If EPA abided by the National Contingency Plan (NCP) during its cleanup action, it may subsequently sue the PRPs to recover the amount used from the fund. See, e.g., *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 747 (8th Cir. 1986) (noting that a PRP bears the burden of proving that EPA's cleanup action was inconsistent with the NCP), *cert. denied*, 484 U.S. 848 (1987).

The state and private parties may also take remedial action and then sue PRPs to recover costs, but their actions too must be in accordance with the NCP. See *Id.* (noting that burden falls on PRP to show state's response costs were inconsistent with the NCP; burden falls on PRP to show that its response costs were consistent with the NCP).

CERCLA establishes liability on four categories of persons:³⁹ (1) the present owners and operators of hazardous waste sites, (2) past owners and operators of such sites, (3) generators of hazardous waste, including those who arrange for the disposal of hazardous substances, and (4) transporters of the hazardous substances to the waste sites.⁴⁰ Liability is imposed without regard to fault.⁴¹ In addition, if the environmental harm is indivisible, responsible parties are jointly and severally liable⁴²

39. See *infra* note 45 for the definition of "person" under CERCLA.

40. 42 U.S.C. § 9607(a) (1988). See *supra* note 6 for the CERCLA definition of "potentially responsible parties."

41. See, e.g., *General Elec. v. Litton Indus.*, 920 F.2d 1415, 1418 (8th Cir. 1990) (CERCLA imposes strict liability); *United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988) (same), *cert. denied*, 490 U.S. 1106 (1989); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (same); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (same); *Violet v. Picillo*, 648 F. Supp. 1283, 1290 (D.R.I. 1986) (same); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 191 (W.D. Mo. 1985) (same); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 844 (W.D. Mo. 1984) (same); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983) (same); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982) (same).

Strict liability under CERCLA is subject to certain defenses. No liability will be found where:

a person . . . can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned . . . , and (b) he took precautions against foreseeable acts or omissions of any such third party . . . ; or (4) any combination of the foregoing

42 U.S.C. § 9607(b) (1988).

See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1048-49 (2d Cir. 1985) (rejecting property owner's affirmative defense because the release was not caused solely by a third party and the owner did not take precautions against foreseeable acts or omissions); *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 557-58 (W.D.N.Y. 1988) (rejecting chemical company's defense claim because of its contractual relationship with the responsible third parties).

42. Joint and several liability is imposed by judicial discretion. *Ferrey, supra* note 3, at 234-35. See, e.g., *United States v. R. W. Meyer, Inc.*, 889 F.2d 1497, 1506-08 (6th Cir. 1989) (holding that to the extent the harm is indivisible, the property owner and operator of facility and its present owner would be jointly and severally liable), *cert. denied* 494 U.S. 1057 (1990); *O'Neil v. Picillo*, 883 F.2d 176, 178-180 (1st Cir. 1989) (holding that generators of hazardous waste would be held jointly and severally liable due to the indivisibility of removal costs), *cert. denied* 493 U.S. 1071 (1990).

CERCLA's drafters contemplated a joint and several liability approach, but after receiving heavy criticism, they rejected it. 126 CONG. REC. 30,972 (1980) (statement of Sen. Helms). Legislators thought that the joint and several method of liability imposed

for any costs incurred.⁴³

CERCLA's liability scheme does not expressly exempt municipalities.⁴⁴ In fact, the language of CERCLA includes municipalities in its definition of the term "person."⁴⁵ Thus, liability may be imposed⁴⁶ provided municipalities have engaged sufficiently in the characteristic activities of generators.⁴⁷ Municipalities traditionally have chosen one of the following approaches to deal with MSW: (1) collect and transport MSW to disposal sites or landfills; (2) collect MSW from residences, unload it at a transfer station, and contract with a third party to transport it to a disposal site or landfill; (3) contract with third parties for residential collection and transportation to a disposal site; or (4) provide no collection services, thereby requiring its residents to dispose of their own waste.⁴⁸ Under all but the last of these approaches, municipalities "arrange for" the disposal of waste and therefore may fall within the purview of CERCLA's definition of generator.⁴⁹

too great of a burden, for it would unreasonably require those small contributors to bear the entire cost of the cleanup. See 126 CONG. REC. 26,786 (1980) (statement of Rep. Stockman).

43. The parties are liable for the government's cost of removal or remedial action, damages to natural resources, the cost of any health assessment done pursuant to CERCLA authorization, as well as any other necessary response costs expended. 42 U.S.C. § 9607(a)(4)(A)-(D) (1988).

44. Under very narrow circumstances, a municipality may be exempt from liability under CERCLA as an owner or operator if the municipality's only connection to the site is that it owned or operated the site and acquired ownership or control involuntarily by virtue of its sovereign function. See 42 U.S.C. § 9601(20)(D) (1988).

45. CERCLA defines person as "an 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) (1988) (emphasis added).

46. In general, to maintain an action under CERCLA, plaintiff's prima facie case must show that: (1) defendant fits one of the four classes of responsible parties outlined in § 9607(a); (2) the site is a facility; (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or threatened release; and (5) the costs and response actions conform to the NCP. See *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 (2d Cir. 1985).

47. Section 107(a) of CERCLA defines a generator as:

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances

48. Ferrey, *supra* note 3, at 233.

49. See *supra* note 47 for the definition of "generator." See also *EPA Interim Policy*,

Municipal liability as generators is, however, dependent on MSW containing hazardous substances.⁵⁰ The language of CERCLA does not specifically apply to MSW.⁵¹ Instead, the definition of hazardous substances includes those substances designated as hazardous in other environmental acts⁵² or those designated by EPA, pursuant to section 102 of CERCLA, as potentially dangerous to the public health and welfare or the environment.⁵³

Because CERCLA incorporates RCRA, those substances designated as hazardous wastes under RCRA qualify as hazardous substances under CERCLA.⁵⁴ RCRA defines hazardous waste as "a solid waste

supra note 10, at 51,074 ("Municipalities may . . . be PRPs as part of CERCLA's broad definition of who is potentially liable.").

50. 42 U.S.C. § 9607(a)(3) (1988). *See supra* note 6 for the statutory language on PRP liability and note 46 for the elements of a *prima facie* case under CERCLA.

51. The statutory definition of hazardous substances includes:

(A) any substance designated pursuant to section 1321(b)(2)(A) of title 33 [the Federal Water Pollution Control Act], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [also known as RCRA] (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33 [the Federal Water Pollution Control Act], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of the title 15 [the Toxic Substances Control Act]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14) (1988) (citations omitted).

52. Courts have interpreted the definition to mean that if a substance falls under any of the stated statutory sections, then it is a hazardous substance under CERCLA. *See, e.g., Eagle-Pitcher Indust. v. United States EPA*, 759 F.2d 922, 930 (D.C. Cir. 1985) (holding that even if a substance falls within one exception, it is still a hazardous substance if it falls within another provision).

53. Pursuant to § 9602, and as adopted by reference in subsection (B) of § 9601(14), EPA has published a list of over 700 designated hazardous substances and their requisite quantities. *See* 40 C.F.R. pt. 302 (1991). For the exact language of § 9601(14), *see supra* note 51.

54. *See* 42 U.S.C. § 9601(14)(C) (1988). Under RCRA, EPA adopted two distinct regulatory schemes for the treatment of waste and the operation of waste storage and disposal facilities: Subtitle D, 42 U.S.C. §§ 6941-49a (1988) regulates nonhazardous solid waste, Subtitle C, 42 U.S.C. §§ 6921-39b (1988), regulates hazardous waste. Regulation under Subtitle C of RCRA is more stringent than under Subtitle D. *See* H.R.

which might contribute to increased mortality or illness, or might pose a substantial hazard to human health or the environment.”⁵⁵ Household waste, the principal component of MSW,⁵⁶ is exempt from coverage as a hazardous waste under RCRA.⁵⁷ Relying on the RCRA exemption, municipalities allege that an exemption for MSW has therefore been incorporated into the CERCLA definition of hazardous substances.⁵⁸ Yet, EPA,⁵⁹ courts,⁶⁰ and other authorities⁶¹ have

REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (noting that only hazardous wastes are subject to the strict standards of the “cradle-to-grave regulatory regime [of Subtitle C]”).

55. 42 U.S.C. § 6903(5) (1988). The definition of solid waste includes “any garbage, refuse, sludge . . . and other discarded material.” 42 U.S.C. § 6903(27)(1988).

Pursuant to its authority under RCRA, 42 U.S.C. § 6921 (1988), EPA has compiled a list of those chemicals and chemical compounds that are potentially hazardous. 40 C.F.R. § 261.30-.33 (1991).

56. *See supra* note 10 for EPA’s definition of MSW.

57. 42 U.S.C. § 6921(i) (1988) and 40 C.F.R. § 261.4(b)(1) (1991). RCRA defines household wastes as “any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, range stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas).” 40 C.F.R. § 261.4(b)(1) (1991).

Because household waste is not considered a hazardous waste, RCRA requires those who collect and dispose of household waste to follow the dictates of Subtitle D, as opposed to the more stringent requirements of Subtitle C. *See* 42 U.S.C. § 6941-49a (1988). *See also EPA Interim Policy, supra* note 10, at 51,074 n.3 (“All household wastes, including household hazardous wastes, are unconditionally exempt from the Federal hazardous waste regulations promulgated under subtitle C of RCRA.”). Subtitle D requires that MSW be disposed of in sanitary landfills or in an environmentally sound manner. 42 U.S.C. § 6943(a)(2).

58. *See* Brief for Appellants Connecticut Municipal/Government Agency Solid Waste Collectors Group at 29-35, *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992) (No. 91-7450) [hereinafter Appellants’ Brief]; Memorandum in Support of Motion for Summary Judgment Filed on Behalf of the Defendant Municipal/Government Agency Collectors Group at 37-40, *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960 (D. Conn. 1991) (No. N-87-52) [hereinafter Municipal Defendants’ Memorandum]. *See also infra* notes 92-115 and accompanying text discussing *B.F. Goodrich*.

59. *EPA Interim Policy, supra* note 10, at 51,074 (“(CERCLA) does not provide an exemption from liability for municipal wastes.”).

60. *See, e.g., B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1203 (2d Cir. 1992), *aff’g* 754 F. Supp. 960 (D. Conn. 1991); *Transportation Leasing Co. v. California*, No. 89-7368, 1990 U.S. Dist. LEXIS 18,193, at 4-7 (C.D. Cal. 1990). These cases are discussed in Part III of this Note.

61. *See Ferrey, supra* note 3, at 262-67 (addressing the statutory language and judicial interpretations of RCRA and CERCLA and concluding that MSW is not exempt); Molly A. Meegan, Note, *Municipal Liability for Household Hazardous Waste: An Analysis of the Superfund Statute and Its Policy Implications*, 79 GEO. L.J. 1783, 1788-89 (1991) (arguing that household waste contains elements that qualify as hazardous sub-

concluded that MSW is not exempt from CERCLA. Under these interpretations, to the extent that MSW contains a hazardous substance under CERCLA, albeit minute, and to the extent that there is a release or threatened release,⁶² liability may attach.⁶³ The question then becomes to what degree are municipalities liable.

II. EPA's Policies on Municipal Liability

A. *Municipal Settlement Policy*

Acknowledging the vulnerability of municipalities for the cleanup costs of waste sites, EPA in December 1989 issued an Interim Municipal Settlement Policy, which describes the approach EPA officials should take when a municipality is potentially responsible for the release of hazardous substances at a site.⁶⁴ According to the policy, CERCLA does not exempt municipalities from liability if they fall within one of the categories of PRPs under section 107(a) of CERCLA.⁶⁵ In addition, EPA noted that some MSW may contain potential CERCLA hazardous substances.⁶⁶ Nonetheless, EPA's general policy is to exempt municipalities from liability under Superfund for MSW, regardless of whether the waste contains household hazardous waste,⁶⁷ unless the hazardous substances come from commercial or in-

stances and commenting that had Congress intended to exempt such waste from liability it would have done so expressly).

62. See *supra* note 35 for the definition of "release" under CERCLA.

63. See *EPA Interim Policy*, *supra* note 10, at 51,074. EPA acknowledges that "[MSW is] generally characterized by large volumes of non-hazardous substances and my [sic] contain small quantities of household hazardous or other wastes, although the actual composition of the waste streams vary [sic] considerably at individual sites." *Id.*

64. *Id.* at 51,071. The policy is a product of nearly two years of research by EPA. Paul G. Wallach & Mark K. Atlas, *EPA's CERCLA Municipal Settlement Policy*, 1 SHEPARD'S ENVTL. LIAB. IN COM. TRANSACTIONS REP. 137, 137 (1991). Until the policy's issuance, EPA enforced liability on municipalities inconsistently. Michelle L. Washington, Note, *A Proposed Scheme of Municipal Waste-Generator Liability*, 100 YALE L.J. 805, 812 (1990). Cf. *EPA Interim Policy*, *supra* note 10, at 51,071 ("Until the development of this interim policy, EPA had not addressed [municipal involvement in the Superfund settlement process] from a national perspective.").

65. *EPA Interim Policy*, *supra* note 10, at 51,074. See *supra* note 6 for the text of section 107(a) of CERCLA.

66. *EPA Interim Policy*, *supra* note 10, at 51,074.

67. EPA refers to "household hazardous waste" as those wastes generated by households that would be dealt with as hazardous wastes under subtitle C of RCRA if a non-household generated them in quantities which would make them ineligible for the small quantity generator exception. *Id.* at 51,074 n.3.

dustrial processes.⁶⁸

Other clarifications brought out in the policy include EPA's position with respect to information gathering, notification of potential responsibility, and settlement proceedings.⁶⁹ First, EPA made known that it will include municipalities in the Agency's information gathering activities.⁷⁰ Accordingly, municipalities, like private parties, will be issued information request letters under section 104(e) of CERCLA.⁷¹ From the information obtained, EPA may determine whether the waste sent to the site contained CERCLA hazardous substances.⁷² EPA is then able to determine whether the party should be notified that it may be a PRP.⁷³

Second, EPA will generally treat municipalities and private PRPs alike for notification purposes.⁷⁴ As a threshold matter, however, EPA

68. *Id.* at 51,072. *See infra* notes 75-78 and accompanying text for a description of waste stream assessment and consequent liability. EPA came to its decision on how to treat MSW after analyzing the cost effectiveness of imposing liability. *EPA Interim Policy*, *supra* note 10, at 51,073. Realizing that Superfund's policies would be better served by pursuing other PRPs, EPA provided municipalities with the limited exemption. *Id.* *See infra* note 179 for a direct quotation of EPA's reasoning.

EPA justifies its approach to municipal liability as an exercise of the Agency's enforcement discretion. *EPA Interim Policy*, *supra* note 10, at 51,073. Section 122(e)(1) provides that "(w)henever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action . . . and would expedite remedial action, the President shall so notify all such parties and shall provide them with information concerning each of the following . . ." 42 U.S.C. § 9622(e)(1) (1988). Some commentators disagree with the Agency's broad interpretation of its discretion under § 122(e)(1). *See* Paul G. Wallach & Mark Atlas, *CERCLA Municipal Settlement Policy: EPA Enforcement Indiscretion*, 20 ENV'T REP. (BNA) 1854, 1854 (1990) (asserting that the Legislature refused to give EPA discretionary authority, and even if EPA had the discretion, it was abused in this instance); Washington, *supra* note 64, at 812-14 (criticizing EPA's policy as being discriminatory and contrary to legislative intent).

69. *EPA Interim Policy*, *supra* note 10, at 51,074-76.

70. *Id.* at 51,074.

71. *Id.* EPA's authority to request information is designated in 42 U.S.C. § 9604(e) (Supp. V 1988). Receiving a "104(e)" information request letter is the start of the enforcement process. The letter requires the PRP to provide the government with all pertinent information relating to the site.

72. *EPA Interim Policy*, *supra* note 10, at 51,074. EPA will also accept site specific information from other parties to supplement its own efforts. *Id.* at 51,074 n.6.

73. *Id.* at 51,074. *Cf. infra* notes 86-89 and accompanying text discussing EPA's policy of sending non-notice letters to municipal non-PRPs.

74. *EPA Interim Policy*, *supra* note 10, at 51,074-75. As owner/operators or past owner/operators, municipalities will be notified just like similarly situated private parties. *Id.* at 51,074. Municipalities will also receive like treatment as genera-

will not notify municipalities, as generators or transporters, unless it obtains site-specific information⁷⁵ that the MSW contains a hazardous substance that derived from commercial, institutional, or industrial processes.⁷⁶ As an exception to this rule,⁷⁷ EPA may notify generators or transporters of MSW which contain a hazardous substance derived only from households when the total contribution of commercial, institutional, and industrial hazardous waste by private parties is insignificant when compared to the MSW generated or transported to the site by municipalities.⁷⁸

Third, once EPA has notified all PRPs, its goal and process for reaching settlement at sites involving municipalities or MSW is the same as for other sites.⁷⁹ This goal is to reach one settlement agreement which, consistent with the law and EPA policies, completely incorporates all pending CERCLA claims.⁸⁰ Accordingly, EPA will try

tor/transporter PRPs of hazardous substances once the substances have been scrutinized. See *infra* notes 75-78 and accompanying text for discussion of EPA's approach to scrutinizing MSW.

75. By site-specific information, the EPA means information pertaining to that particular Superfund site. It does not include "general studies" drawing conclusions about whether MSW typically contains a certain amount of CERCLA hazardous substances, unless these studies pertain to "site-specific information" obtained from PRPs or the Superfund site at issue. The "general studies," however, may be used as supplemental material. *EPA Interim Policy, supra* note 10, at 51,075 n.8.

76. *Id.* at 51,075. "This [policy] means [that] EPA will not generally notify . . . generators [and/or] transporters of MSW [as PRPs] if only household hazardous wastes are present." *Id.* If EPA has information that hazardous substances derive from particular non-household sources, such parties may be notified as PRPs. "Non-household sources" refers to small quantity generator waste from commercial or industrial processes or waste from private or municipally owned maintenance shops. *Id.*

77. EPA expects this exception to be applied sparingly and only in "truly exceptional situations." *Id.* at 51,072, 51,075.

78. *EPA Interim Policy, supra* note 10, at 51,075. To aid the regional offices in coming to this determination, the policy states:

The Regions should consider both the volume and the toxicity of the commercial, institutional, and industrial hazardous waste when determining whether it is insignificant when compared to the MSW. In determining whether the volume is insignificant, the Regions should consider the total volume of such waste contributed by all private parties. In determining whether the toxicity is insignificant, the Regions should consider whether such waste is significantly more toxic than the MSW and whether such waste requires a disproportionately high treatment and disposal cost or requires a different or more costly remedial technique than that which otherwise would be technically adequate for the site.

Id. at 51,075 n.10.

79. *Id.* at 51,075.

80. *Id.*

to include all municipal and private PRPs in the same settlement agreement.⁸¹ Although municipalities may seek de minimis settlements⁸² or special financial arrangements when appropriate,⁸³ the policy does not provide any protection against third party lawsuits brought by other parties.⁸⁴ The only option for avoiding cost-recovery suits from other PRPs is to enter into a settlement with EPA and obtain contribution protection under section 113(f) of CERCLA.⁸⁵

B. *Non-Notice Letters to Local Governments*

In an effort to aid municipalities, EPA developed a policy of sending "non-notice" letters to local governments.⁸⁶ The letters provide information about potential Superfund actions in the local government's area in which it might have an interest.⁸⁷ Designed for those local governments that EPA does not consider PRPs, the letters put the municipality on notice of other named PRPs that may bring actions

81. *EPA Interim Policy*, *supra* note 10, at 51,075.

82. Under section 122(g), de minimis settlements are available. A municipality settling under § 122(g) will be held responsible for only a minimal share of the overall cleanup cost. *See* 42 U.S.C. § 9622(g)(1) (1988). More recently, EPA announced a special settlement policy for "de micromis" parties, or very small parties. *EPA Moves to Protect Very Small Business from Superfund Cleanup Costs*, *INSIDE E.P.A.*, Nov. 15, 1991, at 1, 9-10.

83. EPA notes that some settlement provisions may be especially appropriate for municipalities. These include options for delayed payments, payments over time, and in-kind contributions. Such provisions would take into account their status as governmental entities which could limit their abilities to fulfill their obligations as PRPs. *See EPA Interim Policy*, *supra* note 10, at 51,075-76.

84. *Id.* at 51,076.

85. *Id.* Under section 113(f), EPA has the authority to provide contribution protection to those settling parties. This is an option available to parties who have not been notified as PRPs by EPA but who would like to settle any potential liability. *Id.* at 51,076, n.15. *See infra* notes 86-89 and accompanying text for a discussion of EPA's policy of sending non-notice letters, which could induce local governments to go to EPA to settle under section 113(f).

86. *EPA to Give Heads-up to Towns in Non-notice Letters*, *INSIDE EPA'S SUPERFUND REPORT*, Jan. 30, 1991, at 1 [hereinafter *Non-notice letters*]. Note that "non-notice letters" is an unofficial name for the document.

Requests from local government organizations, including the International City Managers Association, prompted the decision to issue the letters. *Id.* Local governments felt that they were at a disadvantage in settlement negotiations due to their unawareness of EPA's involvement with PRPs at the Superfund site. *Id.* *Cf.* Steinzor, *supra* note 4, at 81 (noting that lack of information and understanding of Superfund litigation disadvantaged local governments).

87. *Non-notice letters*, *supra* note 86, at 1.

against them for contribution.⁸⁸ Upon receiving the letter, a local government may be persuaded to seek a settlement with EPA, which has the effect of barring third party suits by other PRPs for cost recovery.⁸⁹

III. JUDICIAL DECISIONS

In two recent decisions, *B.F. Goodrich Co. v. Murtha*⁹⁰ and *Transportation Leasing Co. v. California*,⁹¹ federal courts held that CERCLA's liability scheme does not exempt municipalities as generators of MSW.

A. *B.F. Goodrich Co. v. Murtha*

B.F. Goodrich Co. v. Murtha involved two Connecticut Superfund sites, both of which had accepted municipal and industrial wastes.⁹² EPA negotiated a \$20 million settlement with the industrial PRPs, which included B.F. Goodrich, Uniroyal Chemical Company and thirty other companies.⁹³ These companies subsequently filed suit against Murtha and other entities, the alleged owners or operators of the landfills, for the cleanup costs.⁹⁴ Murtha then filed a contribution suit against approximately two hundred parties, including twenty-four municipalities and local government agencies.⁹⁵ The corporate plaintiffs filed amended complaints to add the municipalities as defend-

88. *Id.* Unlike § 122(e)(1) notice letters, which are sent to PRPs, the non-notice letters are not a notice of potential liability. In practice, the non-notice letters will be sent at the same time that regular notice letters are sent to PRPs. *Id.*

89. *Id.* See *supra* note 85 and accompanying text for an explanation of possible contribution protection.

EPA has no record of how many non-notice letters were sent in 1991. Telephone Interview with Maria T. Bywater, Office of Waste Programs Enforcement, U.S. Environmental Protection Agency (Feb. 27, 1992).

90. 958 F.2d 1192 (2d Cir. 1992), *aff'g* 754 F. Supp. 960 (D. Conn. 1991).

91. No. 89-7368, 1990 U.S. Dist. LEXIS 18,193 (C.D. Cal. Dec. 5, 1990).

92. One of the sites, Laurel Park Landfill, was listed as the 85th site on EPA's February 1991 NPL. 40 C.F.R. pt. 300 at 196 (1991). The February 1991 NPL ranked the other site, Beacon Heights Landfill, as the 265th worst site. *Id.* at 199.

93. See Norman A. Dupont, *Municipal Solid Waste: The Endless Disposal of American Municipalities Meets the CERCLA Strict Liability Dragon*, 24 LOY. L.A. L. REV. 1183, 1190 (1991).

94. *B.F. Goodrich*, 958 F.2d at 1196. EPA brought four separate cases against the State of Connecticut Department of Environmental Protection, B.F. Goodrich, and Uniroyal. The four actions were consolidated. *Id.*

95. *Id.* at 1196. For a list of the twenty-four municipal defendants, see Appellants' Brief, *supra* note 58, at 2 n.2.

ants.⁹⁶ The municipalities then moved for summary judgment, arguing that the generation and collection of MSW does not trigger liability under CERCLA.⁹⁷

On appeal from the district court's denial of summary judgment,⁹⁸ the municipalities argued that they cannot be liable under section 9607(a)(3) of CERCLA⁹⁹ because MSW, for which they allegedly arranged disposal, is not a hazardous substance.¹⁰⁰ In support, the municipal appellants advanced four grounds to exclude MSW from CERCLA's purview. The municipalities' argument was as follows: (1) CERCLA does not address the issue of MSW, therefore, any construction should conform with its legislative history and EPA interpretations,¹⁰¹ (2) the legislative history reflects an intent to charge industry, not the taxpayers, with the cleanup costs,¹⁰² (3) in light of the foregoing, EPA formulated its Municipal Policy so as to create a rebuttable presumption that MSW is non-hazardous¹⁰³—rebutted when there is site specific information that MSW contains hazardous substances derived from commercial or industrial processes,¹⁰⁴ and (4) because CERCLA incorporates RCRA hazardous wastes and RCRA excludes household waste from its definition of hazardous waste, CERCLA im-

96. *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 962 & n.3 (D. Conn. 1991). The companies' amended complaint added 388 parties to the suit. *Id.* at n.5.

97. *B.F. Goodrich*, 958 F.2d at 1197.

98. The U.S. District Court for the District of Connecticut denied the municipal defendants' motion for summary judgment in an order dated January 8, 1991. *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960 (D. Conn. 1991). The municipalities then filed a Petition for Permission to Appeal from Interlocutory Order with the U.S. Circuit Court of Appeals for the Second Circuit. Appellants' Brief, *supra* note 58, at 3. Permission to appeal was granted on May 8, 1991. *Id.*

99. *See supra* note 6 for the text of the statute.

100. *B.F. Goodrich*, 958 F.2d at 1199-1201.

101. Appellants' Brief, *supra* note 58, at 14-16.

102. *Id.* at 17. The fact that in creating the Superfund Congress chose to collect its revenue from predominantly industrial sources supports this argument. *See id.* at 18 n.14 for a discussion of Superfund's revenue base.

103. The reverse of this premise creates a rebuttable presumption that waste from a commercial or industrial source contains hazardous substances. This presumption could be rebutted by proof that the waste is "the compositional equivalent of household-type waste." *Id.* at 26.

104. *Id.* at 25-29. The presumption may also be rebutted in those "truly exceptional" scenarios where the MSW contains hazardous substances from household sources and where total contribution of commercial or industrial waste is insignificant in comparison with municipal waste. *See supra* notes 77-78 and accompanying text describing the use of this exception.

plicitly excludes MSW from CERCLA's definition of hazardous substances.¹⁰⁵ Furthermore, because courts should construe CERCLA and RCRA to compliment each other, and acknowledging the fact that RCRA considers MSW non-hazardous, the logical conclusion is that MSW should not be considered hazardous under CERCLA.¹⁰⁶

Upon reviewing the arguments that the municipal appellants advanced, the Second Circuit held that CERCLA's definition of hazardous substances included MSW, and therefore the municipalities were not exempt from CERCLA liability.¹⁰⁷ In coming to this result, the court first reviewed the language of CERCLA itself and noted that CERCLA does not differentiate liability based on the PRP or the source of the particular waste.¹⁰⁸ Focusing next on RCRA, the court rejected the municipalities' contention that MSW is not a "hazardous substance" under CERCLA due to RCRA's household waste exclusion.¹⁰⁹ The court noted that Congress intended the RCRA exemption to apply narrowly¹¹⁰ and in no way to limit CERCLA's definition of hazardous substances.¹¹¹ Additionally, when enacting CERCLA, Congress was cognizant of RCRA and could have excluded household waste from CERCLA liability as it did for petroleum and natural

105. Appellants' Brief, *supra* note 58, at 29-35. The municipalities made this argument by first noting that households generate the MSW. RCRA excludes household waste from its definition of hazardous waste. Accordingly, as referred to in § 9601(14)(C) of CERCLA, CERCLA incorporates RCRA's household waste exclusion. See *supra* notes 54-56 and accompanying text and *supra* note 51 (discussing RCRA's and CERCLA's respective definitions of hazardous wastes and substances).

106. Appellants' Brief, *supra* note 58, at 36-43.

107. *B.F. Goodrich*, 958 F.2d at 1206.

108. *Id.* at 1200. In addition, the court noted that CERCLA liability was also not contingent on quantity or concentration. *Id.*

109. *Id.* at 1201-03.

110. *Id.* at 1201-02. The household waste exclusion was meant to exempt such waste from the stringent standards required for the daily management of waste under RCRA. *Id.* at 1202.

111. *B.F. Goodrich*, 958 F.2d at 1202. The court also distinguished treatment of MSW under the two statutory schemes by pointing out that RCRA applies to hazardous waste, while CERCLA applies to hazardous substances. *Id.* Additionally, RCRA takes into consideration certain threshold quantities or concentrations. *Id.* CERCLA, in contrast, does not consider quantity or concentration as relevant to defining hazardous substances. *Id.*

Analogizing RCRA's household waste exclusion with other waste exclusions, for example the mining waste exclusion, the court noted that the courts addressing the latter have refused to incorporate such an exclusion into CERCLA. *Id.* at 1203 (citing *Eagle-Picher Indus. v. EPA*, 759 F.2d 922, 927 (D.C. Cir. 1985)).

gas.¹¹² Instead, the court reasoned, Congress intended CERCLA's definition of hazardous substances to be broad and not dependent on the source of the waste.¹¹³ Thus, if the MSW, including household waste, contains hazardous substances, and a release or threatened release occurs, the municipalities may be liable.¹¹⁴ To avoid an unfair result, the courts may take equitable factors into consideration in order to allocate costs among the municipal and industrial generators based on the extent to which each caused damage.¹¹⁵

B. *Transportation Leasing Co. v. California*

In *Transportation Leasing Co. v. California*,¹¹⁶ sixty-four corporations named as PRPs filed a third party lawsuit against a number of local governments.¹¹⁷ The municipalities filed a motion for an order specifying certain issues as without substantial controversy.¹¹⁸ The municipalities asserted two defenses. First, they argued that merely issuing a business license or franchise to independent waste haulers to conduct business and collect rubbish within the city does not constitute an "arrangement" for the disposal of waste under section 107(a)(3) of

112. *Id.* at 1203. See *supra* note 51 for the definition of hazardous substance under CERCLA and its exclusion of petroleum and natural gas.

113. *B.F. Goodrich*, 958 F.2d at 1200.

114. The court came to this conclusion after considering the legislative history, scant as it is, and EPA's interpretations of this history. See *id.* at 1203-06.

115. *Id.* at 1206. The equitable factors that the courts may consider include "the relative volume and toxicity of the substances for disposal of which the municipalities arranged, the relative cleanup costs incurred as a result of these wastes, the degree of care exercised by each party with respect to the hazardous substances, and the financial resources of the parties involved." *Id.*

116. No. 89-7368, 1990 U.S. Dist. LEXIS 18,193 (C.D. Cal. Dec. 5, 1990).

117. *Dupont*, *supra* note 93, at 1195. The landfill involved in the suit, the Operating Industries, Inc. landfill, ranked number 101 on EPA's February 1991 NPL. 40 C.F.R. pt. 300 app. B at 196 (1991). While in operation, the landfill accepted "industrial solid, liquid and hazardous wastes and municipal trash." *Dupont*, *supra* note 93, at 1195 (citing Partial Consent Decree, *United States v. Chevron Chem. Co.*, No. 88-7186, slip op. at para. IV(A) (C.D. Cal. May 11, 1989)). EPA entered a settlement decree with 181 private corporations named as PRPs for an estimated \$34 million in remedial work. *Dupont*, *supra* note 93, at 1195. Sixty-four of these corporations subsequently sought contribution from the local governments. *Id.*

Plaintiffs originally requested the municipalities to pay 90% of the estimated \$66 million cleanup cost. Telephone Interview with Kevin Murphy, City Manager of Alhambra, California (Feb. 26, 1992). This allocation would be based on volume. *Id.*

118. *Transportation Leasing*, 1990 U.S. Dist. LEXIS 18,193, at *1-2.

CERCLA.¹¹⁹ Second, the cities sought a declaration that rubbish generated by residences and businesses is not a "hazardous substance" as defined by CERCLA.¹²⁰ As in *B.F. Goodrich Co. v. Murtha*,¹²¹ the cities argued that CERCLA impliedly incorporated the RCRA exclusion for household waste.¹²²

The U.S. District Court for the Central District of California declined to decide the cities' first claim and found their second argument meritless.¹²³ The court stated that "it does not necessarily follow that the RCRA exclusion for household waste compels the conclusion that household waste cannot be a 'hazardous substance' under . . . CERCLA."¹²⁴ Like the court in *B.F. Goodrich*, the *Transportation Leasing* court noted that if Congress intended to exclude household waste under CERCLA, it would have done so explicitly in the Act.¹²⁵ Accordingly, the court ruled that CERCLA does not expressly exempt from liability the disposal of household waste.¹²⁶ The court made it known, however, that the plaintiffs carried the burden of showing that the waste disposed of at the site contained hazardous substances as defined under CERCLA.¹²⁷

119. *Id.* To further this argument, the city pointed out that it was issuing the business licenses pursuant to its police power to protect the public health and safety. *Id.* at *2.

120. *Id.*

121. 958 F.2d 1192 (2d Cir. 1992), *aff'g* 754 F. Supp. 960 (D. Conn. 1991). See *supra* notes 109-114 and accompanying text for the *B.F. Goodrich* court's analysis of the argument that MSW is exempt from CERCLA's definition of hazardous substances by the RCRA household waste exclusion.

122. *Transportation Leasing*, 1990 U.S. Dist. LEXIS 18,193, at *4.

123. *Id.* at *3-4.

124. *Id.* at *4.

125. *Id.* at *4-5. See *supra* note 112 and accompanying text for the *B.F. Goodrich* court's analysis of this issue.

126. *Transportation Leasing*, 1990 U.S. Dist. LEXIS 18,193, at *7. In coming to its decision, the court cited an EPA Directive which made known that, "CERCLA does not contain an exclusion from liability for household waste or an exclusion based on the amount of waste generated. . . . If a household waste contains a substance that is covered under these CERCLA sections (whether or not it is a RCRA hazardous waste), potential CERCLA liability exists." *Id.* at *6 (citing *Clarification of Issues Pertaining to Household Hazardous Waste Collection Programs*, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. EPA Directive No. 9574.00-1 (1988)).

127. *Transportation Leasing*, 1990 U.S. Dist. Lexis 18,193, at *7.

IV. CONGRESSIONAL BILLS

Considering the holdings of *B.F. Goodrich Co. v. Murtha*¹²⁸ and *Transportation Leasing Co. v. California*,¹²⁹ municipalities now confront the harsh reality of joint and several liability under CERCLA for the disposal of MSW. Having failed to obtain relief from the judiciary, local governments are attempting to find solace in the Legislature.¹³⁰ The issue of municipal liability has led municipalities to seek congressional support for legislative action to protect local governments.¹³¹ The local government lobby effort has resulted in the introduction of bills in both houses of Congress to amend CERCLA to protect municipalities from liability.¹³²

Senators Lautenberg (D-NJ) and Wirth (D-CO) introduced the Toxic Cleanup Equity and Acceleration Act (TCEAA) in the Senate.¹³³ A similar bill, under the same title, was introduced in the House by Congressmen Dreier (R-CA) and Torricelli (D-NJ).¹³⁴

128. 958 F.2d 1192 (2d Cir. 1992), *aff'g* 754 F. Supp. 960 (D. Conn. 1991).

129. No. 89-7368, 1990 U.S. Dist. LEXIS 18,193 (C.D. Cal. Dec. 5, 1990).

130. Municipalities nationwide have joined together to form a coalition, the American Communities for Cleanup Equity (ACCE), to lobby Congress for legislative action to protect local governments. Telephone Interview with Jocelyn Guyer, Lobbyist for American Communities for Cleanup Equity (Jan. 13, 1992). As of January 1992, ACCE membership included 106 municipalities.

Other groups supporting the legislation to protect municipalities include the U.S. Conference of Mayors, National Association of Counties, Sierra Club, Natural Resources Defense Council, Clean Water Action, Environmental Defense Fund, and the U.S. Public Interest Research Group, known as PIRG. *Id.*

131. ACCE initially advanced a proposed amendment to RCRA which would have declared MSW non-hazardous, thereby creating a blanket exemption from Superfund. *See Major Municipal Lobby Joins Battle to Exempt Cities from Superfund Costs*, INSIDE E.P.A., Dec. 14, 1990, at 10. Subsequently, however, ACCE revised its agenda to exclude the blanket exemption for MSW. *See Cities Seeking Protection from Superfund Drop Call for Blanket MSW Exemption*, INSIDE E.P.A., June 28, 1991, at 11. Instead, a compromise resulted in a legislative proposal to proscribe industries from filing suits for contribution against municipalities. *See infra* notes 133-50 discussing the Toxic Cleanup Equity and Acceleration Act.

132. *See* S. 1557, 102d Cong., 1st Sess. (1991); H.R. 2767, 102d Cong., 1st Sess. (1991); H.R. 3026, 102d Cong., 1st Sess. (1991). *See also infra* note 151 (describing attempts to limit municipal liability through an amendment to the Government-Sponsored Enterprises bill).

133. *See* 137 CONG. REC. S10,952 (daily ed. July 25, 1991) (statement of Sen. Lautenberg).

134. *See* 137 CONG. REC. H5817 (daily ed. July 24, 1991) (statement of Rep. Torricelli). The language of the House bill, H.R. 3026, is slightly different than the Senate version, S. 1557. The notable difference is an added "Findings" section in the House

TCEAA would amend CERCLA to restrict lawsuits by third parties against municipalities that generate and transport MSW to Superfund sites, while leaving unaffected municipal liability as owners or operators.¹³⁵

The legislation would modify Superfund litigation in two respects; first, it would proscribe third party suits against municipalities by any party other than the government, and second, it would codify EPA's Interim Municipal Settlement Policy.¹³⁶ The specific statutory scheme includes: findings concerning the current problems of Superfund litigation; additional definitions; limits on Third party suits for MSW; settlement provisions; and retroactive application.¹³⁷

Section 2 of TCEAA states the following findings: (1) there is a need to reaffirm the Superfund principle that the polluter should pay for cleanup; (2) Congress did not intend to hold municipalities strictly, jointly, and severally liable; (3) the toxicity of MSW averages less than 0.5%; (4) third party contribution suits distort the intent of Superfund and delay cleanup; and (5) spurious litigation needs to be stopped.¹³⁸

Section 3 would amend CERCLA to add the definition of MSW, while leaving all other definitions under CERCLA intact.¹³⁹ MSW is defined as "all waste materials generated by households" including but not limited to food, yard waste, paper, clothing, appliances, consumer product packaging and diapers, as well as household hazardous waste.¹⁴⁰ The term includes all components of MSW, even though

bill. For purposes of analysis in this section of the Note, all references will be made to the House version of the Toxic Cleanup Equity and Acceleration Act of 1991.

135. *Id.* Rep. Christopher H. Smith (R-N.J.) introduced the other piece of legislation. H.R. 2767. H.R. 2767 proposes an alternate amendment to CERCLA. This bill, titled the Toxic Pollution Responsibility Act of 1991, provides that municipalities should be exempt from CERCLA liability for the generation or transportation of MSW. See H.R. 2767, 102d Cong., 1st Sess. (1991).

136. See 137 CONG. REC. S10,952 (daily ed. July 25, 1991) (statement of Sen. Lautenberg).

137. H.R. 3026, 102d Cong., 1st Sess. (1991).

138. *Id.* § 2. One additional finding concerns sewage sludge. Subsection 4 reads, "cities that have received awards from the Environmental Protection Agency for the beneficial reuse of sewage sludge have been sued under Superfund because such sewage sludge was present at Superfund sites." *Id.*

139. *Id.* § 83. TCEAA would also add a definition of "sewage sludge" and "municipality." See *id.*

140. *Id.* The amendment would read:

(39) The term 'municipal solid waste' means all waste materials generated by households, including single and multiple residences, hotels and motels, and office buildings. The term also includes trash generated by commercial, institutional,

some may constitute hazardous substances under CERCLA when separate from MSW.¹⁴¹

More importantly, section 4 would limit third party suits against generators of MSW.¹⁴² In codifying EPA's Municipal Settlement Interim Policy, TCEAA permits the government to bring an action against a municipality only in "truly exceptional circumstances."¹⁴³ These circumstances exist when (1) there is evidence from a site that hazardous substances have been released that are not ordinarily found in MSW and that those substances come from a commercial, institutional, or industrial source, or (2) the toxicity and volume of waste from commercial, institutional, or industrial sources at the site is insignificant in comparison with that of the MSW.¹⁴⁴ Thus, this section would unequivocally eliminate third party suits against municipalities and limit actions by the government to those in which the municipality's waste was of an unusual toxic nature, based on site-specific evidence, or in which solely municipal garbage caused the release because there were no industrial generators involved at the site.

and industrial sources when the general composition and toxicity of such materials are similar to waste normally generated by households, or when such waste materials, regardless of when generated, would be considered conditionally exempt generator waste under section 3001(d) of the Solid Waste Disposal Act because it was generated in a total quantity of 100 kilograms or less during a calendar month. The term 'municipal solid waste' includes all constituent components of municipal solid waste, including constituent components that may be deemed hazardous substances under this Act when they exist apart from municipal solid waste. Examples of municipal solid waste include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, and household hazardous waste (such as painting, cleaning, gardening, and automotive supplies). The term 'municipal solid waste' does not include combustion ash generated by resource recovery facilities or municipal incinerators.

H.R. 3026, 102d Cong., 1st Sess. § 3 (1991).

141. *Id.*

142. Section 113 of CERCLA would be amended to read:

(1) Contribution Actions for Municipal Solid Waste and Sewage Sludge.—No municipality or other person shall be liable to any person other than the United States for claims of contribution under this section or for other response costs or damages under this Act for acts or omissions related to the generation, transportation, or arrangement for the transportation, treatment, or disposal of municipal solid waste or sewage sludge unless such acts or omissions provide a basis for liability under sections 107(a)(1) or 107(a)(2) of this Act.

Id.

143. *Id.* § 4(i)(m).

144. *Id.* See *supra* note 78 for EPA's calculation of insignificant contributions.

The settlements section, section 5, would modify CERCLA to make settlements between EPA and municipalities more equitable.¹⁴⁵ The provisions of this section would govern settlements for those cases in which the exceptions under the previous sections give EPA the right to sue.¹⁴⁶ If a municipality requests a settlement, EPA must make every effort to reach a final settlement of municipal liability within 120 days.¹⁴⁷ The grounds for which the government can excuse its failure to reach a settlement are limited to those cases which involve the municipality refusing to agree to standard settlement provisions or to adhere to settlement criteria in the statute, or those cases in which the government has insufficient information.¹⁴⁸ For final settlement purposes, EPA should consider only the amount of hazardous constituents in the MSW, assumed to be 0.5% hazardous unless site-specific evidence proves otherwise, rather than the overall volume of the MSW.¹⁴⁹

Lastly, section 7 would make the new amendments applicable to all sites in which a binding court order or court-approved settlement has not resolved municipal liability.¹⁵⁰ As written, TCEAA accomplishes its goal to "fine-tune the Superfund statute to block opportunistic and costly lawsuits by large corporate polluters against such innocent entities as the nation's cities and towns."¹⁵¹

145. See H.R. 3026, 102d Cong., 1st Sess. § 5(n) (1991). This section of the bill would amend § 122 of CERCLA to add a new subsection titled "(n) Settlements for Municipal Generators and Transporters of Municipal Solid Waste or Sewage Sludge." *Id.*

146. *Id.* § 5(n)(1).

147. *Id.* § 5(n)(2). The language reads:

(2) Timing of Settlements.—For applicable actions under this subsection, a municipality may request that the President enter into a settlement under this section. The request may seek to settle a municipality's potential liability for all or part of the response costs or damages to natural resources. Notwithstanding any other deadlines under this Act, the President shall make every effort to reach a final settlement with the municipality within 120 days after receiving such request.

Id.

148. *Id.* § 5(n)(3).

149. H.R. 3026, 102d Cong., 1st Sess. § 6 (1991).

150. *Id.* § 7.

151. *Superfund Problems Facing Municipalities: Hearings on S. 1557 Before the Subcomm. on Superfund, Ocean and Water Protection of the Senate Comm. on the Environment and Public Works*, 102d Cong., 1st Sess. (1991) (statement of Sen. Lautenberg).

Senator Donald Riegle (D-Mich) introduced the most recent attempt to limit municipal liability in the form of an amendment to the Government-Sponsored Enterprises bill. See S. 2733, 102d Cong., 1st Sess. (1991). Similar to TCEAA, this bill would prevent third party suits but allow EPA to pursue municipalities for contribution. 138

V. UNDERSTANDING THE ISSUE OF MUNICIPAL LIABILITY: PLIGHTS AND POLICIES

A. *The Conflicting Perspectives of Industries and Municipalities*

Under present interpretations, as advocated by industrial generators, municipalities face costly lawsuits under CERCLA for the mere disposal of MSW.¹⁵² Industries claim that municipalities are responsible for disposing large volumes of waste, including some hazardous waste, at landfills, and have not paid their share for the cleanup. From industry's perspective, a fair means of apportionment would be on a volumetric basis.¹⁵³ Its contention rests on the theory that due to the high volume of municipal waste dumped at the landfills, regardless of its toxicity, industry's hazardous substances have spread and caused greater damage than would have been the case absent the municipal waste. Consequently, industry complains that it must treat tons of MSW to get at the hazardous material it has been ordered to cleanup. Moreover, even if industrial waste was highly toxic, the limited amount of it that has seeped into the MSW has created a mixture more costly to cleanup.¹⁵⁴

In addition, industry contends that even seemingly innocuous municipal trash contains hazardous substances.¹⁵⁵ Because CERCLA re-

CONG. REC. S9389 (daily ed. June 23, 1992). Unlike the TCEAA, the bill would allow a party liable for acts done three years after the law's enactment to appeal to the special settlement provisions only if that municipality had in place a household hazardous waste collection program. *Id.*

Also dissimilar is the bill's allocation scheme. The bill would order EPA to settle with municipalities and limits municipal liability to 4% of the total cleanup costs. *Id.* Each municipal generator would then be held liable for an "equitable share" of the total 4% liability. As under TCEAA, the prohibition on third party suits would apply retroactively. *Id.*

Although subject to much disapproval, the Senate defeated a motion to quash the municipal liability limit by a vote of 52-44. 138 CONG. REC. S8648 (daily ed. June 23, 1992).

152. See *supra* notes 107-127 and accompanying text (discussing the holdings of *B.F. Goodrich* and *Transportation Leasing*).

153. See, e.g., Keith Schneider, *Industries and Towns Clash Over Who Pays to Tackle Toxic Waste*, N.Y. TIMES, July 18, 1991, at A1.

154. The costs increase because the volume of MSW necessitates special processes, like retaining walls and methane recovery systems. See Cynthia C. Kelly, *Superfund and Local Governments: Making the Process Work*, PM, May 1991, at 13.

155. Industry acknowledges that MSW normally contains between 0.5% and 2% hazardous constituents. Considering the large quantity of MSW at a landfill, industry argues that there may therefore be a significant amount of hazardous waste cumulatively speaking. *EPA Seen Leaning Toward Superfund Plan Holding Cities Liable For*

quires no threshold level of toxicity or minimum quantity of hazardous substances for liability to attach,¹⁵⁶ industry asserts that CERCLA's broad remedial net should reach municipalities.¹⁵⁷

Industry's ulterior motive for targeting municipalities to shoulder the costs rests on the long-term goal to undermine Superfund.¹⁵⁸ By trying to spread the burden of Superfund liability to as many parties as

Trash, INSIDE E.P.A., Oct. 18, 1991, at 1, 9. See also Ferrey, *supra* note 3, at 200-10 (discussing the volume and toxicology of MSW); Meegan, *supra* note 61, at 1795 n.73 (arguing in support of industry).

156. See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669-70 (5th Cir. 1989) (holding that CERCLA's language does not require any quantitative amount of hazardous substances); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 238 (W.D. Mo. 1985) (arguing that CERCLA imposes liability regardless of the volume or concentration of hazardous substances); *United States v. Carolawn Co.*, 21 Env't Rep. Cas. (BNA) 2124, 2126 (D.S.C. 1984) (noting that CERCLA does not distinguish hazardous substances on the basis of concentration); *United States v. Wade*, 577 F. Supp. 1326, 1339-40 (E.D. Pa. 1983) (holding that CERCLA requires no specific reportable quantity or effluent standard).

157. See, e.g., *3550 Stevens Creek Assoc. v. Barclays Bank of California*, 915 F.2d 1355 (9th Cir. 1990) (holding that CERCLA is to be given a broad interpretation to accomplish its remedial goals); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (determining that, because CERCLA is meant to be a remedial statute, its provisions must be liberally construed "to avoid frustration of the beneficial legislative purposes"); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) (same).

158. Under this "conspiracy theory," industry's ultimate goal advocates total repudiation of the Superfund liability scheme. *EPA Seen Leaning Toward Superfund Plan Holding Cities Liable For Trash*, INSIDE E.P.A., Oct. 18, 1991, at 1, 9. See also 138 CONG. REC. S8630 (daily ed. June 23, 1992) (statement of Sen. Lautenberg) ("We are talking about a campaign designed to ultimately destroy the Superfund Program. The worse its opponents make it look, the more people that are unhappy with it, the easier it will be for industry to escape its cleanup responsibilities by gutting the law's liability provisions.").

From the initial enactment of Superfund, industries have attempted to undermine its success. For instance, constitutional challenges to CERCLA's retroactive application have failed. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988) ("[E]ven if CERCLA is understood to operate retroactively, it nonetheless satisfies the dictates of due process because its liability scheme is rationally related to a valid legislative purpose."), *cert. denied*, 490 U.S. 1106 (1989). See also *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732-37 (8th Cir. 1986) (holding that CERCLA liability applies to acts committed and costs incurred pre-enactment); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1397-99 (D.N.H. 1985) (same); *Town of Booton v. Drew Chem. Corp.*, 621 F. Supp. 663, 668-69 (D.N.J. 1985) (same); *United States v. Ward*, 618 F. Supp. 884, 898-99 (E.D.N.C. 1985) (same); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072-79 (D. Colo. 1985) (same); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1114-16 (D. Minn. 1982) (same); *United States v. Wade*, 546 F. Supp. 785, 789-94 (E.D. Pa. 1982) (holding off-site generators of wastes disposed of before CERCLA's enactment liable under § 107 but not under § 106).

possible, some corporations hope their efforts will force the threatened parties to lobby for changes in cleanup liability.¹⁵⁹ Municipalities have resorted to lobbying, but not with the intention of doing away with the joint and several liability scheme as industry hoped.¹⁶⁰ Municipal opposition to liability focuses on the inequity of forcing local governments to pay for cleanup costs. The arguments advanced principally involve considerations of municipalities' uniqueness as a source. Municipalities note the unique nature of the MSW generated and dumped, as well as their unique position as a political subdivision and their obligations as such.

With respect to their waste, municipal defendants argue that the principal inquiry to determine liability should focus on the actual damage that the toxic constituents of the particular entity's waste cause, not on the volume of waste. Given MSW's low toxicity, municipalities point out that if corporate PRPs had not dumped their highly toxic waste at the landfills, thus commingling it with the MSW, the landfills would not have become Superfund sites in the first place. Although about twenty percent of the landfills named on the Superfund national priority list are considered "municipal" sites,¹⁶¹ most of these sites contain both MSW and industrial waste. Only a few have been found to contain solely MSW.¹⁶² This supports the inference that absent codisposal, the dangerous conditions would not have been created.¹⁶³ Considering the varied components of MSW, municipalities argue that they should not be held liable absent site-specific evidence of hazardous constituents in their waste stream.

The other consideration to be taken into account relates to municipalities' duties as governmental entities. Local governments feel that courts should not subject them to liability for merely providing a service to their citizens.¹⁶⁴ Unlike industrial polluters, municipalities do

159. *EPA Kicks Off Major Effort to Shield Cities From Industry Superfund Lawsuits*, INSIDE E.P.A., July 19, 1991, at 1, 7-8.

160. See *supra* note 131 for ACCE's proposals.

161. 40 C.F.R. pt. 300, app. B (daily ed. July 1, 1991). See *supra* note 16 noting that "municipal" sites are those owned or operated by municipalities, along with those privately owned or operated that frequently allow the disposal of MSW.

162. Steinzor & Lintner, *supra* note 18, at n.4.

163. Upon analyzing the actual commingling of the industrial waste with the MSW, the MSW may have "cushioned" the hazardous wastes from causing more severe damage. See 138 CONG. REC. H918 (daily ed. March 3, 1992) (statement of Rep. Martinez).

164. See, e.g., *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir. 1992)

not profit from the disposal. Consequently, municipalities are not able to absorb or transfer the costs like corporations.¹⁶⁵

Under current interpretations of Superfund liability, municipalities find themselves caught in an unfortunate predicament. Unlike industrial defendants, municipalities did not have reason to know about the potential toxic effects of the substances they were handling. If they had known, they could have prepared for it. For example, they could have secured liability coverage.¹⁶⁶ Indeed, because it was not the municipal-

(noting the appellants' argument that liability cannot attach to a municipality when it is acting in its sovereign capacity).

165. Unlike municipalities, industry estimates its potential liability and factors that estimate into its decisionmaking. In the final analysis, any costs can be diffused to consumers through price increases. *But cf.* Washington, *supra* note 64, at 819 (arguing that municipalities may diffuse costs even to a greater extent due to their broad taxable group as opposed to industry's limited consumer group).

166. Insurance may pay a significant portion of the cleanup costs. Many municipalities have purchased comprehensive general liability (CGL) insurance policies. *But see* James R. Hackney, Jr., *A Proposal of State Funding for Municipal Tort Liability*, 98 YALE L.J. 389, 389 (1988) (noting that some municipalities have had to forego liability insurance and face the risk of bankruptcy due to increased municipal insurance premiums). Coverage under these policies includes all risks, unless specifically excluded.

In the 1970s, however, the insurance industry added what became known as the pollution exclusion clause. This clause excludes coverage for pollution damage unless the injury or damage was "sudden and accidental." Interpretations differ as to the meaning of "sudden and accidental" in coverage litigation. *Compare* Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1202 (2d Cir. 1989) (affirming decision in favor of insured coverage for pollution damage); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1361 (D. Del. 1987) (denying insurers' motion for summary judgment in action seeking to deny benefits for pollution damage); *Claussen v. Aetna Casualty & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989) (holding in favor of insured coverage for pollution damage); *Du-Wel Prod., Inc. v. United States Fire Ins. Co.*, 565 A.2d 1113, 1115 (N.J. Super. Ct. App. Div. 1989) (same); and *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 572-73 (Wis. 1990) (same); *with* *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 555 N.E.2d 568 (Mass. 1990) (denying coverage); *Powers Chemco, Inc. v. Federal Insurance Co.*, 548 N.E.2d 1301, 1302 (N.Y. 1989) (same); and *Technicon Electronics Corp. v. American Home Assurance Co.*, 544 N.E.2d 1048, 1049 (N.Y. 1989) (same).

For more thorough discussions of insurance coverage for environmental cleanup, see generally Robert D. Chesler et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9 (1986) (discussing the Comprehensive General Liability Policy and its Pollution Exclusion Clause); Jeffrey Kehne, *Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes*, 96 YALE L.J. 403 (1986) (arguing that insurance-based incentives could greatly help control the risks associated with hazardous wastes); E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237 (1986) (proposing a model for insurance coverage); Amy L. Fisher, Comment, *The Pollution Exclusion Clause: In Favor of the Insurer or the Insured?* *Just v. Land Reclamation, Ltd.*, 40 WASH. U.J. URB. & CONTEMP. L. 209 (1991) (discussing the

ities themselves which generated the waste, but their residents, they were not in a position to control the amount or type of waste handled.¹⁶⁷

Furthermore, at the time such waste was handled, it was processed under the regulations of RCRA,¹⁶⁸ which excluded household waste from its hazardous waste regulatory scheme.¹⁶⁹ To impose liability on an entity for the past disposal of waste, the same waste that was exempted from hazardous regulation at the time of initial disposal, would create an inconsistency in the overall framework of hazardous waste regulation.¹⁷⁰

Municipalities find themselves disadvantaged in other respects as well; one being their lack of experience with Superfund. Corporations have been involved with Superfund since its inception. Due to their inexperience, municipalities are strategically at a disadvantage.¹⁷¹ For instance, novice defendants stand unaware of the intricacies of negotiation strategies inherent in the cost allocation phase.¹⁷² As a result,

pollution exclusion clause); Eugene R. Anderson et al., *Superfund: Is Your City Insured?*, 32 MUNICIPAL ATTORNEY 1, 8-9, 14, 17-19 (Jan./Feb. 1991) (describing the use of past statements to prove that insurance policies may cover environmental clean-up costs).

167. *But cf.* Florio, *supra* note 11, at 118-19 (“[W]hile the state or local government unit is the party least able to control the amount or even the type of waste generated, the state or local government unit is subject to the same liability as [industry].”).

168. *See supra* notes 28-30 and accompanying text explaining that RCRA was intended to regulate the current disposal of solid waste, while CERCLA was enacted to address the past disposal of waste. Nonhazardous municipal solid waste is regulated under Subtitle D of RCRA. In contrast, hazardous waste falls under the more arduous regulation of Subtitle C. *See supra* notes 54-57 and accompanying text for a discussion of RCRA’s categorization for treatment of waste under Subtitles C and D.

169. *See supra* note 57 noting RCRA’s household waste exclusion.

170. If the disposal of MSW was found sufficient to incur liability under CERCLA, then a municipality handling such waste under Subtitle D of RCRA would be treated as if it disposed of Subtitle C waste. *See supra* note 54 describing MSW’s treatment under Subtitle D and hazardous waste treatment under Subtitle C of RCRA.

171. Steinzor, *supra* note 4, at 81 (“Most local governments have only a vague understanding of how the law operates . . . and . . . many function at a level of sophistication that lags years behind the strategic abilities of private industrial participants . . .”).

172. *Id.* Small businesses are similarly disadvantaged. As exemplified at the Ludlow Landfill in New York, two large corporations who agreed to pay \$9 million in cleanup costs subsequently sued hundreds of area towns and small businesses for \$5 million in contribution. *See* Robert Tomsho, *Pollution Play: Big Corporations Hit By Superfund Cases Find Way to Share Bill*, WALL ST. J., Apr. 2, 1991, at A1. The strategy is to request a high estimated contribution and then negotiate for a lesser amount if the party settles early. Realizing the consequences of a drawn out legal battle, most small parties resort to accepting the settlement offer. As one small pizzeria owner said,

they are forced to pay a disproportionate share of the cleanup cost.

Municipalities also face a financial disadvantage. Local governments can not raise revenues or disperse the costs as can industrial entities. Municipalities have very limited resources. Requiring them to bear the burden of cleanup costs plus litigation costs could deplete their entire budget.¹⁷³ As a result, municipalities risk bankruptcy. In the alternative, their limited financial resources force them to make other compromises, such as raising taxes, increasing trash-hauling fees, laying off public employees, or cutting public services.¹⁷⁴ Because the threat of liability now haunts every local government,¹⁷⁵ the municipal perspective must be considered.

B. Policy Goals of Superfund

CERCLA essentially addresses two policy goals: cleanup and deter-

"You don't have a choice . . . small businesses can't afford to fight these large corporations." *Id.* The corporations involved in the Ludlow case even gave the parties a "holiday offer": parties that settled by January 15, 1991 could do so for half price, those who did not would be sued in full. *Id.* at A14. Eighty-five percent of the defendants accepted the offer. *Id.*

173. These threatening costs come at a time when local governments are involved in a fiscal crisis. According to a 1992 survey conducted by the National League of Cities, the economies of more than 50% of American cities are at deficit levels. *Financial Burdens Mount as Cities Struggle with Budget Stress; Tough Choices Diminishing Quality of Life and Ability to Help; Local Officials Say Candidates Need to "Get Real" About Problems*, Press Release (Nat'l League of Cities, Washington, D.C.), July 8, 1992, at 1. Meanwhile, nearly four out of five (78.7%) cities say that they are less able to satisfy their financial needs in 1992 than in 1991. *Id.* at 3.

174. See Tomsho, *supra* note 172, at A1. For example, the City Manager of Bell, California, who now confronts a \$1.5 million settlement offer, has already had to fire two city employees and increase citizens' trash-hauling fees almost two-fold. *Id.*

175. Industrial corporations have filed or threatened to file approximately 22 third party suits according to one estimate. 138 CONG. REC. S8630 (daily ed. June 23, 1992) (statement of Sen. Lautenberg). These suits involve municipalities situated in 11 states, primarily California, Colorado, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and Wisconsin. In total, at least 450 municipalities and 1,000 small businesses and nonprofit groups have been targeted. *Id.*

The Los Angeles-Long Beach Harbor case exemplifies the legal blitzkrieg. There Potlatch Corporation and Simpson Paper Company have filed third party suits against 115 local governments for owning the pipelines into which the companies poured hazardous materials. Keith Schneider, *Industries Battle Cities on Funds for Toxic Waste*, N.Y. TIMES, July 18, 1991, at A1, A9 (chart showing suits pending). See also *infra* note 198 listing municipal parties involved in litigation.

The fear of liability becomes more ominous when municipalities are involved in multiple landfills. See Tomsho, *supra* note 172, at A1 (noting the predicament of the city of Bellmawr, New Jersey, and its involvement with two lawsuits).

rence. The former contemplates a massive, comprehensive scheme of suing responsible parties for the cleanup costs.¹⁷⁶ The latter goal furthers the objective of improving waste management. To prevent continued destruction of the environment, parties must be deterred from unsafe practices and encouraged to improve activities involving waste disposal.

1. Cleanup

Superfund bases cleanup liability on a "polluter should pay" principle.¹⁷⁷ That means that those responsible for the release or threatened release should pay an amount in proportion to the amount of hazardous substances handled. The scheme proposed by industry, a formula based on the volume of waste, frustrates a proportional formulation. To equate a ton of industrial waste to a ton of MSW is erroneous because an industrial generator is not on equal terms with a municipal generator.¹⁷⁸ Even EPA differentiates them and considers a contribution of household waste as insufficient to bring about notification as a PRP.¹⁷⁹ This policy choice, of course, does not foreclose liability suits for contribution.¹⁸⁰ It does, however, acknowledge the uniqueness of municipal generators.

As public entities, municipalities provide a service for the disposal of their citizens' waste. In this vein, municipalities essentially personify their citizens collectively.¹⁸¹ Thus, prosecuting municipal residents di-

176. See *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) ("[CERCLA] is intended to facilitate the prompt clean-up of hazardous waste dump sites and when possible to place the ultimate financial burden upon those responsible . . ."). See also H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 67 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6143.

177. See H.R. 3026, 102d Cong., 1st Sess. § 2 (1991) (adding the finding that "there is a need for a reaffirmation of the policies that are the basis for Superfund . . . including the principle that the polluter should pay for cleanup").

178. See *supra* notes 165-174 and accompanying text discussing the disadvantaged position of municipalities.

179. EPA's *Interim Policy*, *supra* note 10, at 51,073. EPA's policy states as follows: [B]ased on our experiences at Superfund sites, especially municipal landfills, we believe that it is generally not a cost-effective use of our enforcement resources to pursue those generators/transporters whose only contribution at a Superfund site appears to have been substances that may have been contaminated only with relatively small quantities of household hazardous waste (e.g., municipal solid waste). *Id.*

180. *Id.* at 51,071 ("[N]othing in the interim policy precludes a third party from initiating a contribution action.").

181. Amicus Brief of American Communities for Cleanup Equity at 4, B.F. Good-

rectly is the next logical step in expanding liability.¹⁸² Congress, however, never intended to hold citizens liable for the disposal of household trash.¹⁸³

Using a volumetric approach to cost allocation could force municipalities to pay as much as ninety percent of the cleanup costs.¹⁸⁴ This would be in complete disproportion with the actual amount of hazardous substances contained in MSW. The fact that the Superfund sites where industrial and municipal waste were codisposed would not be on the NPL had only MSW been dumped at the site makes the unfairness of allocating remedial costs under a method that considers strictly volume even more evident.¹⁸⁵ Accordingly, imposing liability on municipalities, especially under the conventional volumetric apportionment method, undermines CERCLA's liability scheme of having polluters pay for cleanup.

2. Deterrence

The deterrence theory under Superfund rests on the idea that the threat of strict liability will create an incentive for improved waste disposal.¹⁸⁶ The legislative history states that "it is essential that this incentive for greater care focus on the initial generators . . . since they . . . create the hazardous wastes, they have more knowledge about the risks inherent in their waste and how to avoid them"¹⁸⁷ Unlike indus-

rich Co. v. Murtha, 754 F. Supp. 960 (D. Conn. 1991) (No. 91-7450) ("[governmental] institutions stand in the place of ordinary citizens").

182. Indeed, one over-zealous attorney for a corporate PRP has threatened a suit of this kind against the citizens of New York City. *Designation of Metals as Hazardous Disputed in New York City Landfill Cost Recovery Suit*, 21 ENV'TL REP. (BNA) 1653 (Jan. 11, 1991).

183. Governor Jim Florio of New Jersey, one of the original drafters of Superfund law, comments that "[t]he very clear intent of the law is that corporate polluters are to be made responsible for cleaning up toxic wastes." Keith Schneider, *Industries and Towns Clash Over Who Pays to Tackle Toxic Waste*, N.Y. TIMES, July 18, 1991, at A1.

184. See Barnaby J. Feder, *E.P.A. Proposal on Costs of Waste Cleanups Is Halted*, N.Y. TIMES, May 18, 1992, at D1 (noting one instance in Southern California where communities may be responsible for \$500 million in the \$800 million cleanup of a landfill).

185. See *supra* notes 17-18 and accompanying text explaining the codisposal of industrial waste with MSW.

186. Meegan, *supra* note 61, at 1793.

187. *Id.* at 1793 n.58 (quoting S. REP. NO. 848, 96th Cong., 2d Sess. 11-12 (1980), reprinted in 1 SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RE-

trial generators, who know and may control their waste material, municipalities, in collecting the waste of others, are not in a position to know the inherent risks of the waste.¹⁸⁸ Furthermore, while theoretically local governments may attempt to minimize their potential liability by removing all hazardous substances from their waste before disposal, as a practical matter, achieving this, let alone enforcing it, is extremely tenuous. Considering the large number of households, it is idealistic to think municipalities could improve their waste collection methods so as to remove the less than one percent of their waste that is considered hazardous.

The goal of deterrence also relates to improving waste management, such as implementing recycling and treatment programs. Improving waste management, however, is costly.¹⁸⁹ Forcing municipalities to subsidize the industrial share of waste cleanup would exhaust the funds for improved waste treatment.¹⁹⁰ A more reasonable and effective method for inducing municipalities to improve waste management would be to impose liability, if at all, in a more flexible manner. One possible method would allow municipalities to reduce their liability or offer some other protection if they had in place a hazardous waste collection program.¹⁹¹ In the final analysis, the deterrence rationale for imposing liability is specious when applied to municipalities absent

SPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), Pub. L. No. 96-510, at 318-19).

188. Florio, *supra* note 11, at 118 (“[A] 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.”). *Cf.* Washington, *supra* note 64, at 818 (“The liability costs are factored into the choice of enterprise activity level, thus influencing the volume of waste that will be produced.”).

189. See Marla Conc, *Cities’ Tactics Vary in the War Against Waste*, L.A. TIMES, Mar. 22, 1991, at B1, B4 (estimating that recycling programs may cost a municipality millions of dollars).

190. Due to the national economy, municipalities cannot rely on the federal government for funding. “Since 1980, federal funding assistance for priority municipal programs . . . has been cut by more than half, falling from a high of \$48.4 billion to as low as \$19.5 billion.” Joe Petruzzi, Mayor of the Borough of Bellmawr, New Jersey, testimony before the Superfund Subcommittee of the Senate Environment and Public Works Committee (July 29, 1991).

191. The amendment to Senator Riegle’s Government-Sponsored Enterprises bill allows a municipality to take advantage of expedited final settlements if it had in operation a qualified household hazardous waste collection program. See 138 CONG. REC. S9389 (daily ed. July 1, 1992). The amendment notes that an acceptable program would have the following characteristics:

consideration of their unique circumstance.¹⁹²

VI. ALTERNATIVES FOR ALLOCATING COSTS OF SUPERFUND LIABILITY

Under the current statutory language of CERCLA, municipalities find no exemption from liability. The present scheme of imposing liability through contribution suits, however, is an inefficient and expensive means of extending liability to municipalities. Contribution suits tend to result in high transaction costs.¹⁹³ The costs of drawn out litigation may even exceed the municipalities eventual portion of liability.¹⁹⁴

One option for change is to amend the current framework by banning corporate PRPs from allocating costs through contribution suits. The Toxic Cleanup Equity and Acceleration Act advocates this approach,¹⁹⁵ but it has confronted strong opposition.¹⁹⁶ In the absence of

(A) at least semiannual, well-publicized collections at conveniently located collection points with an intended goal of participation by ten percent of community households;

(B) a public education program that identifies both hazardous household products and safer substitutes (source reduction);

(C) efforts to collect hazardous waste from conditionally exempt generators under section 3001(d) of the Solid Waste Disposal Act (because they generated a total quantity of 100 kilograms or less during a calendar month), with an intended goal of collecting wastes from twenty percent of such generators doing business within the jurisdiction of the municipality; and

(D) a comprehensive plan, which may include regional compacts or joint ventures, that outlines how the program will be accomplished.

Id. at S9390.

192. *But see* Meegan, *supra* note 61, at 1793-94 (arguing that holding municipalities liable will induce proper MSW disposal); Washington, *supra* note 64, at 818 (arguing for municipal liability as a means of making resident polluters pay and realize the importance of minimizing hazardous waste).

193. Transaction costs are any costs that do not go toward the actual site cleanup. They include administrative, legal, engineering, consulting, and other management costs expended by EPA and parties involved. Rather than going toward actual cleanup, these costs go toward establishing liability for site cleanup, along with cost allocation between the PRPs, the PRPs and the Superfund, and between PRPs and their insurers. *See* John T. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,413 (July 1991).

194. *But see Draft Superfund Study Finds Most Legal Fees Do Not Dwarf Cleanup Spending*, INSIDE E.P.A., Oct. 25, 1991, at 3 (citing study done by the Rand Corporation which concluded that, except for the insurance industry, transaction costs do not exceed cleanup costs).

195. *See supra* notes 142-144 and accompanying text analyzing § 4 of TCEAA.

196. Industrial groups critical of the legislation oppose a ban on third party suits

express statutory authority for a new approach to municipal liability, EPA¹⁹⁷ and courts¹⁹⁸ are left with the dilemma of how to apportion

because of the unfairness of protecting an entire class of PRPs from liability. They also contend that sheltering municipalities from contribution suits will undermine the deterrence goal of CERCLA because, without accountability, municipalities will have no incentive to minimize the amount of hazardous substances in their waste stream. *See* Meegan, *supra* note 61, at 1794 (“[The] history of haphazard waste disposal indicates that municipalities need incentives to ensure proper handling of such waste in the future.”).

197. In response to the TCEAA legislation, EPA announced that it would explore a new policy initiative. *EPA Kicks Off Major Effort to Shield Cities From Industry Superfund Lawsuits*, *INSIDE E.P.A.*, July 19, 1991, at 1, 7-8. The effort includes trying to expedite settlements with cities, drafting a model settlement plan, and pursuing contributions from municipalities in exchange for protection from third party suits. *Id.* EPA held a conference on October 10-11, 1991, to discuss guidelines for allocating costs for MSW at Superfund sites. *See EPA Seen Leaning Toward Superfund Plan Holding Cities Liable for Trash*, *INSIDE E.P.A.*, Oct. 18, 1991, at 1, 8-10 (discussing the three approaches advanced at the conference); *Cities, Industry Concerned by Early Options for Distributing Superfund Costs*, *INSIDE E.P.A.*, Oct. 11, 1991, at 3-4 (discussing the draft options for cost allocation).

198. Besides the cases of *B.F. Goodrich* and *Transportation Leasing*, at least 11 other suits pose the question of proper cost allocation. The list includes:

(1) Los Angeles-Long Beach Harbors, California (115 municipalities face estimated cleanup costs of \$350 million);

(2) Lowry Landfill, Arapahoe County, Colorado (EPA has sued a number of cities for disposal of sewage sludge and could allocate costs on the basis of the volume of sludge each disposed);

(3) Charles-George Reclamation Landfill, Tyngsborough, Massachusetts (12 municipalities face possible apportionment on a volumetric basis which may reach \$51 million);

(4) Mason County Landfill, Pere Marquette Township, Michigan (at least two municipalities served with third party complaints by industrial PRPs);

(5) Metamora Landfill, Metamora, Michigan (27 municipalities and other entities, including the local Girl Scouts and Boy Scouts, face a lawsuit by PRPs);

(6) GEMS landfill, Gloucester Township, New Jersey (private PRPs suing 70 municipalities and requesting contributions totaling \$10 million of the \$52 million estimated cleanup);

(7) Helen Kramer Landfill, Mantua Township, New Jersey (16 corporations suing 18 municipalities for contribution toward the estimated \$56 million cleanup);

(8) Lone Pine Landfill, Freehold Township, New Jersey (approximately 20 municipalities threatened to pay major portion of estimated \$52-70 million cleanup);

(9) Ludlow Sand & Gravel, Clayville, New York (25 municipalities named as fourth-party defendants in landfill cleanup action, 85% of which have already settled under plaintiffs' attorney's allocation scheme);

(10) Moyer Landfill, Eagleville, Pennsylvania (seven municipalities sued for disposal of MSW); and

(11) Mid-State Disposal Site, Cleveland Township, Wisconsin (11 municipalities seeking settlement with Weyerhaeuser Company; settlement under review by district court). Memorandum of Pending or Threatened Litigation, compiled by American

costs.

A. *Trial Balloon*

One proposed method of cost allocation, described as a "trial balloon,"¹⁹⁹ would apportion costs through three stages.²⁰⁰ First, EPA would calculate the national average cost to clean up a ton of MSW and a ton of industrial hazardous waste.²⁰¹ From these figures, EPA would establish a ratio for the costs of cleaning up MSW versus industrial waste.²⁰² This ratio would determine the total cost allocation at a given site.²⁰³

The second stage would determine whether the municipality could offer in-kind contributions in lieu of cash payments.²⁰⁴ For instance, a locality may own a waste water treatment facility. By allowing a cleanup contractor to access the facility, the municipality could deduct from its contribution amount the market rate for constructing such a facility.²⁰⁵ The third stage would consider equitable factors, like a municipality's ability to pay.²⁰⁶

The trial balloon method of cost allocation would apportion, however, an inequitable share on municipalities. The formulation bases

Communities for Cleanup Equity (1992) (on file with author). See also *supra* note 24 for a list of suits pending that involve municipalities.

199. This scheme of allocation is also referred to as the "double delta theory." *EPA Plan for Allocating Superfund Costs Surprises, Outrages Cities*, INSIDE E.P.A., Dec. 20, 1991, at 1, 8 [hereinafter *EPA Plan*]. Similar to the "delta theory," which some have advocated, the "double delta theory" "attempts to charge polluters for the costs of cleanup that derive from their waste streams." *Id.* at 8. For a critical analysis of the "delta theory," see Steinzor, *supra* note 4, at 123-25.

200. EPA assistant administrator for Solid Waste and Emergency Response, Don Clay, offered the "trial balloon" scheme of cost allocation at a speech he gave to the National League of Cities on December 12, 1991. See *EPA Plan, supra* note 199, at 8.

201. *Id.*

202. *Id.*

203. To illustrate this formulation, suppose a site has 100,000 tons of MSW and 20,000 tons of industrial waste. If the average cost for cleaning up a ton of MSW is \$1000 and \$10,000 per ton for industrial waste, then the cost ratio would be \$100 million for municipalities and \$200 million for industry: a ratio of 1:2. Consequently, if cleanup costs were \$30 million, industry would pay \$20 million and municipalities would pay \$10 million. See *infra* note 208 setting forth ACCE's chart illustrating cost percentages calculated under various ratio schemes.

204. *EPA Plan, supra* note 199, at 8.

205. *Id.*

206. *Id.*

costs on the volume of waste.²⁰⁷ Consideration of the toxic differences is provided for only implicitly at the initial phase of calculating the national averages of cost cleanup per ton of MSW versus industrial waste. Because municipalities generate a high volume of MSW, the proposed formula would require municipalities to pay approximately thirty percent of the total cleanup.²⁰⁸

Moreover, the use of this formula would undermine EPA's policy of encouraging early settlements.²⁰⁹ Municipalities will hesitate to sign settlements with EPA when the consequences are so high. For those who do not settle with EPA, industrial PRPs will pursue contribution

207. EPA justifies the volumetric formulation because "it is far easier to get information on volume than on relative toxicity or percentage of toxic materials in municipal waste." *Id.* at 10.

208. *EPA Plan*, *supra* note 199, at 8. Although EPA estimates the 30% breakdown, municipalities dispute that figure and argue that a more accurate estimate would make them liable for more than 60% of the total cleanup. *Id.* The chart below illustrates the breakdown of potential liability percentages under the trial balloon formula.

PERCENTAGE OF CLEANUP COSTS LOCAL GOVERNMENTS WILL PAY UNDER
EPA'S DRAFT ALLOCATION FORMULA

% MSW AT SITE	RATIO OF THE COSTS OF MSW CLEANUP TO INDUSTRIAL HAZARDOUS WASTE CLEANUP							
	1:20	1:10	1:7	1:5	1:3	1:2	2:3	1:1
99%	83%	91%	93%	95%	97%	98%	99%	99%
95%	49%	66%	73%	79%	86%	91%	93%	95%
90%	31%	47%	56%	64%	75%	82%	86%	90%
75%	13%	23%	30%	38%	50%	60%	67%	75%
50%	5%	9%	13%	17%	25%	33%	40%	50%
25%	2%	3%	5%	6%	10%	14%	18%	25%
10%	.6%	1%	2%	2%	4%	5%	7%	10%
1%	.1%	.1%	.1%	.2%	.3%	.5%	.7%	1%

Source: American Communities for Cleanup Equity (Dec. 17, 1991).

209. See *EPA Kicks Off Major Effort to Shield Cities from Industry Superfund Lawsuits*, INSIDE E.P.A., July 19, 1991, at 1, 7 (noting that EPA's municipal initiative was to "speed negotiations with cities").

suits under “‘EPA-approved’ method for calculating costs.”²¹⁰ Consequently, the trial balloon formula appears to favor litigious industrial parties, much to the dismay of municipalities.²¹¹

B. *Alternatives to the Trial Balloon Method of Apportionment*

Suggested methods of determining settlement amounts for generators of MSW, other than the trial balloon formulation, vary greatly depending on the particular viewpoint adopted. The list of possible approaches includes: (1) volume times toxicity; (2) a focus on remedy; (3) the availability of services; and (4) a fixed rate.²¹²

Under the “volume times toxicity” plan, the percentage of waste at a site that is municipal trash would be multiplied by a percentage that represents the percent of hazardous substances present in the MSW.²¹³ The calculated figure would represent the percentage of total costs municipalities would have to pay.²¹⁴

An alternative approach takes a more intense look at the particular remedy involved. This scheme charges the costs of specific remedial procedures to the party responsible for causing the condition necessitating the treatment.²¹⁵ The method attempts to trace one or more

210. *EPA Plan, supra* note 199, at 8. See also Letter from Robert G. Torricelli, Representative, U.S. House of Representatives, to William K. Reilly, Administrator, U.S. Environmental Protection Agency (Dec. 18, 1991) (on file with author) (“For the first time, EPA would bring certainty to the Superfund litigation process by allowing polluters to perform a few simple calculations to determine the large amounts they could collect by suing other parties.”).

211. As a consequence of strong opposition to the trial balloon proposal, EPA reopened discussion on other possible approaches to cost allocation. *EPA Backs Away from Waste Chief’s Plan to Assign Superfund Costs by Volume*, INSIDE E.P.A., Jan. 3, 1992, at 3. Other approaches include a volume-toxicity formula, a remedial focus, in-kind services, a fixed rate, or a “unit cost” ratio. *In Marked Shift from December Plan: EPA Options for Dividing Superfund Costs Cut Cities’ Share by Over Half*, INSIDE E.P.A., March 6, 1992, at 1, 8. See *infra* text accompanying notes 213-19 describing each option.

212. See *EPA Interim Settlement Guidance, supra* note 16, at 20-24.

213. *Id.* at 20. The percentage of MSW thought hazardous is estimated between 0.5% and 2%. See *supra* note 14 noting the results of numerous surveys.

214. To illustrate, if the volume of MSW is 1,000,000 tons, the total volume of all waste is 1,500,000, the cost of the remedy is \$40,000,000, and the MSW has a toxicity of 0.3%, the formula for calculating the settlement amount would read: $0.03 \times (1,000,000/1,500,000) \times \$40,000,000 = \$80,000$. Thus, the municipal parties would pay a total of \$80,000 of the total \$40,000,000 remedial cost for the site.

215. See *EPA Interim Settlement Guidance, supra* note 16, at 21-22.

distinct aspects of the remedy to a party.²¹⁶ If a certain remedy or part of a remedy were prescribed to treat MSW, then the municipal parties would be responsible for a percentage of that treatment.

A third method would allow the option of offering services in lieu of monetary support. A party's settlement amount would depend on what services the site requires, along with what services the particular party could provide.²¹⁷ In this vein, the services would be given a value, and the locality could opt to pay the relative amount in cash if it was unable or unwilling to provide the services.

A fixed rate approach to cost allocation would assign a certain percentage of the remedial costs to the generators.²¹⁸ EPA would select a national percentage based on the average percentage cost to municipalities of all the other approaches in consideration. The range of possible percentages vary from anywhere between one to ten percent.²¹⁹ This flat percentage would apply regardless of the particular circumstances of the site or municipal party.

C. *Proposal: A Percentage Cap*

Whatever option one adopts, the method of cost allocation should acknowledge the undeniable differences between municipal and industrial PRPs. The unique status of local governments, as well as the unique nature of MSW, should be considered in determining a municipality's fair share.²²⁰ Adoption of a unit cost formula with a standardized percentage cap would provide an equitable means of apportioning cleanup costs.²²¹

216. *Id.* For example, particularly appropriate remedies for MSW include capping or leachate collection regimens.

217. *Id.* at 22.

218. *Id.* at 24.

219. *Id.*

220. *See, e.g.,* *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) ("The Court has discretion to use equitable factors in apportioning damages in order to mitigate the hardships of imposing joint and several liability upon defendants who have only contributed a small amount to a potentially large indivisible harm.").

221. After much debate and analysis of each option discussed in the previous section of this Note, EPA released a draft notice for the Federal Register on March 10, 1992. *EPA Draft Slashes Municipal Superfund Costs to 4%, Enraging Industry*, INSIDE E.P.A., Mar. 27, 1992, at 1, 8. Acting as a supplement to its 1989 Interim Municipal Settlement Policy, EPA disclosed the methodology by which EPA will calculate the amount that the municipal generators and transporters owe collectively. *EPA Interim Settlement Guidance*, *supra* note 16, at 2. "[The] guidance is intended to facilitate settlement with contributors of MSW." *Id.* at 3. Those municipalities that settle with

Under the unit cost approach, the first formulation would compare the average national cost for remediation of an acre of industrial waste to the cost of remediation for an acre of MSW.²²² The average cost per acre to remediate MSW is estimated at \$94,000.²²³ In contrast, the average cost per acre to remediate industrial waste is thought to be \$2,279,000.²²⁴ By dividing the municipal remediation cost by the sum of the municipal and industrial remediation costs, 4% results.²²⁵ This figure represents the specific percentage of the estimated total remedial cost to be attributed to all the generators and transporters of MSW at the site.²²⁶

The second phase would evaluate certain criteria that address the

EPA "will receive contribution protection as provided by CERCLA Section 113(f)." *Id.*

In the guidance, EPA advocates adoption of the unit cost formula. EPA rationalizes use of the unit cost theory by stating:

The Agency believes that volumetric apportionment, the conventional method for arriving at settlements, is not appropriate for sites involving MSW because MSW may contain a very low amount of hazardous substances in relation to the volume of non-hazardous material. Even though certain studies suggest that MSW may contain small amounts of a variety of hazardous substances, the total quantity of such substances, according to these studies, is very low. In addition, there frequently exists a lack of site-specific data and information necessary to accurately attribute waste found at a MSW site to one particular MSW contributor. The methodology by which a settlement is calculated in this guidance is designed to account for this lack of certainty by providing a methodology for MSW settlements. The Agency believes this approach is fair, reasonable and in the public interest for all parties involved at a Superfund site.

Id. at 3-4.

Not long after EPA disclosed the guidance, industrial lobbyists voiced their disagreement to President Bush's administration. Barnaby J. Feder, *E.P.A. Proposal on Costs of Waste Cleanups Is Halted*, N.Y. TIMES, May 18, 1992, at 01. Members of the White House staff quickly pressured EPA to withdraw the notice and reopen discussion. *Id.* Due to the controversial nature of any approach EPA adopts, it is not likely that EPA will release a methodology until after the 1992 general election. See *EPA Policy to Ease Cities' Superfund Costs Appears to be Election Year Hostage*, INSIDE E.P.A., June 5, 1992, at 9.

222. *EPA Interim Settlement Guidance*, *supra* note 16, at 13.

223. *Id.* at 13-14. This amount derives from the average cost to close a RCRA Subtitle D landfill. See *id.* at 14 n.12, 31-33.

224. *Id.* at 14. This figure is based on the closure of an industrial waste landfill under CERCLA. See *id.* at 14, 29-30, 33-35.

225. The exact formulation is as follows: $\text{MSW Unit Cost} / (\text{MSW Unit Cost} + \text{Industrial Unit Cost})$, or more specifically, $\$94,000 / (\$94,000 + \$2,279,000) = 4\%$. See *id.* at 14.

226. To illustrate, if the estimated cleanup cost is \$50,000,000, the total settlement amount for all MSW generators and transporters at the site would be \$2,000,000.

unique conditions of a site.²²⁷ The exact settlement may be adjusted after consideration of: the litigation risks; the public interest; the volume of the waste contributed to the site; and the nature of the remedy.²²⁸ More importantly, consideration would also be given to the particular municipality's ability to pay.²²⁹

To further aid municipal PRPs, the final phase would allow municipalities to offset some of their share by providing in-kind services instead of cash payments.²³⁰ Substitute methods of contribution include, for example, treating leachate at publicly owned treatment works, offering security for the site, furnishing operation and maintenance services, providing construction materials and equipment, and constructing water lines.²³¹ Although not obligated to offer in-kind services, if it so chooses, a municipality may reduce its amount by the market value of the services offered.²³² Credit should also be given municipalities for their efforts to reduce household hazardous waste, along with those municipalities that handle MSW on a nonprofit basis.²³³

Use of the unit cost formulation and percentage cap, coupled with the equitable considerations and the possibility of in-kind services, results in an overall equitable methodology for cost allocation. The 4% cap is consistent with the municipal PRPs' degree of culpability. Because it acknowledges the low level of hazardous constituents present in the municipal waste stream, as well as the relatively low health risks caused by MSW, the formula protects municipalities from the draconian method of volumetric formulations. The simplicity of the method adds some degree of predictability and consistency to apportionment cases nationwide.

With respect to the actual payment of damages, consideration of a municipality's ability to pay must enter the picture.²³⁴ In light of a

227. *EPA Interim Settlement Guidance*, *supra* note 16, at 13.

228. *Id.* at 17.

229. *Id.*

230. *Id.* at 13. As used by EPA, in-kind services means "any services, facilities, or other non-monetary support for the remedy or its maintenance." *Id.* at 18.

231. *Id.* at 18.

232. *EPA Interim Settlement Guidance*, *supra* note 16, at 18-19. "The 'market value' approach . . . is appropriate because these services would have to be purchased on the open market if they were not offered by generators and transporters of MSW and thus represent an avoided cost for the non-MSW parties." *Id.* at 19.

233. *See* Ferrey, *supra* note 3, at 276.

234. *See supra* notes 173-74 and accompanying text addressing municipalities' financial straits.

municipality's constrained position to generate revenue, in-kind methods of contribution should be a viable option. Application of this proposed approach may persuade municipal PRPs to seek early settlement with EPA, thus reducing their overall transaction costs.

Adopting the unit cost and percentage cap method makes for a fair and reasonable compromise. On the one hand, it would not expressly create a blanket exemption for municipalities, thus placating the industrial and environmentalist sectors. On the other hand, it would reassure local governments that they will not be forced to bear a disproportionate share of the cleanup costs. Furthermore, allowing more flexible means of contribution diminishes the aggregate amount of municipal liability.

VII. CONCLUSION

As a consequence of corporate PRPs bringing third party suits against municipalities seeking contribution, local governments must now face Superfund's strict, joint and several liability scheme. Under interpretations of EPA and the judiciary, municipalities face liability as generators under CERCLA for their disposal of MSW. In an attempt to limit municipal liability, legislation has been introduced to protect municipalities from third party suits. With industry lobbying to allocate the costs on a volumetric basis, the plight of municipalities rests in the realization that they may be forced to pay as much per ton to clean up MSW as industry pays to clean up industrial waste. Considering the policies and positions involved, changes at the national level must take place, through legislation or the discretionary power of EPA, so as to protect municipalities and reaffirm the main principle of Superfund, that the polluter should pay.

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COMMENTS

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