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I. INTRODUCTION

OUT of the chorus of voices disparaging the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[1] liability scheme, there has emerged a new loud voice: local governments. Various interest groups, including the American Committees for Cleanup Equity and Local Governments for Superfund Reform, as well as some on Capitol Hill, are now

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992).

citing the issue of municipal liability under CERCLA as the leading example of the statute's alleged unfairness.[2]

At the center of the debate is whether municipalities should be liable under CERCLA as arrangers for the disposal (generators) or transporters of hazardous substances when municipalities collect, haul, and dispose of municipal solid waste ("MSW"). Municipalities argue that CERCLA's liability scheme was never intended to encompass local governments, especially since municipalities undertake a public function in handling these materials. Furthermore, municipalities argue that saddling them with volume-based liability is similarly unfair since it is industrial waste, not MSW, that is the source of the high pollutant levels prevalent in MSW landfills.[3] The primary opponents of this view, the manufacturing, oil, chemical, and insurance industries, contend that the liability scheme under CERCLA does encompass liability for the generation, transportation, or disposal of MSW,[4] which contains hazardous substances that contribute to the very environmental contamination CERCLA was intended to address. They further argue that the large volume of MSW present in landfills exacerbates the problem.[5]

While municipalities that find themselves owners or operators of a Superfund landfill have raised substantial concerns regarding CERCLA's liability scheme, this Article focuses on CERCLA's effect on municipalities that are generators or transporters[6] of MSW to

2. *See* Barnaby J. Feder, *In The Clutches Of The Superfund Mess*, N.Y. TIMES, June 16, 1991, at C1; William K. Burke, *Wasting The Superfund With Household Trash*, IN THESE TIMES, June 12-25, 1991; Robert Tomsho, *Big Corporations Hit By Superfund Cases Find Way To Share Bill*, WALL ST. J., Apr. 2, 1991, at A1.

3. *See* RENA I. STEINZOR & DAVID KOLKER, AMERICAN COMMUNITIES FOR CLEANUP EQUITY, LIABILITY UNDER SUPERFUND FOR MUNICIPAL SOLID WASTE AND SEWAGE SLUDGE: A TECHNICAL REVIEW 10 (1993) (noting that concentrations of hazardous substances in co-disposal landfills often is 10 to 100 times greater than in MSW-only landfills).

4. The debate goes beyond mere household trash because municipal sewage sludge and commercial "trash" also are common ingredients of municipal landfills. EPA's policy documents on this issue, as well as pending legislation on municipal liability, include all of these waste streams in the discussion. For purposes of this Article, all such materials will be referred to, collectively, as municipal solid waste ("MSW").

5. *See, e.g.*, WEBSTER, UNOCAL CORP., MUNICIPAL SOLID WASTE LANDFILLS: TOXIC CHEMICAL RELEASES AND THE ROLE OF INDUSTRIAL WASTES IN THOSE RELEASES (1988).

6. CERCLA imposes liability on four classes of persons. *See* CERCLA § 107, 42 U.S.C. § 9607. This Article focuses on generator and transporter liability under CERCLA § 107(a)(3),(4), 42 U.S.C. § 9607(a)(3),(4). Past and present owners and operators of a site comprise the other two categories of "covered persons," but these categories will not be discussed in this article. *See id.* § 107(a)(1),(2). For the text of CERCLA § 107(a), see *infra* note 8.

co-disposal landfills.[7] The discussion below also demonstrates that the caselaw has answered the question of whether municipalities are within the grasp of CERCLA—and the answer is "yes." However, municipalities and other local governments can minimize their exposure through the allocation process. While the courts and the United States Environmental Protection Agency ("EPA") seem to be leaning towards "going easy" on local governments, it is not at all clear that these governments will reap the benefits of this benevolence, given the municipalities' high costs of justifying their minimal share of liability.

7. Co-disposal landfills are those that have accepted both household waste and commercial or industrial wastes. *See* Rena Steinzor, *Local Governments and Superfund: Who Will Pay the Tab?*, 22 URB. LAW. 79, 103 (1990). According to Steinzor, the typical co-disposal landfill holds both waste transported by the municipality by its garbage collection system, and waste generated by the municipality's own operations. *Id.* at 102-03. For example, municipalities often generate hazardous waste through their parks departments' use of fertilizer or through the school board's disposal of asbestos. *Id.* at 102.

II. CERCLA LIABILITY SCHEME

The liability scheme of CERCLA[8] has been thoroughly explained in other contexts[9] and will not be explored in depth in this Article. In general, however, CERCLA provides EPA with broad authority to investigate and remediate hazardous waste sites and to recover the cost of that effort from responsible parties.[10] Private parties who are held liable or who settle their responsibility may then pursue other potentially responsible parties ("PRPs") in contribution actions to recover their response costs.[11]

CERCLA identifies four classes of PRPs: (1) the present owners or operators of hazardous waste sites;[12] (2) past owners or operators

8. CERCLA § 107(a), 42 U.S.C. § 9607(a). Section 107(a) 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, at any facility or incineration vessel owned or operated by another 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 Government 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.

9. *See generally* ALFRED E. LIGHT, CERCLA LAW AND PROCEDURE (1991); Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821 (1989); Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458 (1986).

10. CERCLA § 107(a), 42 U.S.C. § 9607(a). If a site presents an imminent and substantial danger, EPA is authorized to issue administrative orders or pursue injunctive relief for site investigation and cleanup. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a). Section 106(a) authorizes the President to pursue "such relief as may be necessary to abate such danger or threat." *Id.*

11. CERCLA § 113(f), 42 U.S.C. § 9613(f).

12. CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). Section 101(20) defines "owner or operator." It states: "The term 'owner or operator' means . . . in the

of hazardous waste sites;[13] (3) generators of hazardous waste and persons who arranged for disposal or treatment of hazardous substances;[14] and (4) transporters of hazardous substances who selected the disposal sites.[15]

Strict liability is imposed upon PRPs under CERCLA.[16] In addition, courts have interpreted the language of CERCLA as imposing joint and several liability for pollution cleanup when the environmental harm is indivisible.[17] Under developing case law,

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case of an onshore facility or an offshore facility, any person owning or operating such facility . . . ." *Id.* § 101(20)(A), 42 U.S.C. § 9601(20)(A). "The term 'person' means 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." *Id.* § 101(21), 42 U.S.C. § 9601(21) (emphasis added).

13. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

14. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). CERCLA defines "hazardous substances" as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (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 [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. §§ 6901-6992] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. 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).

Id. § 101(14), 42 U.S.C. § 9601(14) (bracketed language appears in Code).

For a discussion of the expanding scope of CERCLA generator liability, see Meigan Flood Cooper, Note, *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.: The Bottomless Pit of CERCLA Generator Liability*, 4 VILL. ENVTL. L.J. 417 (1993).

15. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). CERCLA defines "transport" or "transportation" as "the movement of hazardous substances by any mode." *Id.* § 101(26), 42 U.S.C. § 9601(26).

16. Although CERCLA does not expressly impose strict liability, courts have consistently interpreted CERCLA to impose strict liability. *E.g.*, B.F. Goodrich v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992); General Elec. v. Litton Indus., 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); United States v. Monsanto, 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

17. *See, e.g.*, United States v. R.W. Meyer, Inc., 932 F.2d 568, 570 n.2 (6th Cir. 1991) ("Joint and several liability may be imposed on a responsible party, even though its role in creating the hazardous site was small, if the harm is indivisible."); O'Neil v. Picillo, 883 F.2d 176, 178-81 (1st Cir. 1989) (imposing strict liability absent defendant's showing of divisibility of harm).

however, defendants in third-party contribution actions may only be severally liable.[18]

The statute provides settlement mechanisms that EPA may employ, including cost recovery agreements[19] and de minimis settlements.[20] As part of a settlement with the government, PRPs are entitled to statutory contribution protection for matters addressed in the settlement, i.e., the settling PRP cannot be held liable in a

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18. *See* New Jersey Dep't of Envtl. Protection & Energy v. Gloucester Envtl. Mgmt. Servs., 821 F. Supp. 999, 1004 (D.N.J. 1993) ("Third-party defendants . . . are . . . only severally liable for contribution under § 113(f)(1) of CERCLA."); *see* United States v. Kramer, 757 F. Supp. 397, 414 (D.N.J. 1991) (indicating in dicta that liability for third-party defendants is several). For a discussion of the evolving factors regarding allocation of liability, see *infra* Part VII.

19. CERCLA § 122(h), 42 U.S.C. § 9622(h). Section 122(h) of CERCLA states in relevant part:

> The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

Id. § 122(h)(1), 42 U.S.C. § 9622(h)(1).

20. *Id.* § 122(g), 42 U.S.C. § 9622(g). The de minimis settlement provision reads:

> Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:
>
> (A) Both of the following are minimal in comparison to other hazardous substances at the facility:
>
> (i) The amount of the hazardous substances contributed by that party to the facility.
>
> (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.
>
> (B) The potentially responsible party-
>
> (i) is the owner of the real property on or in which the facility is located;
>
> (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and
>
> (iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.
>
> This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

Id. § 122(g)(1), 42 U.S.C. § 9622(g)(1).

subsequent contribution action brought by other PRPs associated with the site.[21]

CERCLA contains very limited affirmative defenses. The defendant can avoid liability if he can show that the release or threat of release was caused by an act of God, an act of war, or an act of certain third parties.[22] As the first two defenses are reserved for extraordinary circumstances, the typical defendant has only the third-party defense as an affirmative barrier to liability. Even the third-party defense, however, contains limitations which would render the defense unavailable in the usual municipal situation.[23]

III. SCOPE OF MUNICIPAL INVOLVEMENT UNDER CERCLA

As generators or transporters of MSW, municipalities are increasingly finding themselves the target of contribution actions brought by industrial PRPs seeking to expand the scope of Superfund liability and spread the cost of cleanup.[24] Several studies have addressed the degree of local government involvement at

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21. There are actually three separate contribution protection provisions in CERCLA. Section 122(g)(5) protects de minimis settlors from contribution relating to matters addressed in the settlement. It provides:

> A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

CERCLA § 122(g)(5), 42 U.S.C. § 9622(g)(5). Using identical language, § 122(h)(4) provides protection under EPA's cost recovery agreement settlement authority. *See id.* § 122(h)(4), 42 U.S.C. § 9622(h)(4). The general contribution protection provision for all other parties to administrative or judicially approved settlements is provided by § 113(f)(2), which uses substantially similar language. *See id.* § 113(f)(2), 42 U.S.C. § 9613(f)(2).

22. *See* CERCLA § 107(b), 42 U.S.C. § 9607(b).

23. *See id.* § 107(b)(3), 42 U.S.C. § 107(b)(3). The defendant must show that (1) the release was caused *solely* by an "act or omission of a third party . . . other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant;" (2) the defendant "exercised due care;" and (3) the defendant "took precautions against foreseeable acts or omissions" of the third party. *Id.* In the instance where a municipality contracts for private hauling of its MSW, the third-party defense would not be available because the private party's act or omission causing the release, would occur in connection with a contractual relationship with the municipality. Thus, the municipality could not satisfy the first element of the defense. *See generally* J.B. Ruhl, *The Third-Party Defense to Hazardous Waste Liability: Narrowing the Contractual Relationship Exception*, 29 S. TEX. L. REV. 291 (1988)(outlining parameters of contractual relationship exception to CERCLA's third-party defense).

24. *See* 138 CONG. REC. S8630 (daily ed. June 23, 1992) (statement of Sen. Lautenberg) (noting that approximately 450 local governments in 11 states are involved in Superfund litigation).

Superfund sites. According to one EPA study, there were 318 municipal sites on, or proposed for, the Superfund National Priorities List ("NPL")[25] as of March 1990.[26] Other studies have estimated that approximately twenty percent of the sites on the NPL are municipal landfills,[27] and that local governments are involved in some manner at approximately twenty-five percent of the sites on the NPL.[28]

One study identified 403 Superfund sites where local governmental entities are involved.[29] At 143 of these sites, EPA has notified one or more municipalities of their potential liability by either a general or specific notice letter, or both.[30] While the data is preliminary—a remedy has been selected at only 156 of the 403 sites—it is estimated that the total cost of cleanup will approach $2.1 billion.[31]

Since EPA entered the municipal liability field it has consistently suggested that municipal PRPs seek de minimis and other settlements with EPA in order to obtain protection from contribution

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25. The National Priorities List is established pursuant to CERCLA § 105(c), 42 U.S.C. § 9605(c), and appears at 40 C.F.R. Pt. 300, app. B (1993). It is the list of "uncontrolled hazardous substance releases in the United States that are priorities for long term remedial evolution and response." 40 C.F.R. § 300.5 (1993).

26. HAZARDOUS SITE EVALUATION DIVISION, ENVIRONMENTAL PROTECTION AGENCY, MUNICIPAL SITES ON THE NATIONAL PRIORITIES LIST (March 1990). Municipally-owned sites as well as privately-owned sites with a record of receiving municipal waste are included in the classification of a site as "municipal."

27. *See* Superfund Program; Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071, 51,071 (1989) [hereinafter Interim Settlement Policy].

28. *See* CLEAN SITES, MAIN STREET MEETS SUPERFUND: LOCAL GOVERNMENT INVOLVEMENT AT SUPERFUND HAZARDOUS WASTE SITES 5 (Nancy W. Newkirk ed., 1992) [hereinafter CLEAN SITES]. "Clean Sites is a national nonprofit . . . organization dedicated to solving America's hazardous waste problem." *Id.* at 10. "It conducts policy analyses, facilitates dialogues, develops policy solutions and conducts education and outreach activities, all geared toward improving the hazardous waste cleanup process." *Id.*

29. *Id.* at 11.

30. *Id.* The failure of EPA to issue a PRP letter to a particular municipality does not necessarily preclude that municipality's involvement. For instance, at the remaining 260 sites, EPA has not "notified" any local governments even though the sites may be presently or previously owned by a municipality or may have received municipal waste. *Id.* Some local governments have received notice at more than one site. The study tabulated a total of 822 notice letters issued by EPA to 735 local governments at the 143 sites. CLEAN SITES, *supra* note 28, at 24.

31. *Id.* at 21. Cost data for the remaining 237 of the 403 sites involving municipalities was not available for the Clean Sites study. Further, the remedy cost estimate excludes site investigation expenses and transaction costs. *Id.* A study conducted by the University of Tennessee estimated the total cost for cleaning up all the hazardous waste sites to be $750 billion. *Study Finds Potential Hazardous Waste Cleanup Costs May Top $1.5-Trillion*, INSIDE E.P.A., Jan. 3, 1992, at 13.

actions by private industrial PRPs.[32] However, even though EPA has encouraged such settlements and drafted numerous guidance documents to facilitate agreement, relatively few settlements with municipal contributors, de minimis or otherwise, have occurred. In fact, between the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA")[33] and October 1993, EPA entered into only 125 de minimis settlements; 112 with de minimis waste contributors and thirteen with de minimis landowners.[34] In conjunction with thirteen de minimis settlements,[35] over 5,400 PRPs have resolved their liability to EPA at 78 Superfund sites.[36] Of that total, only 126 PRPs, a mere 2.4%, are municipalities.[37]

EPA also prepared a report for Congress in the Spring of 1993 which detailed EPA's progress in municipal contributor settlements.[38] This report revealed that despite EPA's professed willingness to entertain settlement offers, few agreements had actually been reached. As of the date of that report, only five settlements involving fifty municipal contributor PRPs[39] had been completed, and a mere seven others were in progress.[40]

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32. *See,* Robert Van Heuvelen, Director, Civil Enforcement Division, Environmental Protection Agency, Remarks at the ABA/SONREEL "Hazardous Waste and Superfund 1992" Teleconference (May 7, 1992), 24 CHEMICAL WASTE LITIG. REP. 374 (July 1992). CERCLA authorizes EPA to reach settlement agreements with *de minimis* waste contributors and de minimis landowners. CERCLA § 122(g), 42 U.S.C. § 9622(g). For the text of § 122(g)(1), see *supra* note 20.

33. Pub. L. No. 99-499, 100 Stat. 1613 (1986)(codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992)).

34. *See* OFFICE OF WASTE PROGRAMS ENFORCEMENT, ENVIRONMENTAL PROTECTION AGENCY, THE FIRST 125 DE MINIMIS SETTLEMENTS - STATISTICS FROM EPA'S DE MINIMIS DATABASE 4 (October 1993) [hereinafter DE MINIMIS SETTLEMENT SUMMARY]. CERCLA authorizes EPA to settle with de minimis waste contributors when that person's waste contributions, with respect to both volume and toxicity, are "minimal in comparison to [the] other hazardous substances" of the site. CERCLA § 122(g)(1)(A), 42 U.S.C. § 9622(g)(1)(A). For the text of this provision, see *supra* note 20.

35. *See* DE MINIMIS SETTLEMENT SUMMARY, *supra* note 34, at 7. CERCLA authorizes EPA to enter into de minimis settlements with landowners who do not "conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance [on their land] and did not contribute to the release or threat of release." CERCLA § 122(g)(1)(B), 42 U.S.C. § 9622(g)(1)(B).

36. *See* DE MINIMIS SETTLEMENT SUMMARY, *supra* note 34, at 7.

37. *Id.* The De Minimis Settlement Summary defines "municipalities" as "any political subdivision of a state, including cities, townships, utility districts, school districts, water districts and road commissions." *Id.*

38. OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, SETTLEMENTS WITH MUNICIPAL WASTE GENERATORS AND TRANSPORTERS SINCE 1991 UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (1993).

39. *Id.* at 2.

40. *Id.*

The extent of municipal liability and the allocation of response costs to municipalities under Superfund continues to be an area of great uncertainty. Although EPA and Congress recognize the public function performed by municipalities in the collection and disposal of MSW, industrial PRPs and municipalities continue to debate the precise share of Superfund liability municipalities should bear.

IV. JUDICIAL RESPONSES TO MUNICIPAL LIABILITY UNDER CERCLA

The evolving case law pertaining to municipal liability under CERCLA has clearly run in favor of the industrial generators. Courts have held that municipalities are not exempt from Superfund liability for the generation, transportation, or disposal of MSW.[41] A discussion of the principle cases follows.

A. *Transportation Leasing Co. v. California*

Transportation Leasing Co. v. California[42] involved a contribution suit by over sixty industrial PRPs against twenty-nine municipal contributors at the Operating Industries, Inc. landfill in California.[43] The municipalities contended that household waste generated by residences and commercial establishments did not constitute "hazardous substances" under CERCLA.[44] The municipalities also argued that MSW is exempt from regulation as a hazardous substance under CERCLA by virtue of the household waste exclusion under the Resource Conservation and Recovery Act of 1976 ("RCRA").[45]

41. *See* Steven Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 262-67 (1988) (Stating that MSW is not exempt under statutory language and judicial interpretations of CERLCA and RCRA).

42. No. 89-7368, 1990 U.S. Dist. LEXIS 18193 (C.D. Cal. Dec. 5, 1990).

43. The Operating Industries, Inc. site remained on the NPL as of October 1992. 40 C.F.R. pt. 300, app. B (1993).

44. *Transportation Leasing*, 1990 U.S. Dist. LEXIS 18193, at *3-4. The defendant municipalities advanced three other defenses in a motion for summary judgment. First, they argued that the issuance of business licenses to residents of cities did not render them "arrangers" under CERCLA § 107(a)(3). *Id.* at *1. Defendants' second argument was that they had not "owned or possessed" the waste since the trash collection in the cities was handled by private parties. *Id.* at *2. Third, defendants contended that the issuance of business licenses to the independent parties hauling the waste did not constitute "arrang[ing] for disposal" under CERCLA § 107(a)(3). *Id.* The court declined to address these defenses because a factual record had not yet been developed. According to the court, it "would have to revisit these issues when actually deciding whether the precise conduct of each city is sufficient for the imposition of liability under CERCLA." *Id.* at *3.

45. *Id.* at *4. The Resource Conservation Recovery Act of 1976 is set forth as Subchapter III of the Solid Waste Disposal Act and codified at 42 U.S.C. §§ 6921-6939b (1988 & Supp. III 1991). Section 6921(b) authorizes EPA to establish the

The court found no basis to adopt RCRA's definition of hazardous "waste" when enforcing CERCLA, which regulates hazardous "substances."[46] Accordingly, the court held that household waste is not exempt from regulation under CERCLA.[47]

In a subsequent decision in that case, the district court held that a municipality that had contracted with a hauler for transport and disposal of its MSW had "arranged for disposal" under CERCLA.[48] However, to prove the liability of the municipal defendants, the court held, the plaintiff industrial generators must show that the municipalities owned or possessed the hazardous substances.[49]

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

B.F. Goodrich Co. v. Murtha[50] involved actions brought by EPA, the State of Connecticut Department of Environmental Protection, and a coalition of industrial generators, to recover past and future cleanup costs from the owners/operators of the Beacon Heights and Laurel Park landfills in Connecticut.[51] The owners of the landfills subsequently brought contribution actions against approximately 200 third-party defendants, including numerous Connecticut municipalities.[52] The municipalities moved for summary judgment on the grounds that their contribution of MSW to the site did not subject them to liability under CERCLA.[53] The district court denied the motion, holding that (1) MSW can be regulated as a hazardous substance under CERCLA;[54] (2) RCRA's

characteristics of hazardous waste. 42 U.S.C. § 6921(c). EPA, in promulgating regulations defining "hazardous waste" under RCRA, carved out an exception for "household waste." *See* 40 C.F.R. § 261.4(b)(1) (1992). The regulations expressly exclude "[h]ousehold waste, including household waste that has been collected, transported, stored, treated, disposed, recovered . . . or reused." *Id.* The regulations define "household waste" as "any material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campground, picnic grounds and day-use recreational areas)." *Id.*

46. *Transportation Leasing*, 1990 U.S. Dist. LEXIS 18193, at *4.

47. *Id.* at *7. For CERCLA's definition of "hazardous substances," see *supra* note 14.

48. Transportation Leasing Co. v. California, 34 Env't Rep. Cas. (BNA) 1203, 1218 (C.D. Cal. 1991)

49. *Id.*

50. 754 F. Supp. 960 (D. Conn. 1991), *aff'd*, 958 F.2d 1192 (2d Cir. 1992).

51. *Id.* at 961-62. These landfills had been designated as NPL sites. *Id.* at 961.

52. *Id* at 962.

53. *Id.*

54. *Murtha*, 754 F. Supp. at 968 ("The [Interim Settlement] policy, coupled with the legislative history and the lack of an explicit exemption of MSW from CERCLA strongly suggests the absence of any intention to exclude MSW from CERCLA.").

exclusion of household solid waste from the definition of hazardous waste was not incorporated into the CERCLA definition of hazardous substances;[55] (3) a municipality that disposes of hazardous substances at a site where such substances are found may be held liable under CERCLA;[56] and (4) a genuine issue of material fact remained as to whether the MSW contained hazardous substances for purposes of CERCLA liability.[57]

On appeal, the municipalities presented five arguments in support of their contention that CERCLA was not meant to hold municipalities liable for contribution to cleanup costs based on the mere disposal of MSW. The court rejected each argument.[58] First, the municipalities argued that a local government cannot be held liable under CERCLA when it arranges for the disposal or treatment of hazardous substances while acting in its sovereign capacity.[59] The municipalities relied on *Lincoln v. Republic Ecology Corp.*,[60] which held that a city's involvement in the disposal of abandoned automobiles at a CERCLA site was *not* "arranging for disposal," but, instead, was "nothing more that a non-contributory exercise of its sovereign power to abate public nuisances."[61] The Second Circuit rejected the validity of a sovereign function exception in this context.[62] The court emphasized that CERCLA expressly included municipalities, states, and other political subdivisions within its definition of PRP. The court concluded: "[T]o construe CERCLA as providing an exemption for municipalities arranging for the disposal of municipal solid waste that contains hazardous substances simply because the municipality undertakes such function in

55. *Id.* ("Congress provided for site cleanup with full knowledge of RCRA and its treatment of household waste.").

56. *Id.* ("To the extent that any municipality disposed of or arranged for the disposal of a hazardous substance and there is a release of the substance at a site, the municipality may be held liable under Section 107(a)(3).").

57. *Id.* at 968-72.

58. B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1199-1206 (2d Cir. 1992).

59. *Id.* at 1199.

60. 765 F. Supp. 633 (C.D. Cal. 1991).

61. *Id.* at 634. The court observed that "[s]trict liability under CERCLA should not attach to government entities engaged in legitimate sovereign, as opposed to proprietary or commercial, functions." *Id.* at 637-38.

62. *Murtha*, 958 F.2d at 1199. The court wrote:

> We regard *Lincoln* as merely holding that the city's activities in that case, taken in furtherance of its sovereign function to abate public nuisances, were insufficient to give rise to "arranger" status for purposes of liability under CERCLA. To the extent *Lincoln* can be construed as extending the "function as a sovereign" exception beyond the liability provision for owners or operators to that for arrangers, we disagree with it.

Id. (citations omitted).

furtherance of its sovereign status would create an unwarranted break in the statutory chain of responsibility."[63]

Second, the municipalities argued that CERCLA's silence regarding MSW demonstrated Congress's intent to exclude MSW from the statute's definition of hazardous substances.[64] In rejecting this argument, the Second Circuit noted that Congress had written an extremely broad definition of hazardous substances, which incorporated definitions from four other statutes.[65] The court further noted that Congress addressed CERCLA's specific exclusions from the definition of hazardous substance and decided to exclude only two substances—natural gas and oil.[66] The court reasoned that Congress's silence on the issue of MSW compelled a finding that MSW was within the definition of "hazardous substance" and therefore regulated under CERCLA.[67]

Third, the municipalities argued that the exemptions for household hazardous waste in regulations under RCRA should be incorporated into CERCLA.[68] The Second Circuit found this argument unpersuasive, stating that the household waste exclusion was Congress's way of ensuring, through a narrow RCRA exemption, that specific waste streams were excluded from RCRA coverage as "hazardous waste."[69] The court recognized Congress's use of the terms "substance" in CERCLA and "waste" in RCRA as worthy of sustaining different treatment by the courts.[70] The court also noted that the municipalities must not look to an exemption from a regulation under a separate statute for authority, but must look to the

63. *Id.*

64. *Id.* at 1200-01.

65. *Id.* at 1200.

66. *Murtha*, 958 F.2d at 1201.

67. *Id.* The Second Circuit concluded that MSW constituted a "hazardous substance" under CERCLA because it was shown to contain what had been definitively listed as hazardous substances. *Id.* The court noted that "[f]or us to consider the whole separate from its hazardous constituent parts would be to engage in semantic sophistry." *Id.*

68. *Id.* The defendant municipalities argued that the household waste exemption under RCRA, discussed *supra* note 45, should be incorporated into the CERCLA definition of hazardous substance. The argument is based on CERCLA's use of the RCRA statute, among others, in defining hazardous substance. For CERCLA's definition of hazardous substance, see *supra* note 14.

69. *Id.* at 1202. The court declared that "[t]o construe this exemption to apply also to CERCLA would frustrate that Act's broad remedial purposes as well as unjustifiably expand the scope of the Resource Conservation and Recovery Act's regulations." *Id.*

70. *Murtha*, 958 F.2d at 1202.

language of CERCLA itself which does not provide an exemption for MSW in its definition of "hazardous substance."[71]

Fourth, the cities argued from legislative history and legislative debate that MSW should be excluded from the jurisdiction of CERCLA.[72] Without discussing the details of the cities' argument, the court rejected their use of legislative history as inaccurate and unjustified. The Second Circuit wrote that the municipalities' argument was based on a misunderstanding of the context of various floor statements made by Representative Stockman, who was commenting on RCRA, not CERCLA, in the language the defendants cited.[73]

Fifth, the municipalities argued that EPA's interpretation of CERCLA in its Interim Municipal Settlement Policy ("Interim Settlement Policy")[74] indicated that no liability should be imposed on municipalities for MSW disposal.[75] Characterizing the municipalities' view of EPA's policies as "more wish than reality," the court rejected the notion that the Interim Settlement Policy was an agency edict that only industrial waste contributors will be pursued.[76] The court noted that the Interim Settlement Policy "merely indicates that the EPA presently does not intend to pursue enforcement actions against municipalities generating or transporting municipal waste—regardless of whether hazardous substances are present—unless the total privately generated commercial hazardous substances are insignificant compared to the municipal waste."[77] The court also quoted language from the Interim Settlement Policy, which states that nothing in the Interim Settlement Policy precludes a third party from initiating a contribution suit.[78]

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71. *Id.* at 1203. The court wrote that "[a] regulatory exemption [under a separate statute] cannot take precedence over Congress' concerns spelled out in . . . the Act." *Id.*

72. *Id.* at 1203.

73. *Id.* at 1204. "On this question, review of the legislative history reveals a picture more confusing than pellucid, and a Congressional purpose not so discernible that it should cause [the court] to depart from the plain meaning of [CERCLA] § 9601(14)." *Id.* at 1205.

74. Interim Settlement Policy, *supra* note 27.

75. *Murtha*, 958 F.2d at 1205. The municipalities argued that the court should adopt EPA's interpretation. *Id.* For a discussion of the Interim Settlement Policy, see *infra* notes 87-98 and accompanying text.

76. *Murtha*, 958 F.2d at 1205. The court did not take issue with the municipalities' assertion that EPA interpretations of CERCLA, as the Agency in charge of administrating the statute, should be followed; it did disagree with the way in which the municipalities interpreted EPA's policy. *Id.*

77. *Id.*

78. *Id.*

The Second Circuit fully recognized that its decision could increase the burden on municipal taxpayers.[79] However, the policy argument that municipalities would be overwhelmed with Superfund liability still did not pursuade the court into accepting any of defendants' arguments.[80] However, the court did identify what it felt to be the proper and statutorily sanctioned method of avoiding unjust burdens on municipalities: the liability allocation process.[81]

On remand, the industrial generator defendants sought to file third-party complaints against 1,151 potential contributor defendants, including eighteen municipalities.[82] Given the enormity of the case, the district court faced a unique procedural issue: how to fairly evaluate and procedurally manage the large number of claims.[83] It was decided that the coalition would be permitted to pursue the claims against a particular third-party defendant only if it could legally substantiate the claim.[84]

The court utilized a test based on Rule 11 of the Federal Rules of Civil Procedure to determine if the coalition had met its burden. Rule 11 requires counsel to investigate to ensure that the claim is

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79. *Id.* at 1206.

80. *Murtha*, 958 F.2d at 1206. The court noted that "burdensome consequences are not sufficient grounds to judicially graft an exemption into a statute, a graft that would thwart the language, purpose, and agency interpretation of the statute." *Id.*

81. *Id.* The court wrote:

> An array of equitable factors may be considered in this allocation process, including 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. Consequently, the amount of liability imposed will not necessarily be a function solely of the total volume of municipal waste disposed of in the landfills, but rather will be a function of the extent to which municipal dumping of hazardous substances both engendered the necessity, and contributed to the costs, of cleanup.

Id.

82. B.F. Goodrich Co. v. Murtha, 815 F. Supp. 539, 540 (D. Conn. 1993). The industrial generator defendants in this action formed two coalitions, one for each site involved. These coalitions worked together to pursue contribution for the costs of cleanup from other PRPs. The Laurel Park coalition was involved in this action. *Id.*

83. *Id.* at 541. As the court wrote, "[t]he issue here is not the merits of [the coalition's] claims, but the most efficient and fair method of determining their validity." *Id.* at 543.

84. *Id.* at 541. It is not clear from the opinion how this procedural format was chosen, nor who chose it, the court, the parties, or both. *See id.* A master was assigned to make this determination. The master denied the coalition's request to pursue these claims from which the coalition sought *de novo* review. *Id.* at 546.

well grounded in fact.[85] Thus, the court evaluated the claims against the municipalities to determine if the claims were sufficiently grounded in fact.[86]

The court found the claims against the municipalities to be well grounded in fact and permitted the coalition to pursue its claims. The district court relied on an expert opinion that MSW usually contained the types of hazardous substances found at the site at issue.[87] Further, since the municipal defendants could not show that, as a matter of law, the MSW did not contain hazardous substances, the court determined that the Rule 11 threshold had been met.[88]

C. *New Jersey Department of Environmental Protection & Energy v. Gloucester Environmental Management Services, Inc.*

In *New Jersey Department of Environemental Protection & Energy v. Gloucester Environmental Management Services, Inc.* (*"GEMS"*),[89] municipal contributors filed a motion for summary judgment concerning their liability as generators of a hazardous substance; the motion

85. *Id.* at 543; *see* FED. R. CIV. P. 11.

86. *Murtha*, 815 F. Supp. at 543. The requirement of being "legally substantiated" was satisfied by virtue of the Second Circuit's decision on appeal. *Id.*

87. *Id.* The coalition expert did not have any evidence that these municipalities disposed of hazardous substances in their MSW. *Id.*

88. *Id.* at 543. Regarding the industrial *non*-municipal generators, however, the court required specific information regarding generation of waste for each proposed defendant. Reliance on an expert's generic opinion, as was used in the case of the municipalities, was not sufficient for use in the claims against the other third-party defendants. *Id.* at 544-46. The court does not explain this apparent easing of the burden with regard to claims against the municipalities.

In December 1993, on remand, the Connecticut district court issued another ruling in the *Murtha* case. B.F. Goodrich v. Murtha, 840 F. Supp. 180 (D. Conn. 1993). On a motion for summary judgment, the court held that the Connecticut municipalities were not liable under CERCLA because Murtha and the other PRPs had not shown that the municipalities dumped any hazardous substances at the site. *Id.* at 189. To prove their case, the non-municipal PRPs had relied heavily on an affidavit of an expert which asserted that the waste at the sites in question was hazardous. *Id.* at 187-89. The affidavit contained a summary of a study which concluded that MSW generally contains some hazardous substances. *Id.* at 187. However, the court found that these findings were an insufficient basis for imposing liability on the municipalities. *Id.* The court stated "the fact that waste contains items which were made with, by the use of, or incorporated components or elements which constituted or in turn contained [hazardous substances] is not a sufficient basis for finding that disposal of such waste constitutes disposal of [hazardous substances]." *Id.* at 188 (citing B.F. Goodrich v. Murtha, 815 F. Supp. 539, 545-46 (D. Conn. 199)). In sum, the court concluded that "no adequate foundation has been laid for [the expert's] opinion to be applied to the [municipalities]." *Id.* at 188.

89. 821 F. Supp. 999 (D.N.J. 1993).

was subsequently denied.[90] Following the rationale of the Second Circuit in *Murtha*, the district court held that municipalities are not per se exempt from liability under CERCLA for disposal of MSW[91] and that MSW is included in the definition of hazardous substance.[92] In so holding, however, the court was very clear to point out that it was *not* holding that the municipal generators were "equally culpable with other PRPs."[93] The *GEMS* court emphasized that the municipalities' protection from suffering an undue remediation burden was in the allocation of liability process.[94]

The foregoing cases addressing municipal liability have undoubtedly established that municipalities cannot easily escape the liability net imposed by CERCLA for the generation, transportation, and disposal of hazardous waste substances, including MSW. It is clear that future CERCLA litigation involving municipalities will focus on allocation of responsibility between industrial and municipal contributors.

V. ADMINISTRATIVE AND LEGISLATIVE RESPONSES

Municipalities' vocal criticism of the CERCLA process led EPA to search for a CERCLA enforcement policy more amenable to municipalities; the Interim Settlement Policy was the result. An unintended consequence of the Interim Settlement Policy, however, was an increase in third-party contribution suits brought by industrial PRPs seeking to share the costs of Superfund liability.[95] The following discussion addresses the Interim Settlement Policy and EPA's attempts to establish settlement criteria for parties that would

90. *Id.* at 1003.

91. *Id.* at 1004-05. "It is clear from [CERCLA's] definition of 'person' . . . that municipalities are explicitly included as PRPs for purposes of [determining] liability . . . ." *Id.* at 1004. For CERCLA's definition of "person," see *supra*, note 12.

92. *New Jersey Dep't of Envtl. Protection & Energy*, 821 F. Supp. at 1005. "The fact that MSW is not specifically mentioned as a hazardous substance [in CERCLA] does not exempt it from CERCLA's reach . . . ." *Id.*

93. *Id.* at 1008. The court went on to note that the allocation of liability in contribution actions should reflect appropriate equitable factors. *Id.* (citing CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1)). For a further discussion of liability allocation, see Part VII, *infra*.

94. *Id.* at 1008. The court wrote that "even CERCLA suggests that municipalities should not be held equally culpable due to the relatively low toxicity level of MSW. Section 113(f)(1) of CERCLA gives courts the discretion to resolve contribution actions according to 'such equitable factors as the court deems appropriate.'" *Id.* (footnote omitted)(quoting CERCLA § 113(f)(1), 42 U.S.C. § 113(f)(1)).

95. *See* Lynne A. Reinders, Note, *Municipal Liability Under Superfund as Generators of Municipal Solid Waste: Addressing the Plight of Local Governments*, 43 URB. & CONTEMP. L. 419, 421 (1993).

otherwise not be named as PRPs by EPA, but for which settlement with EPA is necessary to receive protection from third-party contribution suits. The section concludes with a discussion of the legislative activities dealing with this issue.

A. EPA's Interim Municipal Settlement Policy

In 1989, EPA issued the Interim Municipal Settlement Policy[96] to delineate how it will treat municipalities in terms of notice of potential liability and involvement in the enforcement and negotiation process. The Interim Settlement Policy addresses three basic issues. The Interim Settlement Policy first focuses on when and how to notify municipal generators/transporters of MSW or sewage sludge that they are considered PRPs, thereby offering the possibility of settlement.[97] Second, the Interim Settlement Policy discusses how to treat municipalities in the Superfund settlement process after they have been notified that they are considered PRPs.[98] Third, it addresses the issue of how the treatment of municipalities and municipal wastes under the policy affects private parties and non-MSW wastes in the Superfund settlement process.[99]

The Interim Settlement Policy provides that, as a matter of enforcement discretion, EPA generally will not pursue municipalities in all cases where they might be considered PRPs. Rather, EPA will focus on municipal liability only when: (1) the municipality was an owner or an operator of a solid waste landfill where there has been a release of hazardous substances; (2) there is site specific information that MSW sent by the municipality to the landfill contained hazardous substances from a commercial, institutional, or industrial activity; or (3) the volume of commercial, institutional, or industrial waste at the site is insignificant when compared to the volume of MSW.[100]

In other words, under the Interim Settlement Policy, EPA generally will not include generator/transporter municipalities as possible defendants in CERCLA actions initiated by the federal government. The Interim Settlement Policy also provides that CERCLA does not include an exemption for municipalities, and, therefore, municipalities may potentially be held liable under section

96. Interim Settlement Policy, *supra* note 27, at 51,071.

97. *Id.* at 51,074.

98. *Id.* at 51,075.

99. *Id.*

100. Interim Settlement Policy, *supra* note 27, at 51,075.

107(a) of CERCLA.[101] In fact, the policy itself specifically states that it should not be interpreted as providing an exemption from potential liability[102] or as restricting the broad application of CERCLA in private contribution actions.[103]

Under the Interim Settlement Policy, EPA endeavors to negotiate a universal settlement—a settlement with all PRPs, covering all pending CERCLA claims—that is consistent with both applicable statutory requirements and EPA's overall settlement policies.[104] Although the ideal situation is to reach one settlement agreement, EPA recognizes that separate settlement agreements may be necessary at one site, including de minimis settlements pursuant to section 122(g) of CERCLA.[105] Last, the policy recognizes the special circumstances confronting a municipality and permits delayed payment schedules and in-kind contributions to facilitate settlement.[106]

B. Proposed Double Delta and Four Percent Strategies

EPA has been criticized for not actively pursuing the settlement goals set out in its Interim Settlement Policy. As third-party contributor suits multiplied, the hopes of many municipal contributor PRPs that early settlement with EPA would obviate involvement in contribution actions did not materialize. EPA has responded to this criticism by refining the Interim Settlement Policy to include more precise settlement criteria. Former EPA Administrator William Reilly promised relief to municipalities in the form of a "fair share" settlement policy.[107]

In its first formulation, the proposed "fair share" plan would have established national averages for unit costs of remediating industrial hazardous waste and MSW. Those unit costs would then be applied on a per-ton basis to the volumes of waste sent to a particular site. EPA justified the formula, dubbed the "Double Delta"

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101. *Id.* at 51,074.

102. *Id.* "This interim policy does not provide an exemption from potential CERCLA liability for any party; potential liability continues to apply in all situations covered under § 107 of CERCLA." *Id.*

103. *Id.* "Nothing in this interim policy affects the rights of any party in seeking contribution from another party, unless such party has entered into a settlement with the United States or a state and obtained contribution protection pursuant to § 113(f) of CERCLA." *Id.*

104. Interim Settlement Policy, *supra* note 27, at 51,075.

105. *Id.*

106. Interim Settlement Policy, *supra* note 27, at 51,075-76.

107. William K. Reilly, Fact and Fiction in Wetlands Regulation, Address Before the National Association of Counties 5 (July 16, 1991) (transcript available from Office of the Administrator, Environmental Protection Agency).

formula, by pointing to RCRA's closure and corrective action requirements for pure MSW sites.[108] Since municipalities already had an obligation to "close and correct" under RCRA, EPA was only requiring of cities under CERCLA what was already required of them under RCRA.[109] According to critics, under this formula, MSW contributors typically would have had to fund thirty to fifty percent of cleanup costs and in extreme cases might have been tagged with more than sixty percent of the total remediation costs.[110] Critics also assailed its effect of encouraging third-party contribution actions.[111]

The Double Delta formula prompted such sharp criticism from municipalities and Congress that EPA went back to the drawing board. In March 1992, EPA floated an unofficial draft proposal which became known as the "Four Percent Strategy."[112] This proposal would require municipal generators and transporters to pay four percent[113] of Superfund cleanup costs at a contaminated site, regardless of the percentage of total waste volume the municipality had contributed.[114] Industry lobbied intensively in opposition to this proposal, eventually persuading the Bush Administration to reconsider the proposed policy.[115]

Shortly after the Clinton Administration took office, senior EPA policy makers hinted that the Four Percent Strategy was still

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108. *Cities, Congress Burst EPA Trial Balloon on Allocating Municipal Landfill Cleanup Costs*, 22 Env't Rep. (BNA) 2115 (Jan. 10, 1992) [hereinafter *Double Delta Criticism*].

109. *Id.* For a contrary opinion, see STEINZOR & KOLKER, *supra* note 3, at 12-14.

110. *Double Delta Criticism*, *supra* note 108, at 2115.

111. *Id.* In a letter to then-Administrator William K. Reilly, eight members of the House of Representatives wrote:

> This policy would give corporate polluters even more incentive to subsidize the costs of their own activities by suing local governments and their citizens. 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.

Id. (quoting Dec. 18, 1991 letter from Representatives to EPA Administrator).

112. Environmental Protection Agency, Interim Settlement Guidance for Generators and Transporters of Municipal Solid Waste (March 10, 1992) (unpublished guidance on file with author) [hereinafter Four Percent Strategy Guidance].

113. The four percent figure was based on EPA's experience regarding relative cost of remediating MSW as compared to hazardous substances. The precise calculation is described *infra* note 120 and accompanying text.

114. Four Percent Strategy Guidance, *supra* note 112 at 3.

115. *See* Barnaby J. Feder, *EPA Proposal on Costs of Waste Cleanups is Halted*, N.Y. TIMES, May 18, 1992, at D1; *EPA Policy to Ease City's Superfund Costs Appears to be Election Year Hostage*, INSIDE E.P.A., June 5, 1992, at 9.

alive and that it may be part of the "administrative fixes" that were being considered by the Clinton Administration.[116] EPA's Superfund reform measures, however, did not include provisions regarding the "appropriate" share of liability that should be attributed to MSW contributions at Superfund sites.[117]

Although the Four Percent Strategy is in political limbo within the Executive Branch, it remains worthwile to outline its main points since its methodology has become important to pending legislation[118] and serves as a focal point in the ongoing discussions. In particular, a proposed Four Percent Strategy Guidance issued by EPA was intended to supplement the Interim Settlement Policy by focusing on the terms of settlements with MSW contributors, which were not fully addressed in that policy. Under the proposed guidance, EPA would have adopted a "unit-cost approach." The volumetric apportionment rationale was rejected because it was "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."[119] The Guidance sets out the Four Percent Stategy as follows:

> The agency has determined that the appropriate settlement amount for all generators and transporters of MSW collectively at a site is approximately four percent of this estimated total site remedy cost. This figure is derived using a ratio of the cost to remediate an acre of MSW to the cost to remediate an acre of industrial hazardous waste.[120]

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116. *See EPA Revives Bush Proposal to Limit Superfund Cleanup Costs for Cities*, INSIDE E.P.A., May 28, 1993, 1, 4-5.

117. *See* ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND ADMINISTRATIVE IMPROVEMENTS (June 23, 1993). The EPA reforms do provide that the de minimis policies should be revised to encourage future settlements with such parties. *Id.* at 8-11.

118. For a discussion of pending legislation affecting municipal liability, see *infra* notes 112-22 and accompanying text.

119. Four Percent Strategy Guidance, *supra* note 112, at 3.

120. *Id.* at 4. Calculation of the specific unit cost is as follows:

$$\frac{\text{MSW Unit Cost}}{(\text{MSW Unit Cost} + \text{Industrial Unit Cost})}$$

EPA calculated the average cost per acre to remediate MSW to be $94,000 and calculated the average cost to remediate an acre of industrial hazardous waste to be $2,279,000. These figures plugged into the formula produce the allocation of 4%, as follows:

$$\frac{\$94{,}000}{(\$94{,}000 + \$2{,}279{,}000)} = 4\%$$

Id. at 14. For EPA's derivation of unit cost figures, see *id.* at 28 (Appendix B).

EPA anticipated that the Guidance would encourage settlement in two ways. First, EPA hoped the Guidance would encourage generator/transporter municipalities that have not received a PRP letter to voluntarily settle with EPA. Second, EPA felt that the unit-cost formula would facilitate settlement with noticed PRPs and MSW generator/transporters who had not resolved their liability to the United States.[121]

The proposed Guidance was not to be applied mechanically to settlement negotiations with "contributors of relatively insignificant amounts of MSW."[122] Instead, negotiations with these contributors were to be managed in light of the Four Percent Strategy *and* the Agency's de minimis settlement policies in cases where the generator or transporter contributed only small amounts of MSW.[123]

C. Legislative Activity

1. Senate Bill No. 1557

In July 1991, Senator Frank Lautenberg introduced Senate Bill No. 1557, a bill that would have modified the contribution scheme of CERCLA, codified EPA's Interim Settlement Policy, and provided early settlement opportunities for municipalities transporting or generating MSW.[124] That bill traveled a rocky course through a series of oversight hearings on CERCLA and was voted out of the Senate in 1992 only to become the victim of a procedural error that doomed the bill.[125]

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121. Four Percent Strategy Guidance, *supra* note 112, at 12. The Guidance goes on to say that since EPA generally will not pursue MSW generators and transporters, "it is incumbent upon the generators and transporters of MSW seeking settlement with EPA to notify EPA of their desire to enter into settlement negotiations. Absent the initiation of settlement discussions by a generator or transporter of MSW, EPA generally will not take steps to pursue settlements with these parties." *Id.* The not-so-obvious advantage of settling for a non-noticed PRP is the protection from contribution liability which settlement affords. This policy offers PRPs with limited liability exposure for a site the opportunity to "get out" fairly painlessly for a predictable amount. For a discussion of CERCLA's settlement provisions, see *supra* notes 19-21 and accompanying text.

122. Four Percent Strategy Guidance, *supra* note at 112, at 10 n.11.

123. Four Percent Strategy Guidance, *supra* note 112, at 10 n.11. This reference is similar to what has now been released as the De Micromis Guidance. *See infra* note 127 and accompanying text.

124. S. 1557, 102d Cong., 1st Sess. (1991). Representatives Torricelli and Dreier introduced a companion bill in the House, H.R. 3026, 102d Cong., 1st. Sess. (1991).

125. *See Process Error Tangles Senate Superfund Exemptions for Cities, Banks*, INSIDE E.P.A., JULY 10, 1992, AT 5. THE FAILURE BY THE SENATE, IN PASSING THE BILL, TO AMEND IT TO THE HOUSE VERSION OF THE BILL, LEFT THE LEGISLATION DISTINCT FROM THE HOUSE MEASURE THAT WAS PENDING BEFORE THE SENATE. *Id.* This "procedural

2. Senate Bill No. 343

The recent wave of third-party litigation against municipalities and small businesses by industrial PRPs seeking to "avoid full liability" under CERCLA fueled renewed interest in municipal liability by the legislature.[126] In February 1993, Senator Lautenberg and Representatives Torricelli and Dreier sponsored the Toxic Cleanup Equity and Acceleration Act of 1993.[127] Based largely upon their previous effort, the bill seeks to modify CERCLA by prohibiting third-party contribution suits against municipalities or other persons whose only actions at a site are related to the generation or transportation of MSW or sewage sludge.[128]

To the extent that municipalities are responsible for the generation or transportation of hazardous waste to the landfill, the third-party suit prohibition would not apply.[129] Unlike the legislative effort in 1991, these bills do not propose to codify EPA's Interim Settlement Policy, leaving that document in tact as a statement of EPA's enforcement discretion.

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snafu" eventually became too serious a hurdle to be overcome, thereby defeating the Senate provisions exempting cities and lenders from Superfund liability. *See id.*

126. *See* 139 CONG. REC. S1454 (daily ed. Feb. 4, 1993)(statement of Sen. Lautenberg).

127. S. 343, 103d Cong., 1st Sess. (1993); H.R. 870, 103d Cong., 1st Sess. (1993).

128. S. 343 § 2(b). One of the more significant changes proposed by the bill is the addition of definitions to CERCLA for "municipal solid waste," "sewage sludge," and "municipality." The bill provides that MSW shall be defined as:

> [A]ll waste materials generated by households, including single and multiple residences, and hotels and motels. The term also includes trash generated by commercial, institutional, and industrial sources (a) when such materials are essentially the same as waste normally generated by households, or (b) when such waste materials were collected and disposed of with other municipal solid waste or sewage sludge and, regardless of when generated, would be considered conditionally exempt small quantity generator waste under section 3001(d) of the Solid Waste Disposal Act.

Id. § 2(a). Clearly, this definition of MSW was based on the definition of "household waste" set forth in the regulations promulgated under RCRA. *See supra* note 45.

The bill defines "sewage sludge" as "any solid, semisolid, or liquid residue removed during the treatment of municipal waste water, domestic sewage, or other waste waters at or by a publicly-owned treatment works." *Id.* § 2(a). The term "municipality" is defined in the proposed legislation as "any political subdivision of a State and may include cities, counties, villages, towns, townships, boroughs, parishes, schools, school districts, sanitation districts, water districts, and other local governmental entities . . . *Id.* § 2(a)(40). The term also includes any natural person acting in his or her official capacity as an official, employee, or agent of a municipality." *Id.*

129. *See* 139 CONG. REC. S1454, 1456 (daily ed. Feb. 4, 1993).

The proposed legislation would also provide early settlement opportunities for municipalities responsible for transporting or generating MSW, allowing generator/transporter municipalities to initiate settlement discussions with EPA.[130] The bill also contains a provision that would stay all litigation against a municipality once it has initiated settlement negotiations.[131] Drawing upon EPA's proposed Four Percent Strategy, total settlement liability for municipal hazardous waste generated or transported by the settling party would be capped at four percent of cleanup costs.[132]

Last, in an effort to provide relief to those municipalities already in litigation concerning their potential liability, the bill would apply retroactively.[133] Thus, municipalities which were party to pending administrative or judicial action initiated before the effective date of the bill would benefit from the bill's limitations on municipal liability. Of course, Congress is powerless to amend, through legislation, a final court judgment against a municipality or a final court approval of a settlement agreement and municipalities in that situation would not have been affected by the proposed legislation.

While the bills were introduced and announced with some fanfare, it was soon clear that they will be debated within the broader scope of the CERCLA reauthorization debate in 1994.

3. Proposed Superfund Reauthorization Legislation

In February 1994, Senator Max Baucus of Montana and Senator Frank Lautenberg of New Jersey introduced Senate Bill 1834 for amending CERCLA.[134] The bill, which contains the Clinton Administration's reauthorization proposal, deals with several issues relevant to municipal liability under CERCLA.

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130. S. 343 § 2(c). An "eligible person" permitted to initiate settlement discussions to resolve potential liability is defined in the proposed bill as "any person against whom an administrative or judicial action is brought, or to whom notice is given of potential liability under [CERCLA], for the generation, transportation, or arrangement for the transportation, treatment, or disposal of municipal solid waste or sewage sludge." *Id.* § 2(c) (proposal would set forth provision at CERCLA § 122(n)(1)).

131. *Id.*

132. *Id.* § 2(c)(n)(4)(A). For a discussion of the genesis of the four percent figure, see *supra* notes 102-109 and accompanying text.

133. S. 343 § 2(h).

134. Superfund Reform Act, S. 1834, 103d Cong., 2d Sess. (1994). This bill was also introduced in the House of Representatives by Congressman Al Swift of Washington. *See* H.R. 3800, 103d Cong., 2d Sess. (1994). For simplicity, the following discussion will refer only to the Senate version of the proposal.

Most relevant to the issue of municipal liability are the bill's provisions aimed at making settlement procedures more efficient and equitable. To that end, the proposed bill provides for expedited final settlements.[135] The expedited settlement process is available to certain parties including: (1) de minimis waste contributors as defined by the statute; (2) PRPs who are generators or transporters of MSW or sewage sludge; and (3) PRPs who are "small business[es] or municipalit[ies] and [have] demonstrated to the United States a limited ability to pay response costs."[136]

The proposal also places a moratorium on the commencement of cost recovery and contribution suits until the allocation process, as outlined in the bill, is completed.[137] Once the allocation process is completed, the President is obligated to accept a settlement offer from a PRP unless EPA, in agreement with the Attorney General, determines that the settlement based on the allocation is unfair or unreasonable.[138] Furthermore, the bill offers incentives for municipalities to settle with the federal government by providing that the share allocated to contributors of MSW which exceeds a settlement with the federal government will be attributed to an orphan share, which would be separately funded by the Superfund under the proposed bill.[139]

The bill also precludes liability for certain PRPs "who [do] not impede the performance of response actions or natural resource restoration . . . ."[140] These exclusions extend to: PRPs liable solely under subsection 107(a)(3) or subsection 107(a)(4) for less than 500 pounds of MSW or sewage sludge, or less than 10 pounds or liters of waste containing hazardous substances; PRPs that incur liability under subsection 107(a)(1) that are bona fide prospective purchasers of facilities as defined in the statute; in certain cases, governmental entities liable solely under subsection 107(a)(1) or (2) for a facility over which the entity had no control over the activity which resulted in a pre-1976 release or threat of release; federal and state entities or municipalities whose liability stems solely from ownership of a public right of way; and PRPs who are generators or transporters of MSW or sewage sludge where the PRP's actions oc-

135. *See* S. 1834 § 408(k).

136. *Id.* § 408(l).

137. *Id.* § 409.

138. *Id.* § 409.

139. S. 1834 § 409.

140. *Id.* § 403.

curred thirty-six months before enactment and the disposal did not occur on federally owned land.[141]

VI. NON-NOTICE LETTERS AND DE MICROMIS SETTLEMENTS: MODEST RELIEF OFFERED WHILE THE DEBATE RAGES

While the discussions regarding the appropriate CERCLA liability share for municipalities continue, local governments who have generated or transported MSW continue to be pursued by industrial PRPs in private contribution actions. EPA has taken two steps intended to assist municipalities in this situation. First, EPA drafted a letter to local officials intended to inform the municipality of proceedings at Superfund sites where the municipality has not yet been named as a PRP.[142] These letters are commonly known as "non-notice letters."[143] The purpose of the notification is to give non-noticed PRPs an early warning that other PRPs *have* been notified and invited to participate in the process. As a result, the municipality should be aware that it is at risk of being named in contribution actions by "notified" nonmunicipal PRPs.[144] The municipality could then negotiate a settlement with EPA, thereby securing immunity from liability in such actions.[145]

These non-notice letters, however, assist MSW generators and transporters of liability only if coupled with a real ability to settle potential liability with EPA and obtain contribution protection. In that regard, EPA has provided guidance to its Regional Offices concerning settlements with "*de micromis*" parties.[146] This so-called "*De Micromis* Guidance" suggests situations in which it may be appropriate for EPA to enter into a settlement agreement with *de micromis* MSW contributors who face the financial burden of increased litigation expenses and transaction costs associated with third-party contribution actions.[147] The *De Micromis* Guidance cites three

141. *See id.*

142. *Municipalities — EPA Issues Model "Non-notice" Letter for Warning Cities,* SUPERFUND REPORT (EPA, Washington, D.C.), May 22, 1991, at 3.

143. *Id.*

144. *Id.*

145. *Id.*

146. *EPA Guidance on CERCLA Settlements with De Micromis Waste Contributors,* Envtl. Due Diligence Guide (BNA) No. 18, at 23 (July 30, 1993) [hereinafter *De Micromis Guidance*]. "*De micromis*" parties are those "parties who have contributed even less hazardous substances to a site than the *de minimis* parties [EPA] traditionally pursues." *Id. De micromis* contributor settlements arise under EPA authority to enter into de minimis settlements under § 122(g) of CERCLA, which is "intended to encompass only th[ose] parties who [have] contributed minuscule amounts of waste to a site." *Id.* at 26.

147. *Id.* Owners or operators of Superfund sites, however, may not employ *de micromis* contributor settlements to resolve potential liability. *Id.* at 26.

examples of sites where such settlements are appropriate, all of which involved co-disposal MSW landfills where major industrial PRPs asserted contribution demands against municipalities and other MSW contributors that EPA otherwise probably would not have pursued.[148]

While only in the *de micromis* context, this Guidance is EPA's first indication in a *final* and issued document, that the relatively higher volumes of waste typically attributed to a MSW generator should not completely impair use of CERCLA's de minimis settlement tool.[149] In particular, the guidance states that "[b]ased on the different nature of MSW and industrial trash contributions compared to industrial hazardous substances, it is appropriate for a Region to consider a higher volumetric cut-off for de micromis eligibility."[150]

Further, in discussing a settlement payment matrix in the context of MSW contributors, the guidance allows the Regional Offices to

> take into consideration the differing nature of MSW contributions in calculating the payment amount. Among the factors that might be considered in reducing this payment are the toxicity and mobility of MSW relative to other types of waste and the cost differential in addressing MSW-only landfills as compared to mixed-waste landfills.[151]

Although not providing a complete remedy to all municipalities facing expensive, burdensome third-party litigation, the *De Micromis* Guidance acknowledges the need to develop equitable allocation methods for sharing liability under Superfund.

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148. *Id.* at 24-25 (citing examples in New York, Connecticut, and Michigan).

149. The *De Micromis* Guidance states:

> A de micromis settlement may be especially appropriate for such entities as small businesses, associations, non-profit organizations, or other entities that do not manufacture or use large amounts of hazardous substances in their activities and who contributed small amounts of waste to the site. . . . [T]heir activities do not result in generation or disposal of significant amounts of hazardous substances.

De Micromis Guidance, supra note 146, at 25-26.

150. *Id.* at 27.

151. *De Micromis Guidance, supra* note 146, at 28 n.10. While footnote 10 appears vague, it may be read to suggest that EPA considers the four percent solution still viable, at least in this context.

VII. CASE LAW APPROACH TO ALLOCATING LIABILITY

Allocation of liability is emerging as the critical step in CERCLA litigation for municipalities seeking to avoid or minimize liability. As discussed previously, absent congressional intervention, the legal basis for holding generators and transporters of MSW liable under CERCLA is relatively well established. The *extent* of liability, however, has not been decided in the litigation context.

In the cases previously discussed, however, the courts have provided some guidance in dicta regarding issues considered to be critical in allocating liability. This section addresses the comments made by the courts in those cases and outlines the factors that those courts have identified as relevant in allocating responsibility to municipal generators and transporters of MSW in CERCLA contribution actions.

Contribution actions are authorized by CERCLA section 113(f), which provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[152] CERCLA's legislative history suggests various factors—dubbed the "Gore Factors" after their author and proponent—that would be relevant in apportioning liability.[153] The Gore Factors are not exhaustive,

152. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

153. In 1980, then-Representative Gore introduced an amendment to the joint and several liability provisions being proposed in the bill that would eventually become CERCLA. The six factors included in that amendment have become known as the "Gore Factors." Although the amendment was ultimately rejected, the Gore Factors retain vitality because as they are a critical part of the legislative history of the provision. Those factors are:

(i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
(ii) the amount of the hazardous waste involved;
(iii) the degree of toxicity of the hazardous waste involved;
(iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
(v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
(vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). SARA legislative history endorses the factors as relevant criteria to be used in contribution actions. *See* H.R. REP. No. 253, 99th Cong., 1st Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3042 (setting forth the Gore Factors nearly verbatim)(citing *A & F Materials Co.*, 578 F. Supp. at 1256); *see also* Amoco Oil Co. v.

however, and may be supplemented with other considerations.[154] Such other considerations have included, in the generator/transporter context, the financial resources of the parties involved, the benefits received by the parties perpetrating the contaminating activities, and the knowledge or acquiescence of the parties in the contaminating activities.[155]

In the MSW context, at least two courts have expressed a sensitivity to the burdensome nature of CERCLA liability for municipalities and have opened the door to consideration of those and other factors in allocating liability. The *Murtha* court, for example, indicated that the following factors were among "[a]n array of equitable factors were [that] may be considered in this allocation process" between industrial waste and MSW generators:

- Relative volume and toxicity of the substances disposed of by the municipalities;
- Relative cleanup costs incurred as a result of those substances;
- Degree of care exercised by each party with respect to the hazardous substances;
- Financial resources of the parties; and
- The extent to which the municipal dumping of hazardous substances engendered, and contributed to the cost of, cleanup.[156]

Similarly, in *GEMS*, the court suggested various factors that might be considered in a municipal/industrial allocation context.[157] In particular, the court identified the de minimis settlement criteria of CERCLA section 122(g),[158] and "such other factors as effectuate the legislative intent such as the profitability of the

Dingwell, 690 F. Supp. 78, 86 (D. Me. 1988), *aff'd sub nom.*, Travelers Indem. Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989).

154. *See* Environmental Transp. Sys., Inc. v. Ensco, Inc., 969 F.2d 503, 509 (7th Cir. 1992) ("[T]he Gore Factors are neither an exhaustive nor exclusive list."); United States v. R.W. Meyer, Inc., 932 F.2d 568, 572 (6th Cir. 1991) ("[T]he court may consider any factor it deems in the interest of justice in allocating contribution recovery.").

155. U.S. Steel Supply Co. v. Alco Standard Corp., 36 Env't Rep. Cas. (BNA) 1330, 1340-41 (N.D. Ill. 1992) (citing *Environmental Transp. Sys., Inc.*, 969 F.2d at 509).

156. B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1206 (2d Cir. 1992).

157. New Jersey Dep't of Envtl. Protection & Energy v. Gloucester Envtl. Mgmt. Servs., Inc., 821 F. Supp. 999, 1008 n.15 (D.N.J. 1993).

158. CERCLA § 122(g), 42 U.S.C. § 9622(g). Those factors include the relative amounts of the hazardous substances and the relative type and other hazardous effects of the substances contributed by the parties.

selected disposal method and the public necessity for such disposal."[159] Dicta in that decision strongly suggests that municipalities should be allocated a proportionately smaller share of responsibility at CERCLA co-disposal sites.[160]

The developing case law, therefore, contains both bad news and good news for the municipality. While it is clear that local governments contributing MSW are in the CERCLA liability pie, their slice of the pie may be relatively small.[161]

VIII. CONCLUSION

The issue of municipal Superfund liability, for better or worse, is evolving in all three branches of government. The ultimate decision whether and to what extent contributors of MSW will bear CERCLA liability, however, must rest with the Congress. EPA can exercise various administrative options to vent some pressure, and municipalities can press their allocation arguments in the courts, but only a full legislative airing and discussion of the issue will provide certainty of outcome for the stakeholders in this debate.

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159. *New Jersey Dep't of Envtl. Protection & Energy*, 821 F. Supp. at 1008, n.15.

160. The court emphasized the limited nature of its holding. "We are not holding that municipalities will be held equally culpable with other PRPs. That was not the issue presented to us, and even CERCLA suggests that municipalities should not be held equally culpable due to the relatively low toxicity level of MSW." *Id.* at 1008 (footnote omitted).

In a footnote, the court further indicated that "such [equitable] factors would suggest a very low culpability index for municipal generators of municipal solid waste." *Id.* at 1008, n.15.

161. Proving that they deserve a low culpability index at a particular site, however, still would have a high transaction cost aspect. Simply marshalling facts and arguing the equities outlined in those factors may turn out to be cost prohibitive; savings gained by winning the allocation battle may be too costly to afford.