Limiting Municipal Solid Waste Liability Under CERCLA: Towards the Toxic Cleanup Equity and Acceleration Act of 1993

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LIMITING MUNICIPAL SOLID WASTE LIABILITY UNDER CERCLA: TOWARDS THE TOXIC CLEANUP EQUITY AND ACCELERATION ACT OF 1993

James J. Reardon, Jr.*

The public's only contribution to the problem was to trust too blindly that the chemical companies were taking care of their own messes. The public is already bearing more than its fair share of the cost of recklessness in the form of threats to the public's environment.

Senator Al Gore

I. INTRODUCTION

A loophole in a federal environmental statute has created a new lottery. The unlucky winners must subsidize multi-million dollar cleanups of hazardous waste sites. Do you qualify? Have you ever taken out your trash for curbside pickup? Did your city send the collected waste to a landfill where it may have been mixed with toxic waste? Congratulations, you may have won a share in a multi-million dollar cleanup. Each week most of us, in some way or another, discard our household garbage. Courts have held that this disposal of household waste may make municipalities liable to industrial polluters for a substantial portion of the costs of cleaning up their careless hazardous waste disposal.

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 to confront the

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United States' hazardous waste problem. Commentators have characterized CERCLA as a response to the 1978 Love Canal disaster in Niagara Falls, New York. Love Canal proved that landowner abuses may harm neighboring property and the environment and thereby provided an impetus for government intervention on private property. CERCLA forces polluters to pay for the costs the company passed on to the public by recklessly disposing of hazardous waste. Congress intended that when a hazardous waste site falls under CERCLA's regime, the private parties responsible for improper disposal should pay the costs of cleaning up such a site.

The United States Environmental Protection Agency (EPA) primarily targets private entities, such as industrial polluters, rather than public entities, such as municipalities, to recover the costs of hazardous waste remediation at "Superfund" hazardous waste sites. The EPA generally does not name local governments and entities that have contributed only municipal solid waste (MSW) to Superfund sites as potentially responsible parties (PRPs), thereby, at least temporarily, allowing local governments to avoid liability.

Although the EPA generally does not name municipalities as PRPs at hazardous waste sites where municipalities have contributed MSW, industrial polluters that the EPA has sued may still attempt

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6 One might wonder why there was little pre-CERCLA federal or state regulation of land disposal of hazardous waste. The answer, one commentator has noted, may lie in our traditional respect of private property. Id. Air and water, both regulated before land waste disposal, "had a deep legacy of being public trusts. Land, on the other hand, was private property and government had no business involving itself in what people did on their land." Id.


9 "Potentially responsible party" refers to those persons who may be liable under § 107 of CERCLA. Section 107 delineates four classes of persons who may be liable for the costs of CERCLA cleanup: owners and operators of a vessel or facility; 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; any person who by contract, agreement, or otherwise arranged for disposal, transport, or treatment of hazardous substances; and 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. 42 U.S.C. §9607(a) (1988).


11 *Id.*
to recover some of their cleanup costs from municipalities by bringing contribution suits against municipalities.\textsuperscript{12} As the EPA becomes more aggressive in cleaning up hazardous waste sites and recovering the costs of such cleanups,\textsuperscript{13} private parties are also becoming more aggressive in seeking PRPs to help pay the costs of cleanups. Increasingly, named PRPs sue municipalities in an attempt to recoup the costs of their growing\textsuperscript{14} CERCLA liability bills.\textsuperscript{15}

Industrial polluters suing municipalities in third-party actions for contribution\textsuperscript{16} under CERCLA for the disposal of MSW is fast becoming a reality across the country.\textsuperscript{17} At present, there are approx-
imately 230 municipal landfills on the National Priorities List. By involving municipalities and their citizens in CERCLA actions for the disposal of municipal solid waste, industrial polluters distort CERCLA’s purpose and threaten the integrity of one of our nations most powerful environmental statutes.

Potential liability for municipalities is high. Although the total cleanup bill for a contaminated site averages between 25 and 30 million dollars, one site is estimated to cost over half a billion dollars. By shifting this massive private party liability to municipalities and thereby the local taxpayer, industrial polluters may force municipalities to make decisions about spending priorities and threaten the ability of cities and towns to carry out traditional governmental functions. Moreover, municipalities that industrial polluters sue for contribution have limited options. Municipalities may either settle early and at a premium with industrial CERCLA defendants in contribution actions, or enter into protracted and expensive litigation. The possibility that industrial polluters could bring third-party suits against municipalities under CERCLA for the disposal of MSW, according to some members of Congress, is one of accident rather than intention.


See, Burke, supra note 15 at 3; Municipalities, Insurance Groups Seek Legislative Limits on Liability, 22 Env't Rep. (BNA) 175 (Nov. 15, 1991). [hereinafter Legislative Limits]

For example, Alhambra, California, which has a $55 million annual budget, could be liable for $20 million over a decade. Keith Schneider, Industries and Towns Clash About Who Pays to Get Rid of Poisons, N.Y. TIMES, July 18, 1991 at A14.


See, Legislative Limits, supra note 19, at 1765. Representative Robert Torricelli (D-NJ) at the House Public Works and Transportation Subcommittee on Investigation and Oversight on November 13th stated that municipalities are being governed by a law of unintended consequences . . . .
The legal conflict over whether municipalities may be liable for MSW under CERCLA turns on how the courts have determined that MSW may be a CERCLA "hazardous substance." Even if municipalities may be liable under CERCLA for the cleanup of MSW, questions remain as to how much municipalities should pay towards the cleanup of a hazardous waste site and how the EPA should proceed with such cases. The issue of liability for MSW has spilled out of the courtroom and into the EPA and Congress. This Comment seeks to examine the judicial, administrative, and legislative approaches to the problem of municipal liability for MSW. Section II of this Comment provides an overview of CERCLA outlining the statute's framework and describing CERCLA's liability and settlement provisions. Section III explains what MSW is and considers how much of MSW is actually hazardous. Further, Section III introduces the legal sources courts have considered in determining whether MSW is a CERCLA hazardous substance. Focusing on the arguments presented in B.F. Goodrich Co. v. Murtha, Section IV examines how the courts have analyzed and applied CERCLA and EPA policy to determine that MSW may be a hazardous substance for the purpose of CERCLA liability. Section V of this Comment surveys administrative approaches that the EPA has taken, or at one time considered taking, concerning municipal liability for MSW. Section VI then looks at one legislative proposal intended to address the inadequacies of the judicial and administrative approaches to CERCLA liability for MSW. In Section VII, this Comment concludes that judicial remedies under CERCLA and the EPA's administrative proposals do not go far enough to fairly apportion liability, to facilitate the settlement process with municipalities, or to promote speedy cleanup. This Comment argues that the United States Congress should address the issue of municipal liability for MSW under CERCLA by amending CERCLA and by passing the Toxic Cleanup Equity and Acceleration Act of 1993.
II. CERCLA Statutory Framework

A. CERCLA Overview

Congress enacted CERCLA, or the "Superfund," in 1980 with the purpose of cleaning up the nationwide threat of toxic wastes.\textsuperscript{29} Congress' overriding purpose in enacting CERCLA was to clean up hazardous waste by making those responsible for careless waste disposal pay for their actions.\textsuperscript{30} Some courts have indicated that CERCLA accomplishes this goal by making those parties who profited from hazardous waste disposal pay for the cleanup of their dumping.\textsuperscript{31}

To effect CERCLA's goals, Congress required the EPA to establish an information gathering system and create a National Priorities List in order to prioritize the cleanup of hazardous waste.\textsuperscript{32} CERCLA provided the EPA with federal authority to clean up hazardous waste sites through removal or remedial action.\textsuperscript{33} Additionally, where there is an "imminent and substantial endangerment to the public health," the EPA may compel potentially responsible parties to undertake private response actions.\textsuperscript{34} A federal trust, the "Superfund," which is funded through federal appropriations and through use taxes on the chemical and petroleum industries, provides funds for the cleanup.\textsuperscript{35} Most important, Congress created a liability provision in CERCLA that forces those responsible for the improper disposal of hazardous wastes to pay their share of cleanup costs.\textsuperscript{36}

CERCLA's provisions concerning site identification and cleanup are discussed next in more detail. Further, and more significant in relation to MSW liability, CERCLA's liability and settlement provisions are also considered.

1. Information Gathering

CERCLA imposes strict notification requirements on past and present owners and/or operators of facilities where hazardous sub-

\textsuperscript{31} Id.
\textsuperscript{32} 42 U.S.C. § 9605(a).
\textsuperscript{33} Id. § 9604; see also id. §§ 9601(23), 9601(24). (definitions of "removal" and "remedial").
\textsuperscript{34} Id. § 9606.
\textsuperscript{36} 42 U.S.C. § 9607.
stances are stored or disposed. Persons who accept hazardous substances for transport also must meet these notification requirements. These owners, operators, and transporters must report hazardous facilities to the EPA. Civil and criminal penalties buttress CERCLA's notification requirements. Any person who fails to notify the EPA of potential releases also forfeits any limitation of liability or defenses to liability under CERCLA.

The EPA evaluates information received as a result of CERCLA's notification requirements in light of the Hazard Ranking System (HRS) to compile a National Priorities List (NPL)—a list of sites needing the most immediate attention. The HRS prioritizes waste sites based on the relative degree of risk to human health and the environment that these sites pose. When the EPA places a site that meets the HRS criteria on the NPL, the site is subject to a possible clean-up action.

2. Cleanup and Response

Cleanup authority under Section 9604 may be of two types; removal or remedial. Removal actions are relatively short-term responses, limited under the statute to twelve months or two million dollars, while remedial actions are full-fledged clean-up efforts. The term “removal” appears to contemplate a more discrete action as compared to remedial actions. Removal actions provide for temporary evacuation and housing of threatened individuals while remedial actions provide for permanent relocation of residents where relocation is more cost-effective and environmentally preferable.

37 Id. § 9603. Owners and operators of facilities where hazardous substances are present, as well as transporters of hazardous substances, must notify the EPA of the existence of a facility where hazardous substances are or have been stored, treated, or disposed of “specifying the amount and type of any hazardous substances to be found, and any known, suspected, or likely releases of such substances from such facility.” Id.
38 Id.
39 Id.
40 Id.
41 Id. §§ 9603, 9607(b). The limited CERCLA affirmative statutory defenses are available when a release was caused solely by an act of God, an act of war, or certain acts or omissions of third parties other than with whom a defendant has a contractual relationship. Id. § 9607(b).
42 Id. § 9605(c).
45 See 42 U.S.C. § 9605(a) (considerations in adding facilities to NPL).
46 Id. §§ 9604, 9605.
47 See id. § 9604.
48 Steinzor, supra note 29, at 92–93.
50 Id. §§ 9616(d), 9620(e).
A facility that is included on the NPL must undergo a remedial investigation and feasibility study (RI/FS). Through the RI/FS, the EPA evaluates the problems at a site and recommends cleanup options. After an RI/FS is completed, the remedial plan to be taken at a site is established in a Record of Decision (ROD). After a ROD is established, a site proceeds to the design stage where a cleanup plan is laid out for a particular site and cleanup begins. The EPA's authority at a site continues after cleanup, extending into the operations and maintenance (O+M) stage until a site is safe.

B. Section 107 Liability

1. Parties Liable Under CERCLA and Actions that Incur Liability

CERCLA refers to the class of "persons" who may be liable under CERCLA as "potentially responsible parties" (PRPs). The four categories of "persons" that may be subject to CERCLA liability for hazardous waste cleanup are owners, operators, transporters, and persons who arranged for disposal of hazardous waste. The fourth category is commonly referred to as "generators." Municipalities may fit into any of the four categories. For example, a municipality may have owned or operated a municipal landfill. More to the point, a municipality's sanitation department may have collected MSW and taken the trash to a landfill owned by the municipality or by a private contractor. This Comment focuses on municipalities in their capacity as either transporters or generators of MSW.

51 See id. § 9616(d).
52 Steinzor, supra note 29, at 94.
53 Id.
54 42 U.S.C. § 9604(c); See Steinzor, supra note 29, at 94.
56 Section 9601 defines a "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).
57 Id. § 9607(a).
58 See id.
59 See Steinzor supra note 29, at 80.
60 Administrative policy and proposed legislation generally treats municipalities and other generators and transporters of MSW in the same manner. This Comment uses the terms "municipality" and "generators and transporters of MSW" interchangeably.
The party seeking to assign liability to an owner, operator, transporter, or arranger, the CERCLA plaintiff, must establish that there is a "release or threatened release"61 of a "hazardous substance"62 at a CERCLA "facility"63 that has caused that party to incur response costs.64 The amount of costs the PRP can be liable for can depend, in part, on the liability standard, as determined by whether the party bringing the CERCLA action is the EPA or a private party.

2. Liability Standard

The liability standard under Superfund is strict, joint and several.65 Strict liability ensnares PRPs without regard to fault; the intent or negligence of a PRP is not an issue.66 CERCLA's strict liability standard, coupled with CERCLA's broad definition of hazardous substance, allows the EPA to hold a PRP liable by showing merely that the wastes that require cleanup are of the same type as the wastes that a defendant contributed to a site.67 The EPA does not need to trace a particular waste present at a contaminated site to a particular defendant because such evidence is limited by the passage of time since the wastes were actually disposed of and by the resulting mixture of similar wastes with different origins.68

61 42 U.S.C. § 9601(22). "Release" is any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) Id.

62 See id. § 9601(14); see infra notes 131–155 and accompanying text.

63 Id. § 9601(22)(A)(B). CERCLA defines "facility" broadly. See id. For example, buildings, equipment, pipes, wells, landfills, storage containers, motor vehicles, rolling stock, or air craft, are among the many expressly listed facilities. See id. The catch-all definition of facility in § 9601(22)(B) includes "... any area where a hazardous substance has... come to be located; but does not include any consumer product in consumer use or any vessel." Id. (emphasis added).


66 See Steinzor, supra note 29, at 80.


Under joint and several liability, the EPA may sue a “small subset” of the PRPs for all of the “response” costs at a given site rather than searching for every liable party.69 The parties the EPA sues, whether a single PRP or a small subset of PRPs, are liable for the full remediation costs at a site.70 Named PRPs, however, do have a remedy to recover some of the costs from un-named PRPs.71 PRPs that the EPA has sued may, under a right of contribution, implead parties that the EPA has not sued.72 The result of joint and several liability under CERCLA is that PRPs the EPA has named implead the un-named PRPs as third or even fourth party defendants.73 At Superfund sites where MSW and industrial waste have been co-disposed,74 industrial PRPs are suing municipalities as third parties under CERCLA’s contribution provisions.

3. Contribution

Named PRP defendants have the ability to sue un-named PRPs under a right of contribution in section 9613 of CERCLA.75 Through a contribution suit, a named PRP may sue an un-named PRP in an attempt to recover the excess costs that the named PRP may have incurred in an adverse judgment or settlement with the EPA.76 When a named PRP sues an un-named PRP in contribution, the

69 United States v. Kramer, 757 F. Supp. 397, 433–35 (D.N.J. 1991) (noting that CERCLA’s statutory scheme grants EPA enforcement discretion and that the Interim Municipal Settlement Policy is rational as a means of preserving enforcement resources that would be expended both in obtaining evidence of the presence of household hazardous waste and incurring increased transaction costs of litigation and settlement.) The Kramer court also noted that EPA’s position was consistent with the purposes of imposing liability upon those who profited from the improper disposal of hazardous waste and promoting the efficient and rapid reimbursement of the Superfund. Id.


71 See 42 U.S.C. § 9613(f); see infra notes 75–90 and accompanying text.


73 Id. Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a), during or following any civil action under § 9606 or under § 9607(a). Id.


unnamed PRP merely faces several liability rather than the joint and several liability that named PRPs usually face.77 When an unnamed PRP faces several liability in a contribution action, the PRP is merely liable for its “fair share” of the harm that the PRP caused at the Superfund site.78

CERCLA provides little guidance to courts as to how to apportion liability in a contribution actions.79 Section 9613(f) states only that, in contributions claims, courts may consider equitable factors in allocating response costs among liable parties.80

Commentators have noted various approaches to apportioning liability in contribution actions under CERCLA.81 Under a comparative fault approach, courts could apportion liability by comparing the culpability of each PRP’s involvement at a Superfund site.82 Factors courts may consider under the comparative fault approach are the extent to which a PRP knew that it was engaging in a potentially dangerous activity, the magnitude of the risk that a PRP knew or should have known it was creating, and the particular circumstances of a PRP’s activity.83

Under a second approach, comparative causation, a court could consider the total amount of hazardous waste a PRP has disposed of, taking into account the volume of the waste and the waste’s characteristics such as toxicity.84 It is difficult to sort out relative shares of liability under a comparative causation approach, however, because wastes may be commingled.85 Moreover, site-specific data on wastes disposed is not usually available.86

78 See id.
80 See id.
81 See Mason, supra note 76, at 93. See id. for a detailed treatment of contribution under CERCLA.
83 See Uniform Comparative Fault Act § 2(a)(2), 12 U.L.A. 45 (Supp. 1990); see Mason, supra note 76, at 95.
A third approach to apportioning liability in contribution actions is the "Gore Factors" approach. Under the six factors of the Gore approach, a court could consider: the PRP's ability to prove that its contribution was distinguishable from that of other PRPs; the amount of hazardous waste attributable to the PRP; the toxicity of that waste; the PRP's involvement in the generation, transportation, treatment, storage, or disposal of the waste; the degree of care that the PRP exercised in those activities; and the extent to which the PRP cooperated with government officials in preventing further harm.

One court noted some additional factors that courts might consider in using their equity powers to apportion liability. Additional considerations might include the benefits a party receives from its contaminating activities, the knowledge and/or acquiescence of the party in the contaminating activities, and a party's ability to pay for the cleanup.

4. Settlement Tools

Instead of litigating cost recovery actions, the EPA may, under CERCLA section 9622, settle with PRPs through a consent decree or administrative order covering the performance of response actions and the payment of costs. When settling with a PRP, the EPA may also provide a PRP with a covenant not to sue, in which a PRP's liability for matters covered in the agreement are discharged. A PRP that settles with the EPA also receives contribution protection. The settling party will not be liable for the contribution claims of non-settlors.

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87 See H.R. 7020, 96th Cong., 2nd Sess. § 3071 (3)(B)(i)-(vi) (1980); see also Mason, supra note 76, at 99.
89 Environmental Transp. Sys., Inc. v. Ensco, Inc., 969 F.2d 503, 508, 509 (7th Cir. 1992). The Ensco court also noted that, while not appropriate in the case at hand, the court would not exclude the possibility that a pro rata approach, where the costs of a harm would be divided equally among the number of responsible parties, might be workable in an appropriate case. Id.
90 Id.
92 See id. (statutory requirements to grant a covenant not to sue). In settling with a PRP, the EPA may, however, include a re-opener clause to cover conditions unknown at the time of agreement. See Hedeman et al., supra note 24, at 10,425.
94 See id.
CERCLA provides tools that the EPA may use to facilitate settlement. Three such settlement tools are *de minimis* settlements, non-binding allocations of responsibility (NBARs), and mixed funding.

Generally, *de minimis* settlements allow persons who contributed minimal amounts of hazardous substances to a site, both in terms of volume and toxicity, to resolve their liability early in the response process. By allowing a party to settle its share of liability early in a response action, *de minimis* settlements reduce transaction costs. The EPA has not placed priority on *de minimis* settlements because of limited agency resources and the emphasis the Agency places on recovering response costs from major waste contributors at a facility. Municipalities generally have not been able to take advantage of *de minimis* settlements.

Through an NBAR, the EPA allocates the percentages of a site’s response costs among PRPs. NBARs could reduce costs by apportioning liability at an early stage of a response action and by apportioning liability administratively rather than through litigation. Similar to the EPA’s treatment of *de minimis* settlements, the EPA has made little use of NBARS. In a mixed funding agreement, the EPA reimburses a portion of a PRP’s costs in an effort to encourage quick cleanup. Mixed funding is another settlement tool that the EPA generally does not utilize.

In addition to CERCLA’s statutory scheme, which industrial polluters claim MSW falls within, it is helpful to understand what MSW is. The next Section combines the general conception of what MSW is with some scientific data that points to MSW’s low hazardous constituent content.

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95 See id. §§ 9622(b)(1), 9622(e)(3), 9622(g).
96 See id. § 9622(g).
97 See id. § 9622(e)(3).
98 See id. § 9622(b)(1).
100 42 U.S.C. § 9622(g).
101 See Hedeman et al., *supra* note 24, at 10,425.
102 See Sites to Be Deleted from NPL *supra* note 13, at 1944; see also 138 CONG. REC. 8362 (1992)(statement of Senator Durenberger).
103 See Hedeman *supra* note 24, at 10,425.
104 See Hedeman *supra* note 24, at 10,425.
105 Id.
107 See Hedeman *supra* note 24, at 10,424.
MSW consists of municipal garbage collected and deposited in landfills. In order of concentration, MSW is generally composed of paper, plastic, yard waste, food, glass, and inorganic matter. Such waste may, however, contain constituents that are hazardous under CERCLA. These hazardous constituents may come from household items such as batteries, paint thinner, and pesticides. In short, MSW is what one puts in his or her trash can every day. The question remains: Is MSW hazardous?

1. How Hazardous is MSW?

Studies have reached varying conclusions as to whether or not MSW should be considered hazardous. Most studies generally confirm, however, that MSW's potentially hazardous constituents represent a very small percentage of the overall volume and weight of MSW present at a co-disposal site. Some studies, for example, indicate that less than one half of one percent of MSW is hazardous. One study indicated that only .1% of MSW, by weight, is hazardous.

Although the percentage of hazardous waste that MSW may contain is small, studies have reached different conclusions as to whether there is any difference between landfills containing only household waste and landfills containing only industrial waste. One study, authored by Brown and Donnelly, concluded that the risks associated with leachate from municipal waste landfills are similar.

[Notes and Citations]


108 Id. at 200.

110 Id. at 205.

112 See infra notes 114-28 and accompanying text.


to the risks from industrial waste landfills.\textsuperscript{116} Subsequent analysis of the same data, however, reaches the opposite conclusion.\textsuperscript{117} Some more recent studies suggest that landfills containing only MSW are distinguishable from both co-disposal landfills and purely industrial landfills.\textsuperscript{118}

Several studies have criticized the Brown and Donnelly study's conclusion that the risks associated with leachate from municipal waste landfills are similar to those from industrial waste landfills.\textsuperscript{119} The first study states that the Brown and Donnelly analysis does not support the conclusion that leachates from municipal landfills pose a "risk" to human health comparable to the risks that industrial landfills pose or that such levels of risk may amount to a significant threat to human health.\textsuperscript{120} The criticism compared MSW landfill leachate to tap water and beer\textsuperscript{121} and suggested that drinking water affected by MSW landfills is little different from municipal tapwater throughout the nation.\textsuperscript{122} The study further suggested that "leachate from at least some municipal waste landfills is a dilute alcoholic beverage."\textsuperscript{123} A second study also concluded that the Brown and Donnelly study failed to substantiate its assertion that MSW and hazardous waste landfills pose equivalent health risks.\textsuperscript{124}

A third study tested and disproved the hypothesis that there is no difference between leachate characteristics in hazardous waste landfills and in MSW landfills.\textsuperscript{125} The study concluded that leachates from MSW landfills and hazardous waste landfills easily may be


\textsuperscript{117} See infra notes 119-27 and accompanying text.

\textsuperscript{118} See infra notes 119-27 and accompanying text.


\textsuperscript{120} See Crouch, \textit{supra} note 119, at 1.

\textsuperscript{121} See \textit{id.}, at 9-13.

\textsuperscript{122} \textit{Id.} at 11, 12.

\textsuperscript{123} \textit{Id.} at 9.

\textsuperscript{124} See \textit{Review of Brown} \textit{supra} note 119, at 17.

distinguished in terms of detection frequency and concentration of toxic constituents detected.\textsuperscript{126} The study also noted that co-disposal facilities may be distinguished from purely hazardous waste landfills and from purely MSW landfills.\textsuperscript{127}

The usefulness of these studies, however, appears limited. Studies that suggest that MSW is relatively innocuous in nature do not exculpate municipalities seeking to avoid liability in a contribution action because even trace amounts of hazardous substances contributed to a site will trigger liability. Conversely, such generic studies do not necessarily prove that all MSW is hazardous or that the MSW at a particular site is hazardous. Industrial polluters, however, may benefit from generic MSW studies if they are able to convince a court that all MSW is hazardous.\textsuperscript{128} It appears possible that such studies might be useful to a court in apportioning liability.

B. CERCLA, RCRA, and EPA Policy: Where Does MSW Fit In?

In one of the main arguments to defend against third-party liability, municipalities have contended that because MSW and household wastes are practically similar, and because household waste is exempt from being regulated under the Resource Conservation and Recovery Act (RCRA) as a hazardous substance, MSW should not be considered a hazardous substance under CERCLA.\textsuperscript{129} Courts have not accepted this defense noting that it is not inconsistent both to regulate MSW as a non-hazardous substance under RCRA and treat MSW as a hazardous substance for the purposes of liability under CERCLA.\textsuperscript{130}

1. Hazardous Substances Under CERCLA

CERCLA defines hazardous substance by incorporating through reference the hazardous substance definition in other federal environmental statutes.\textsuperscript{131} These other environmental statutes do not state expressly that MSW is a hazardous substance, but do, however, list substances that may be trace components of MSW.\textsuperscript{132} Addition-
ally, pursuant to section 9602 of CERCLA, the EPA also may designate as hazardous other substances that existing environmental law statutes do not encompass if such substances may endanger public health, welfare, or the environment. To date, EPA has listed over 700 substances.

2. Hazardous Substances Under RCRA

RCRA regulates the day-to-day handling of solid and solid hazardous wastes. CERCLA incorporates those substances that RCRA defines as hazardous. Under RCRA, the EPA uses two methods to define and classify hazardous wastes. The EPA determines that a waste is hazardous either because the waste is a "characteristic" hazardous waste or because the EPA rules have specifically designated or listed the waste as hazardous.

RCRA features two distinct regulatory systems: Subtitle C applies to hazardous solid wastes, while the less rigorous Subtitle D covers the regulation of non-hazardous solid wastes. RCRA regulations broadly define "household waste" to include "any material ..."
derived from households."

Household waste is not considered to be a hazardous waste under RCRA. Therefore, household waste is exempt from Subtitle C's hazardous waste regulations. Rather, household waste is subject to the less stringent handling requirements of Subtitle D. Moreover, household hazardous wastes—wastes that would be regulated under Subtitle C if generated by a non-household in greater than small quantity generator limits—are also exempt from subtitle C.

Considering CERCLA and RCRA together, MSW may contain CERCLA hazardous constituents that could trigger liability. At the same time, MSW is managed under RCRA as a non-hazardous substance. RCRA's definition of household wastes is substantially similar to EPA's definition of MSW under EPA's Interim Municipal Settlement Policy concerning MSW's treatment under CERCLA.

3. EPA's Interim Municipal Settlement Policy

The EPA established the Interim Municipal Settlement Policy with dual purposes. The Interim Policy provides enforcement guidance to EPA regional offices in dealing with municipalities and municipal wastes under CERCLA while also delineating how the EPA will treat municipalities and private parties in the CERCLA settlement process at municipal landfills. Apparently, the policy also aims to establish national consistency in handling the complexity of Superfund sites involving municipalities.

a. Definition of MSW

The EPA has defined MSW unofficially in its Interim Municipal Settlement Policy. The Interim Policy refers to MSW as solid waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or re-used, is not hazardous.

144 Id. EPA regulations provide that household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or re-used, is not hazardous. 145 Id. 146 Id. But see Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50, 978 (1991) (to be codified at 40 C.F.R. pts. 257, 258) (final rule creating new criteria, more stringent than Subpart D but less stringent than Subpart C, for municipal solid waste landfills). 147 B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960, 965 (D. Conn.), aff'd 958 F.2d 1192 (2d Cir. 1992). 148 Less that 100 kg/month of hazardous waste and less that 1 kg/month for acute hazardous wastes. 40 C.F.R. § 261.5. 149 54 Fed. Reg. 51,071 (1989). 150 Id. 151 Id. The Interim Policy does not have the force of law but is merely a guidance tool for the EPA. See B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960, 967 (D. Conn. 1991), aff'd, 958 F.2d 1192 (2d Cir. 1992).
wastes generated primarily by households that may include some wastes from commercial, institutional, and industrial sources. The Interim Policy notes that MSW generally is composed of large volumes of non-hazardous substances such as yard waste, food waste, glass, and aluminum and may contain small quantities of household hazardous wastes, such as pesticides and solvents as well as small quantity generator wastes. The Interim Policy also recognizes that the level of hazardous constituents in MSW is generally minimal and that the actual composition of MSW varies considerably among individual Superfund sites.

b. Treatment of Municipalities Under the Interim Policy

The Interim Policy first addresses if municipalities will be notified as PRPs at municipal landfills. The EPA will include data gained from municipalities in the information gathering process in determining whether the Agency will notify a municipality. The Interim Policy also addresses how the EPA will treat municipalities if they are notified.

The Interim Policy states that the EPA generally will not pursue municipalities who are generators or transporters of MSW to help pay for Superfund cleanup costs when the waste is believed to be derived from households. Nor will the EPA pursue private parties for contributing similar wastes to a site. The EPA may, however, send PRP notices to municipalities or private parties when the EPA has information that the MSW at a site contains a hazardous substance originating from a commercial, institutional, or industrial process or activity. An exception to the general policy of not notifying municipalities where only household hazardous wastes are present exists when the total contribution of commercial, institutional, and industrial wastes private parties contributed to the site is insignificant compared to relative toxicity and volume of the MSW. If the EPA does notify a municipality, the EPA will treat

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152 54 Fed. Reg. at 51,074. Commercial, institutional, and industrial wastes are defined as those wastes essentially the same as MSW. Id.
153 Id.
154 See Ferry, supra note 108, at 197, 210.
156 Id. at 51,075.
157 Id.
158 Id. at 51,075.
159 Id.
160 Id.
161 Id.
the municipality like any private party.\textsuperscript{162} The EPA may, however, opt to reach settlements that take into account the unique nature of municipalities.\textsuperscript{163}

The tools the EPA may use in settlements with named municipalities include delayed payment, delayed payment schedules, and in-kind contribution.\textsuperscript{164} Delayed payment simply allows a municipality to pay its liability in a lump sum at a later date.\textsuperscript{165} Delayed payment schedules allow a municipality to pay its share of liability over time.\textsuperscript{166} In-kind contributions allow a municipality to provide services at a site such as operations and maintenance in exchange for a reduction of liability.\textsuperscript{167} Although these flexible modes of settlement may help named PRPs, unnamed PRPs have not benefitted from the special settlement opportunities.

Significantly, the Interim Policy does not preclude contribution actions.\textsuperscript{168} As the Interim Policy now stands, municipalities avoid EPA prosecution but face private party contribution suits.

IV. JUDICIAL INTERPRETATION OF MUNICIPAL LIABILITY UNDER CERCLA FOR MSW

Industrial polluters have exploited the opportunity to bring third party actions against municipalities for the contribution of MSW to co-disposal landfills. Municipalities have resisted third-party actions on the basis that the generation or transportation of MSW does not trigger liability under CERCLA. The district courts have held otherwise.\textsuperscript{169} In the only case to reach an appellate court, the United States Court of Appeals for the Second Circuit affirmed that municipalities may be liable under CERCLA if their MSW actually contains CERCLA hazardous substances.\textsuperscript{170} The municipal defendants have not appealed the appellate court's decision. Absent a change in EPA policy or congressional action, municipalities must abide by present judicial interpretations for their potential MSW liability.

\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 51,076.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} See \textit{id.}
\textsuperscript{170} Murtha, 958 F.2d at 1192.
A. B.F. Goodrich v. Murtha

*B.F. Goodrich Co. v. Murtha*\(^{171}\) is one of the prominent cases litigated concerning the validity of municipal liability for MSW under CERCLA. *Murtha* was the first case that reached a United States Court of Appeals on the hotly contested MSW liability issue.\(^{172}\) In *Murtha*, two Connecticut landfills involved in a CERCLA cleanup, the Beacon Heights Landfill and the Laurel Park Landfill, contained hazardous waste.\(^{173}\) The EPA named B.F. Goodrich Company (B.F. Goodrich) and Uniroyal Chemical Company (Uniroyal) as PRPs but followed the Interim Policy by not naming municipalities as PRPs but followed the Interim Policy by not naming municipalities as PRPs. B.F. Goodrich filed a claim for contribution against Murtha, the owner and operator of the two landfills, for response costs.\(^{174}\) In turn, Murtha filed a third-party complaint against approximately 200 parties, including twenty-one municipalities, alleging that the municipalities disposed of MSW at the site.\(^{175}\) B.F. Goodrich and Uniroyal also amended their complaints to include the municipalities that the EPA had not named as PRPs.\(^{176}\)

The municipalities argued that, in collecting or generating primarily household MSW, municipalities did not arrange for the disposal, treatment, or transportation of hazardous substances, and that the court should hold that municipalities are exempt from contribution actions seeking cleanup costs for MSW under CERCLA.\(^{177}\) The private party PRPs asserted that both the Beacon Heights and Laurel Park Landfills contained MSW and that the MSW contained hazardous materials.\(^{178}\) Because the municipalities were responsible for MSW disposal, the industrial PRPs argued, municipalities were likewise liable for a portion of the cleanup costs.\(^{179}\) The EPA also filed a brief arguing against municipal immunity from CERCLA liability.\(^{180}\)

\(^{171}\) *Murtha*, 754 F. Supp. at 960, 972.

\(^{172}\) See id.

\(^{173}\) Id. at 961–62.

\(^{174}\) See id at 961.

\(^{175}\) Id. at 962.

\(^{176}\) Third Amended Complaint of Uniroyal Chemical Co. alleging additional claims against certain municipalities and housing authorities, B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960 (No. N-87-52 (PCD)).


\(^{178}\) See id. at 962.

\(^{179}\) Id.

\(^{180}\) Opposition of the United States to the Motion for Summary Judgment Filed on Behalf of the Municipal Defendants, B.F. Goodrich v. Murtha, 754 F. Supp. 960 (No. N-87-52(PCD)).
1. The Municipal Argument

The municipalities argued that through section 9604, CERCLA's incorporation of RCRA also incorporates RCRA's exemption for household waste and that MSW therefore is not a hazardous substance under CERCLA.\(^{181}\) By not finding MSW exempt from CERCLA, the court would render the RCRA exemption meaningless.\(^{182}\)

The municipalities asserted that if the court found the municipalities liable for merely generating MSW, it would be making every household member in the municipalities liable for putting their trash out for pickup.\(^{183}\) Municipalities would shift the costs of cleanup back to their citizens in the form of higher taxes even though Congress was concerned with making polluters rather than taxpayers pay. To support this assertion, the municipalities pointed to the Superfund structure that taxes the chemical industry, CERCLA's silence on MSW, and the lack of discussion concerning MSW in CERCLA's legislative history.\(^{184}\)

The municipal defendants also contended that the court should defer to the Interim Municipal Settlement Policy as law because the Policy is EPA's only official interpretation of CERCLA in relation to the MSW issue, and because the policy is the result of extensive consideration and public comment.\(^{185}\) The municipalities asserted that because Congress intended the EPA to have substantial discretion in administering CERCLA, the court must defer to the EPA's interpretation of municipal liability under CERCLA if that interpretation is reasonable and consistent with congressional intent.\(^{186}\) Further, the municipal defendants noted that although the Interim Policy acknowledges that MSW may contain a small amount of

\(^{181}\) Murtha, 754 F. Supp. at 964; 40 C.F.R. § 261.4(b).

\(^{182}\) 42 U.S.C. § 9601(14); see also 40 C.F.R. § 261.4(b).

\(^{183}\) Defendant's Memorandum in Support of Motion for Summary Judgment Filed on Behalf of the Defendant Municipal/Government Agency Collectors Group at 30-31, Murtha, 754 F. Supp. 960 (No. N-87-52 (PCD)).

\(^{184}\) Id. at 31.

\(^{185}\) See Id. at 32.

\(^{186}\) See id; see also Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1344 (D.C. Cir. 1989) (deference to agencies is appropriate not only because of agency expertise but also because Congress is presumed to delegate the policy choices inherent in resolving statutory ambiguities to the agency charged with implementation of the statute; Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (when intent of Congress is clear, Court and agency must defer; Court will defer to permissible agency interpretation when Congress' intent unclear); American Mining Congress v. EPA, 824 F.2d 1177, 1182, (D.C. Cir. 1987), (if Congress has not addressed the question, the court must look to the agency's interpretation to construe the statute); Chem. Waste Management Inc., v. EPA, 869 F.2d 1526, 1540, (D.C. Cir. 1989), (EPA has broad discretion to interpret its own rules).
household hazardous wastes, the Interim Policy presumes that MSW is non-hazardous unless site-specific information is provided to the EPA that MSW contains a hazardous substance from a commercial, institutional, or industrial process or activity.\(^\text{i187}\)

2. The Industrial Argument

The industrial PRP argument followed simply from the language of CERCLA.\(^\text{i188}\) Municipalities are persons who may be liable under CERCLA.\(^\text{i189}\) MSW may contain hazardous substances that trigger liability under CERCLA.\(^\text{i190}\) Therefore, municipalities are subject to contribution actions that PRPs may bring.\(^\text{i191}\)

The industrial plaintiffs claimed that Congress did not intend that municipalities be treated differently from any other party under CERCLA.\(^\text{i192}\) The plaintiffs also claimed that the Interim Policy does not immunize municipalities but is, instead, merely an expression of EPA's prosecutorial discretion.\(^\text{i193}\) The plaintiffs pointed to the Interim Policy's disclaimer that states that the Interim Policy is designed to guide EPA personnel and does not create any substantive rights.\(^\text{i194}\) Finally, the plaintiffs argued that the court should not defer to the Interim Policy. Rather, the industrial plaintiffs claimed that the Interim Policy is merely guidance for the EPA and that the real issue was whether municipalities were liable under CERCLA's express terms.\(^\text{i195}\)

The EPA intervened in *Murtha* to argue that the Interim Policy did not apply because the Interim Policy did not create immunity from contribution.\(^\text{i196}\) The EPA argued that the United States government has an interest in the case because the EPA may desire to


\(^\text{i188}\) Beacon Heights Coalition Plaintiffs' and Uniroyal Chemical Co.'s Memorandum of Law in Opposition to the Defendants Municipal/Government Agency Collectors Group's Motion for Summary Judgment at 5–6., *Murtha*, 754 F. Supp. at 960 (No. N-87-52 (PCD)).

\(^\text{i189}\) Id.

\(^\text{i190}\) Id.

\(^\text{i191}\) Id.

\(^\text{i192}\) Id.

\(^\text{i193}\) Id. at 14–18.

\(^\text{i194}\) Id.

\(^\text{i195}\) Id.

recover from municipalities the response costs that corporate PRPs do not meet. Similar to the plaintiff's argument, the EPA pointed to the broad liability imposing language of CERCLA as indicating that municipalities are not exempt.

3. The Decision: Municipalities May be Liable

Judge Peter Dorsey denied the municipalities' motion for summary judgment holding that municipalities may be liable under CERCLA for the disposal of MSW. The Murtha court rejected the municipalities' contention that CERCLA's definition of hazardous substance incorporates RCRA's regulatory exemption for household waste. Instead, the exemption is limited to RCRA. Based on CERCLA's strict liability provision, the court noted that even though MSW may contain only small quantities of CERCLA hazardous substances, the municipalities may still incur liability. While the amount of hazardous substances may be considered in the apportionment stage, the fact that MSW contains a small percentage of CERCLA hazardous substances did not provide immunity for municipalities. Moreover, CERCLA's silence on MSW did not create an exemption for MSW because Congress could have provided expressly for an exemption for MSW as Congress did with natural gas and petroleum.

The district court did not find the argument that MSW liability under CERCLA shifts liability to the local taxpayer to be persuasive. Instead, the Murtha court was more concerned about the possibility that liability might be shifted to the national tax base through the Superfund if the court prohibited cost recovery from municipalities that disposed of MSW containing hazardous substances. The court viewed such a result as inconsistent with Congress' intent that entities responsible for a hazardous release bear the cost of cleanup.

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197 Id.
198 Id.
199 Murtha, 754 F. Supp. at 960, 967–74.
200 Id.
201 Id. at 966.
202 Id.
203 Id. at 965.
204 Id. at 966.
205 Id.
206 Id.
The *Murtha* court also disagreed with the municipalities’ contention that the EPA’s Interim Policy provides a legal basis for immunity. The court reasoned that the policy is merely a guidance document that does not give protection to municipalities and does not limit the right of private parties to implead the municipalities.

4. Beyond *Murtha*

Other district courts have reached holdings similar to the holding of the Connecticut District Court: municipalities may be liable in contribution for the disposal of MSW. In *Transportation Leasing Co. v. California*, the District Court for the Central District of California rejected the municipal defendant’s argument that CERCLA’s definition of “hazardous substance” does not include rubbish. The *Transportation Leasing* court found it particularly persuasive that Congress had not provided an express exemption for MSW as Congress had done in excluding petroleum from CERCLA liability.

In *United States v. Kramer*, a group of named PRPs argued, among other defenses, that the EPA’s Interim Policy, in generally not naming municipalities, violated their right to equal protection. The *Kramer* court disagreed, however, and viewed the Interim Policy as rationally related to the purpose of replenishing the Superfund as efficiently as possible. The *Kramer* court noted that CERCLA does not exempt municipalities and that private parties might still bring contribution actions against municipalities.

In holding that MSW is not exempt from CERCLA’s definition of hazardous substances and that municipalities may face CERCLA liability, both the *Murtha* and the *Transportation Leasing* courts found that whether the MSW of a particular municipality contains a CERCLA “hazardous substance” remained a question of fact. The
Transportation Leasing court ruled that the third-party plaintiffs must prove that MSW contains hazardous substances. The courts did not declare what level of proof a named PRP would have to meet in order to hold a municipality liable in a contribution action. From the Murtha opinion, it was unclear whether named PRPs could rely on general studies concerning MSW's composition or whether more rigorous site-specific information would be required to attach liability to those responsible for the disposal of MSW. The Interim Policy definitions noted that general studies do not constitute "site-specific" information sufficient to name a municipality as a PRP at a Superfund site unless the studies include information from particular PRP or Superfund site.

After the Second Circuit Court of Appeals affirmed Murtha's holding that municipalities may be liable for MSW disposal under CERCLA, the Connecticut District Court considered whether generic studies concerning MSW led to the conclusion that MSW at a particular site is hazardous. The district court ruled that generic statistical studies that the industrial PRPs submitted were not sufficient to subject municipalities and small business generators of MSW to third-party contribution suits. In its decision, the Murtha court noted that disposal rather than generation, gives rise to liability. The court stated that studies must apply conclusively or that the PRPs must produce specific evidence for each third-party defendant. The court added that although certain products that homeowners discard may contain CERCLA hazardous constituents, the products are not "hazardous" under CERCLA.
V. Administrative Attempts To Resolve MSW Liability

A. "Fair Share" Plan Attempted

As it became more clear that district courts were finding that municipalities may be liable under CERCLA, and as contribution actions against municipalities were increasing across the United States, the EPA began to look at establishing some form of administrative guidance beyond the Interim Policy to address the allocation of response costs at co-disposal sites.226 Who should pay and for how much at co-disposal sites proved, in the end, to be a difficult issue for the EPA. Industry argued that the presence of large volumes of MSW that industry did not generate at co-disposal sites increases clean up costs. Municipalities argued that co-disposal sites would not be on the NPL but for the commingling of hazardous wastes and that cleanup without the presence of hazardous wastes would be much cheaper.227

In July 1991, the EPA announced a new municipal waste policy initiative.228 The Agency also planned a cost-allocation conference of municipal defendants, industrial PRPs, environmental groups, and congressional staff members in October 1991 to facilitate the development of a model settlement document for municipalities.229 At the announcement, EPA Administrator, William K. Reilly, noted that, "You should not be exposed to the expense and uncertainty of protracted litigation in cases where you are not the owner of the site and have sent only household garbage to that site."230 The EPA Administrator also noted that, "I want to get people out of the Superfund system that the law did not intend to be major contributors to the cleanup."231 Through a model settlement document, the EPA aimed to improve the process of resolving potential municipal

231 Id.
liability and enable municipalities to receive contribution protection from the suits of third-party PRPs.\textsuperscript{232}

In December of 1991, Don Clay, Assistant Administrator for Solid Waste & Emergency Response, floated a "trial balloon" concerning the allocation of costs at co-disposal sites.\textsuperscript{233} Municipal groups argued that under the trial balloon's "double delta" formula, municipalities would bear a disproportionate share of a site's response costs.\textsuperscript{234} The double delta formula apportioned liability based on a volume approach.\textsuperscript{235}

Less than a week after the announcement of the "double delta" approach, eight members of the House of Representatives sent a letter to EPA Administrator William K. Reilly opposing the plan.\textsuperscript{236} The Representatives believed, based in part on the relative shares of liability that might result under a double delta formula, that the double delta approach would continue to encourage corporate polluters to subsidize the costs of their activities by suing local governments and their citizens.\textsuperscript{237} The negative reaction that the "double

\textsuperscript{232} See Conference, supra note 229, at 1368.

\textsuperscript{233} EPA Draft Slashes Municipal Superfund Costs to 4\%, Envir. Industry, 13 INSIDE E.P.A. WKLY. REPORT, 1, 8 (Mar. 27, 1992) [hereinafter EPA Draft]. The Assistant Administrator floated the draft at a December 12th meeting of the National League of Cities. See Cities, Congress, supra note 230.

\textsuperscript{234} EPA Draft, supra note 233, at 1, 8; see also Municipal Cleanup supra note 227, at 233.

\textsuperscript{235} Mounteer, supra note 226. The double delta cost formula is as follows. First calculate the costs of MSW and hazardous waste separately. (MSW volume x MSW unit remediation cost = MSW Cost) (hazardous waste volume x hazardous waste unit cost = hazardous waste cost). The total costs of MSW and hazardous waste are then compared in a ratio. Finally, the total response costs of a facility are allocated based on the ratio. For example, assuming 500 tons of MSW and 100 tons of industrial hazardous wastes at cleanup costs of ten dollars per unit and 100 dollars per unit respectively. MSW cost: (500 tons x $10/ton) = $5,000. Hazardous waste cost: (100 tons x $100/ton) = $10,000. MSW cost to hazardous waste cost ratio is 5,000 to 10,000 or 1:2. The municipal share would equal 33 1/3 percent and the industrial share would equal 66 2/3 percent. At a site with total response costs of $100,000,000, municipalities would pay approximately 33.3 million while industrial polluters would pay 66.6 million. See Mounteer supra note 226.

The EPA considered other approaches including the single delta, reverse delta, discount formulas, and piece-of-the remedy allocations. See Municipal Cleanup supra note 227. The piece-of-the remedy approach has been referred to as the "pie chart" or the type of remedy approach. See id. Under a single delta allocation, municipalities would bear the cost of remedies associated with the volume of MSW, such as the cost of a landfill cap, while the industrial PRPs would bear the remainder of the costs. See id. A reverse delta approach would calculate the costs of cleaning up the industrial waste as if MSW had not been co-disposed with industrial waste and then apportion the cost-difference to the municipalities. See id. A discount approach would employ a formula that takes into account the volume and toxicity of MSW. See id. A piece-of-the remedy approach would allocate costs based on what is driving individual components of the remedy. Id.
delta” draft spawned caused the EPA to re-examine the proposal that EPA had hoped to release in January of 1992.238

The EPA outlined a new version of the municipal strategy in a March 10th draft Federal Register notice.239 The revised draft utilized a “unit cost” formula rather than the “double delta” approach as a method of apportioning liability at co-disposal sites.240 Under the “unit cost formula,” the EPA would apportion liability based on a comparison of the average cost of cleanup at sites contaminated only with industrial wastes with the costs of cleanup at a site where only municipal wastes have been discarded.241 The “unit cost” draft noted that, under RCRA, the cost per-acre to close a municipal waste landfill is approximately $97,000, while the cost per acre to close an industrial waste landfill under CERCLA averages $2,279,000.242 The EPA has determined the general municipal waste share of response costs at co-disposal sites under the “unit cost” approach to be 4%.243

Along with the draft’s proposed “unit cost” approach, the draft pointed to an increased emphasis on flexible modes by which municipalities could pay their potential liability.244 For example, a municipality might provide in-kind services as a method of payment.245

B. “Fair Share” Plan Abandoned

The EPA intended, but never did, release a final version of the “unit cost” draft to EPA regional offices.246 Clayton Yeutter, President George Bush’s domestic policy advisor, intervened with EPA, apparently on industry’s behalf, to inquire whether the Agency had considered all reasonable alternatives.247 White House intervention

238 See Cities, Congress, supra note 230.
239 See EPA Draft, supra note 233.
240 Id.
241 Id.
242 Id.
243 Id. EPA derives the municipal portion by “[d]ividing the municipal waste cost [per acre] by the sum of the municipal and industrial waste cost. . .[per acre].” [97,000/(2,279,000 + 97,000)] = 4%. Id.
244 Id.
245 Id.
246 See Mounteer, supra note 226.
247 See id.; see also Proposal on Municipal Liability Issue Draws Industry Fire, White
was apparently successful in causing EPA to hold back the release of the “unit cost” draft.\textsuperscript{248} By November 1992, the EPA’s attempt to release a final policy addressing municipal liability at co-disposal sites had been dropped.\textsuperscript{249} Until the Superfund reauthorization debate, the EPA plans to consider municipal liability at co-disposal sites on a case-by-case basis.\textsuperscript{250}

The industrial PRPs favored the original double delta draft and the municipalities supported the unit cost approach. In attempting to address the complex apportionment issue that the courts were facing, the EPA encountered political resistance, and in the end, could satisfy neither the municipal nor the industrial interests. The focus of the debate shifted to the legislative forum.

VI. LEGISLATIVE ATTEMPTS: THE TOXIC CLEANUP EQUITY AND ACCELERATION ACT OF 1993

At the same time the EPA attempted to design an administrative solution to the MSW liability issue, legislation aimed to address the MSW problem was introduced in both houses of Congress as the Toxic Cleanup Equity and Acceleration Act of 1991.\textsuperscript{251} By mid-1992, while the EPA “re-examined” its interim draft, the United States Senate began to debate the merits of amending CERCLA to provide relief to those parties who may have disposed of MSW at Superfund sites.\textsuperscript{252} On July 1, the Senate passed a modified version of the TCEAA as an amendment to the Government Sponsored Enterprises Bill (GSE).\textsuperscript{253} The House of Representatives, however, did not act on the TCEAA. The following year, the legislation was reintroduced in both houses of Congress as the Toxic Cleanup Equity and Acceleration Act of 1993 (TCEAA).\textsuperscript{254}

The TCEAA of 1993 addresses how the EPA and private parties may deal with generators and transporters of MSW under CER-
CLA. For parties who have generated or transported MSW, TCEAA would prohibit third-party contribution suits, facilitate settlement, and cap liability. TCEAA would apply retroactively. Further, TCEAA precludes liability for MSW for municipalities merely acting in a regulatory capacity. At a later date, municipalities must establish a waste collection program and comply with federal law concerning the handling of sewage sludge in order to take advantage of the bill's settlement provisions.

A. Block on Third-Party Contribution Suits

TCEAA would block contribution actions for MSW and sewage sludge by amending section 9613 of CERCLA. Under the modified section 9613, only the EPA would have the authority to recover response costs, penalties, or damages related to the generation or transportation of MSW. The amendments to CERCLA, do not, however, prevent private parties from bringing contribution suits when a municipality has contributed a hazardous waste that does not meet the TCEAA's definition of MSW.

The bill adds three definitions to CERCLA section 9601 including definitions of MSW, sewage sludge, and municipality. Similar to...
the Interim Policy, the bill defines MSW as household waste and includes, for example, food and yard waste, paper, consumer packaging, and household hazardous waste. Waste derived from non-municipal sources also may qualify as MSW when such waste is essentially the same type of waste that households generate or when the wastes meet RCRA's small quantity generator exceptions. Through an amendment to CERCLA's settlement provisions, TCEAA clarifies that its new provisions apply even if constituent components of MSW may qualify as CERCLA hazardous substances. Neither combustion ash nor industrial process waste that is not "essentially the same" as household waste qualifies as MSW.

Under the TCEAA, "sewage sludge" refers to waste resulting from treating waste water at a publicly-owned treatment works. "Municipality" means any political subdivision including persons acting in the official capacity of a municipality.

In addition to the elimination of third-party suits against the generators and transporters of MSW, TCEAA creates a "public right-of-way" provision that immunizes municipalities from liability when a municipality is acting in its regulatory capacity. Municipalities would not incur Superfund liability when hazardous substances are transported over a public right-of-way that the municipality owns; nor would a municipality incur liability when it grants a business license to a private party to transport or dispose of MSW.

B. New Settlement Procedures and Liability Cap

By amending CERCLA's settlement provisions in section 9622, the TCEAA provides a new mode of settlement for "eligible per-

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268 Household hazardous waste includes painting, cleaning, gardening, and automotive wastes. Id.
269 Id.
270 Id.; see 42 U.S.C. § 6921(d).
275 Id.
276 Id.
277 Id. subsec. (b).
sons," those parties who are subject to administrative or judicial action concerning the generation or transportation of MSW.279 The proposed legislation does not limit the liability of municipal and private parties in their capacities as owners and operators of a facility.280 Owners and operators, however, may take advantage of TCEAA's liability and settlement provisions to the extent their liability arises from the generation and transportation of MSW.281

Parties who qualify as eligible persons may, through a written statement, make a "good faith" offer to settle their potential liability with the EPA.282 The statement must articulate the party's ability and willingness to settle its potential liability.283 The EPA's receipt of a generator or transporter's offer suspends,284 pending negotiation of a final settlement with the EPA, any additional administrative or judicial action against such generator or transporter.285

TCEAA establishes a time frame in which eligible persons may make an offer to settle MSW liability.286 A party may submit an offer within 180 days of receiving a PRP notice, within 180 days of becoming subject to administrative or judicial action, or within 180 days of the EPA's issuing a record of decision concerning the response action at issue, whichever date is later.287

Once a party initiates TCEAA's new settlement method, the EPA must in good faith attempt to expedite a final settlement.288 TCEAA contains guidelines that must be followed when reaching a settlement with a generator or transporter of MSW.289 First, the aggregate level of response costs that the EPA attributes to the generation and transportation of MSW must not exceed four percent of the total response costs at a given facility.290 Moreover, the EPA must reduce

280 Id.
281 Id.
282 Id.
283 Id.
284 Id.
285 Id.
286 Id.
287 Id.
288 Id.
289 Id.
290 Id. As originally proposed in 1991, MSW liability would be apportioned under the TCEAA based on the quantity of hazardous constituents within municipal solid waste. One half of one
the aggregate level of response costs related to MSW to below four percent when the presence of MSW is not significant at a given facility.\textsuperscript{291}

Once the EPA allocates the total level of response costs related to MSW, a settling party becomes liable for no more than its equitable share of the aggregate MSW liability.\textsuperscript{292} The EPA must limit an individual settling party's share of liability by taking into account the party's inability to pay, litigative risks, public interest considerations, precedential value, and equitable factors.\textsuperscript{293} The EPA also must permit an eligible person to pay its share of response costs by providing in-kind services.\textsuperscript{294} Further, when a settlement is reached with the EPA, the EPA shall provide to municipal generators and transporters of MSW a covenant not to sue for liability resolved under the settlement.\textsuperscript{295}

\section*{VII. Recommendation}

This Comment does not argue that MSW should be exempt from CERCLA liability, but rather, seeks to advance a workable scheme to apportion and settle a generator's or transporter's fair share of MSW liability. Current judicial and administrative approaches to addressing the MSW dilemma are inefficient and inappropriate in light of CERCLA's goals.\textsuperscript{296} Moreover, options available to the ju-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id. In-kind services would be valued at market rates. Id. Settlements should also, "beginning 36 months following the date of enactment, for disposal of sewage sludge occurring after that date, limit a publicly-owned treatment works' payments if it has promoted the beneficial re-use of sewage sludge through land application." See 139 CONG. REC. S1456, 1457 (Feb. 4, 1993).
\item Id. The TCEAA does not affect a person's ability to enter into a de minimis settlement with the EPA. Id. The proposed legislation does not need to provide for contribution protection from named PRPs because the legislation bars all contributions actions concerning the transportation and generation of MSW.
\item See supra notes 74–89, 219–52 and accompanying text.
\end{enumerate}
\end{footnotesize}
diary and options the EPA has considered do not go far enough to resolve the issue. One legislative proposal would address the weaknesses of the current judicial and administrative approaches. Congress should amend CERCLA.

A. MSW Liability is Inconsistent with CERCLA's Goals

CERCLA, first and foremost, aims to clean up hazardous waste sites. CERCLA attempts to accomplish its cleanup goal by imposing the costs of cleanup upon those responsible for the reckless disposal of hazardous waste, often those polluters who have profited while using inadequate disposal methods that have resulted in environmental harm. CERCLA may not be a perfect environmental cost-accounting mechanism. Polluters pass on their costs of hazardous waste cleanup to future purchasers of goods rather than to those consumers who already may have directly benefitted from hazardous waste disposal through lower prices. However, by imposing liability on industrial polluters, CERCLA imposes liability on those actors who are best able to spread the costs of cleanup.

The disposal of hazardous waste should be treated differently than the disposal of MSW. This Comment does not dispute that, in some cases, industrial polluters' past actions, like the actions of those who have disposed of MSW, may have been legal. CERCLA, a strict liability statute, however, does not seek to cast blame; the statute seeks to assign responsibility. Likewise, CERCLA does not assign liability based on a threshold level of hazardousness in the substances

297 Id.
that are disposed. Trace amounts of hazardous substances will trigger liability. CERCLA liability, however, is inappropriate for the generation and transportation of MSW.

1. MSW and Industrial Wastes are not Comparable

CERCLA liability is inconsistent with the nature of municipal solid waste. The disposal of household garbage that may contain trace amounts of hazardous constituents may not be equated with the disposal of hundreds or thousands of gallons of toxic waste. Recent studies indicate that purely hazardous sites are readily differentiable from co-disposal landfills in terms of chemical constituents. Moreover, most co-disposal landfills would not be on the NPL if hazardous industrial waste also had not been disposed of at the same sites.

2. Municipalities and Industrial Polluters are Inherently Different

While imposing CERCLA liability upon any party that generates or transports MSW is inappropriate, imposing CERCLA liability upon municipalities is especially inconsistent with CERCLA’s “polluters pay” philosophy. There are inherent differences between industrial polluters and municipalities. Industrial polluters are motivated and constrained by profit. Municipalities serve unique and necessary public functions and have not profited from the disposal of MSW in the same sense as industrial polluters have profited. Municipalities are, however, constrained to provide important governmental services with limited tax resources and sometimes legal limits on their ability to raise revenues.

Imposing CERCLA liability upon parties who have disposed of MSW effectively subsidizes industrial cleanup. Such a subsidy may be equated to a random tax on those parties who have disposed of

306 See generally, Crouch supra note 119, at 1; Gibbons, supra note 125, at 1; Review of Brown, supra note 119, at 17.
307 See generally, Gibbons, supra note 125, at 1.
308 See Steinzor & Lintner supra note 114.
309 See Burke supra note 15, at 3.
310 See supra notes 20–25 and accompanying text.
311 See Federal Hazardous Waste Policy supra note 22, at 373.
312 See Steinzor & Lintner supra note 114.
generally innocuous MSW because, without the co-disposal of hazardous wastes, municipal landfills would not be on the NPL. By shifting the costs of cleanup from the industrial polluter to the municipality or other entities that have disposed of MSW, CERCLA's "polluter pays" philosophy is distorted. Municipal citizens already contribute directly to the cost of CERCLA cleanup through federal appropriations for Superfund.

In addition, industrial polluters are more efficient at distributing the cost of hazardous waste disposal because they may pass the costs of disposal and cleanup on to the buyers of their products in the form of higher prices. Raising taxes is a less, if not a completely, inefficient mode of sending proper price signals to consumers. Raising taxes does not provide an incentive to producers of goods that may use or contain hazardous constituents to alter the composition of their goods. Rather than an industrial polluter bearing the full cost of hazardous waste disposal, consumers and non-consumers alike of products that contributed to hazardous waste pollution would bear the costs of hazardous waste cleanup through higher taxes. The individual taxpayer may never know what portion of the tax bill that he or she receives in the mail represents the cost of cleaning up the industrial polluter's hazardous waste. Raising taxes hides the true cost of hazardous waste cleanup from both industrial polluters and consumers. As a result, municipalities and other generators and

314 Id.
315 Theoretically, the production of some goods could be eliminated due to CERCLA liability. This Comment does not argue that environmental cost-accounting is always appropriate. Assuming CERCLA is perfectly efficient in imposing costs upon responsible parties, which it is not, those who do favor cost-benefit analysis should willingly accept the elimination of the production of goods whose costs outweigh their utility.
316 One commentator has noted that Superfund liability ultimately is a matter of allocation. See Mounteer, supra note 226. In other words, citizens will pay, whether through municipal liability or higher prices of goods and services. The commentator further asserts that if municipalities do not pay a greater share than they would under the proposed TCEAA, industrial polluters will more zealously resist liability with other polluters, thereby increasing transaction costs.

The possibility that citizens will ultimately pay anyway, and that industrial polluters will fight harder without municipalities in the PRP pool, does not justify subjecting generators and transporters of MSW to either litigation costs that may exceed potential liability or cleanup costs that may be twenty times what they would have been without the presence of industrial hazardous waste. Any allocation of liability should not ignore the deterrence function that CERCLA serves. Finally, one need only look back as far as Love Canal to understand that one of Congress' primary concerns in passing CERCLA was not making ordinary citizens pay for the disposal of MSW.
317 Cf. Mounteer, supra note 226.
transporters of MSW will continue to shoulder the costs of hazardous waste cleanup with little opportunity to influence consumer product purchases. More importantly, a municipality will not have the ability to influence an industrial polluter's input choices or disposal practices.

B. Judicial Approaches and the Interim Municipal Settlement Policy are Inadequate

Neither municipalities nor industrial polluters know, where MSW contains hazardous substances, exactly how courts will apportion MSW liability.\(^{318}\) Courts have only noted that they may use their equitable powers as CERCLA authorizes.\(^{319}\) Industrial polluters as well as generators and transporters of MSW are unable to gauge accurately the potential apportionment of liability that might be imposed in a judicial decision. Consequently, neither party can make a fully informed settlement.

The Interim Policy, as it stands, is ineffective.\(^{320}\) Under the Interim Policy, generators and transporters of MSW generally do not participate in the settlement process with the EPA because generators and transporters usually do not receive PRP notices and because the EPA currently does not fully utilize available settlement tools.\(^{321}\) The Interim Policy gives no guidance as to how to apportion MSW liability and does nothing to discourage litigation.\(^{322}\) By allowing named PRPs that have contributed hazardous waste to seek a portion of response costs from parties that have disposed of only MSW, the Interim Policy actually serves to increase litigation. Litigating MSW liability causes municipalities to bear transaction costs that may be disproportionate to their actual share of liability. At the same time, municipalities have no guarantee that even if they do settle third-party suits, the EPA will not later seek response costs. In sum, the combination of current case law and the Interim Policy results in uncertainty, ambiguity, and inefficiency that serves to delay cleanup.


\(^{319}\) See Murtha, 958 F.2d at 1192.


\(^{321}\) See supra notes 155–67 and accompanying text.

\(^{322}\) Id.
C. A Solution Framework

An appropriate resolution to the MSW-CERCLA liability issue would consider the inherent differences between MSW and industrial waste and between municipalities and industrial polluters in light of CERCLA's goals. After factoring in the inherent differences between municipal wastes and industrial wastes and the differences between municipalities and industrial polluters, an appropriate solution to the MSW-CERCLA liability issue would aim to reduce litigation and decrease transaction costs associated with apportioning MSW liability. At the same time, an effective resolution should promote predictability, consistency, and administrative efficiency. Ultimately, all of the qualities desired in ending the MSW-CERCLA liability debate should lead to the cleanup of existing hazardous waste sites and contribute to deterring the wanton disposal of hazardous waste.

The small percentage of hazardous constituents in MSW is enough to justify special rules of liability apportionment for any party who has generated or transported MSW. That imposing liability upon municipalities is generally inconsistent with CERCLA's philosophy leads to the conclusion that settlements with generators and transporters of MSW should be addressed in a manner different from settlements with those parties who have disposed of industrial hazardous wastes. Unfortunately, neither available judicial options nor proposals that the EPA has considered accomplish this goal.

1. Judicial Apportionment Alone is Unworkable

Considering the holdings of the district courts that municipalities may be liable for the disposal of MSW, and assuming that plaintiffs seeking contribution meet the burden of proving that MSW at a given site is hazardous, it remains unclear exactly how a court would apportion liability. From the outset, a judicial apportionment scheme appears unsatisfactory because it forces parties to litigate their liability and thereby increases transaction costs. Once parties resort

323 See Mounteer, supra note 226.
324 See Ferry, supra note 108, at 202.
326 See Murtha, 754 F. Supp. 960 (No. N-87-52 (PCD)) (D. Conn. Jan. 12, 1993) (denying in part and granting in part a motion to add 1,151 potentially responsible parties to the suit); see also Court Refuses, supra note 222, at 2577.
to the courts for MSW apportionment, courts have tools with which to apportion liability.\textsuperscript{327} Courts might apportion liability based on any one or combination of the following approaches: comparative fault, comparative causation, Gore Factors, or general considerations of equity.\textsuperscript{328}

Under a comparative fault approach to apportioning liability, a court might consider whether or to what extent a municipality or named PRP knew of the dangers of dumping their wastes and the magnitude of the risk they created in disposing of wastes. Perhaps one party or the other knew that its wastes were being co-mingled and that such activity would create a risk.\textsuperscript{329} A court may further consider more subjective information such as the particular circumstances of a particular municipality or PRP.

Under a comparative causation approach, a court could consider the volume and types of wastes sent to a facility. This would allow a court to consider the inherent differences, especially in terms of toxicity, between MSW and industrial wastes. Inadequate information about sites and the commingling of wastes, however, make an approach that relies on waste volumes and characteristics to apportion liability somewhat problematic. Moreover, it remains to be seen what type of volume/toxicity formula\textsuperscript{330} a court would employ.

A third approach to apportioning MSW liability a court might consider is one that takes into account equitable factors.\textsuperscript{331} The Gore Factors effectively articulate a broad equitable approach. Under the Gore Factors, courts could weigh a municipality's ability to prove that MSW its distinguishable from other hazardous wastes, the amount of MSW a municipality disposed of, the toxicity of MSW, the municipality's involvement in the generation, transportation, treatment, storage, or disposal of MSW, the degree of care the municipality exercised in its activities related to the MSW, and the extent that a municipality cooperated with the EPA in preventing further harm.

Other equitable factors a court could consider are the nature of each party's wastes and the party's connection to and degree of care in handling the wastes, how much a party profited from waste dis-

\textsuperscript{327} See supra notes 79–107 and accompanying text.

\textsuperscript{328} Id.

\textsuperscript{329} See supra note 81 and accompanying text.

\textsuperscript{330} Given the difficulty that the EPA had in its attempt to develop a uniform means of MSW apportionment, it would seem that courts also would encounter difficulty in apportioning MSW liability.

\textsuperscript{331} See supra notes 87–90 and accompanying text.
posal, and how much each party can pay. The strength of an equitable approach is that it is flexible.

Any judicial apportionment of MSW waste liability, where there are no administrative options to facilitate settlement with the EPA or private PRPs is unpalatable because it increases litigation and the associated transaction costs. Although under the different approaches to apportioning liability the courts may take into account the differences between MSW and industrial waste and the differences between those parties responsible for MSW and those responsible for industrial waste, the lack of a set range of liability impedes and thereby discourages informed settlement.

2. Administrative Proposals Only Solve Half of the Problem

The EPA considered at least five approaches to supplementing the Interim Municipal Settlement Policy in which the EPA would encourage settlement with generators and transporters of MSW and provide contribution protection; double delta, unit cost, volume-toxicity formulas, type of remedy, and single delta. Each of the approaches represented a different method and view of the allocation of response costs at a co-disposal site.

The double delta and volume-toxicity formulas suffer from the weakness of a comparative causation approach in that the formulas rely on volume levels to calculate costs. Actual site specific volumes of wastes are not generally available. It is impossible to analyze each formula specifically because the EPA never officially released the plans through the federal register for comment.

Notwithstanding EPA’s decision not to pursue its fair share plan, the unit cost plan came close to resolving the MSW-CERCLA liability issue. The unit cost plan would have allocated to municipalities four percent of the response costs at a co-disposal site. The EPA had based the cost-allocation ratio on a comparison of the costs of cleaning up MSW at a RCRA subtitle D facility to the costs of cleaning up hazardous waste at a CERCLA facility. The strengths of the proposed policy included its formula to predict liability and

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332 54 Fed. Reg. 51,071 (1989); see supra notes 221–51 and accompanying text.
333 See supra notes 228–45 and accompanying text.
335 See Site Completions, supra note 249, at 1714.
336 See EPA Draft, supra note 233, at 8.
337 Id.
the EPA's encouragement of settlement thereby allowing generators and transporters of MSW to reduce transaction costs by avoiding third party litigation. Generators and transporters of MSW might also reduce their cash liability by providing in-kind services. The weakness of the unit cost version of the fair share plan is that the plan does not block the third-party contribution suits prior to a municipality's settling with the EPA.

Neither judicial nor administrative approaches to MSW liability represent an adequate solution. Judicial apportionment of MSW liability subjects municipalities and industrial polluters alike to high transaction costs and may result in a subjective and unpredictable apportionment. Administrative apportionment of MSW liability may remove some of the subjectivity of judicial apportionment of MSW liability but leaves municipalities open to costly contribution actions. A proposed amendment to CERCLA responds to many of the weaknesses of the judicial and administrative approaches to apportioning MSW liability and serves to hasten, rather than delay cleanup.

D. TCEAA Addresses the Weaknesses of Current Judicial and Administrative Approaches to CERCLA Municipal Solid Waste Liability

TCEAA treats MSW as a non-hazardous substance and attempts to treat municipalities fairly within the CERCLA framework. The Act favors administrative settlement rather than judicial apportionment of MSW liability and generally appears to supplement the Interim Municipal Settlement Policy. The legislation would: reduce litigation and the associated transaction costs of litigation; apportion liability equitably, predictably, and in a manner that is easy to use from an administrative standpoint; and promote early settlement. The Act would also encourage the recycling of municipal solid wastes.

1. Consistency with CERCLA's Goals, the Nature of MSW, and the Municipal Entity

By recognizing that there are inherent differences between MSW and industrial hazardous waste in defining municipal solid waste

See EPA Draft, supra note 221, at 8.

generally as household waste. TCEAA is consistent with CERCLA’s goals. The Act specifically states that MSW does not qualify as a CERCLA hazardous substance even if MSW’s constituents may contain hazardous substances. The Act’s MSW liability formula is based on a formula that follows the EPA’s comparison of the costs of household waste and industrial hazardous waste. As a result, industrial PRPs may not force municipalities to pay hazardous waste remediation rates for generally innocuous MSW. By preventing municipal citizens from further subsidizing CERCLA cleanups through higher municipal taxes, the TCEAA’s liability formula is congruent with CERCLA’s polluter pays philosophy.

Because those parties that have generated or transported a waste “essentially the same” as MSW may also take advantage of the TCEAA’s settlement provisions, the Act concentrates on addressing a particular type of waste rather than a particular party. The Act includes some provisions that might be particularly appropriate for municipalities. For example, the EPA must limit a party’s liability to its equitable share. The EPA may consider the municipality’s inability to pay clean-up costs in apportioning liability. A municipality might provide in-kind services as a means of reducing its monetary liability. In addition, delayed payment would still be available under the Interim Policy.

2. Reduced Litigation and Transaction Costs

The block on third-party contribution actions is the heart of the TCEAA. The prohibition of third-party actions against MSW generators and transporters is an important change from the current administrative approach because municipalities may, under TCEAA,

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340 Id. subsec. (a).
341 See id. subsec. (g); see also subsec. (d) (stating that the amount of hazardous substances in municipal solid waste refers to the quantity of hazardous substances that are constituents of MSW rather than to the overall volume of MSW). Id. subsec. (d). This section apparently is designed to give EPA statutory guidance as to how to prepare de minimis settlements dealing with MSW.
342 See EPA Draft, supra note 233, at 8.
344 See id. subsec. (c).
345 Id.
346 Id.
347 Id.
348 Id.
avoid defending the contribution actions courts currently allow and the Interim Policy encourages.\textsuperscript{351}

Under TCEAA, municipalities have the opportunity to avoid the judicial forum altogether. TCEAA would allow only the EPA to pursue municipalities for MSW liability.\textsuperscript{352} By blocking third-party contribution actions, TCEAA would reduce transaction costs that municipalities and industrial PRPs incur in litigating liability and the apportionment of MSW liability.\textsuperscript{353}

3. Equitable and Efficient Apportionment

While municipalities will not have to defend industrial-PRP contribution actions, municipalities will still be liable for their fair share of liability.\textsuperscript{354} Under TCEAA's formula, municipalities pay a percentage of cleanup costs that is consistent with the comparatively disparate costs of cleaning up MSW and hazardous waste. The EPA will apportion four percent of the total response costs at co-disposal facility to the MSW generators and transporters.\textsuperscript{355}

By capping MSW liability, TCEAA provides a formula that should be relatively simple to administer. The EPA may simply multiply the total response costs by TCEAA's four percent figure to determine the aggregate MSW liability share. Moreover, the four percent cap is not an automatic rebate for industrial PRPs because the EPA may reduce the MSW liability share where appropriate.\textsuperscript{356} The liability cap would provide a guide to generators and transporters of MSW as to their liability and should thereby introduce some consistency and predictability into MSW liability apportionment that would not necessarily exist in a subjective judicial apportionment of MSW liability. When negotiating with the EPA or other PRPs, named PRPs that have disposed of hazardous wastes also will have a better understanding of how much the MSW share will reduce total response costs at a given facility.

4. Swift Settlement Structure

TCEAA serves to get municipalities in and out of the settlement process quickly and without the added burden of defending contrib-
bution actions while negotiating with the EPA. Municipalities may initiate settlement with the EPA through a good faith offer within 180 days of becoming subject to judicial or administrative action or within 180 days of the EPA's issuing a Record of Decision at a given facility. Moreover, because the EPA may not take further administrative or judicial action after a municipality makes an offer of settlement, municipalities can concentrate on working out a settlement with the EPA for their potential liability without bearing additional transaction costs. Presumably, the EPA could begin to apportion liability once the Agency has a reasonably accurate estimate of a facility's total response costs with which to base the municipal share.

Finally, the EPA may offer flexible or alternative methods of payment. Delayed payment in a lump sum or in installments might, for example, give a small municipality, or any municipality with financial difficulties or restrictions on raising taxes, some flexibility in meeting its liability share. In-kind contributions would also aid some municipalities that could assist in the cleanup but could not raise funds quickly. Significantly, the EPA also may provide covenants not to sue to municipalities, thereby adding finality to a municipality's encounter with Superfund.

In sum, TCEAA recognizes that equating MSW to chemical hazardous wastes and thereby imposing liability on generators and transporters of MSW is inconsistent with CERCLA's goals. Through the use of TCEAA's settlement provisions, litigation and transaction costs will be reduced while liability will be apportioned equitably and predictably. A settlement under TCEAA will be quicker and thereby promote cleanup. TCEAA is a necessary modification to the present approaches to handling MSW liability under CERCLA.

VIII. CONCLUSION

From Massachusetts to California, municipalities that disposed of MSW at landfills where industrial waste has been co-disposed have become the target of CERCLA contribution suits. The federal courts have held that, under CERCLA's present terms, municipalities may

\[357 \text{ See id. subsec. (b), (c).} \]
\[358 \text{ See id. subsec. (c).} \]
\[359 \text{ Id.} \]
\[360 \text{ Id.} \]
\[361 \text{ Id.} \]
\[362 \text{ Id.} \]
be liable for disposing of MSW to industrial polluters who bring contribution claims. Municipalities may either settle claims filed against them to avoid protracted litigation, the costs of which may exceed potential MSW liability, or submit to a subjective judicial apportionment of liability. Neither judicial nor administrative relief for municipalities is immediately in sight.

An examination of the judicial, administrative, and legislative approaches to remedying the inadequacies of current case law and EPA policy concerning MSW-CERCLA liability indicates that CERCLA should be amended. The judicial interpretation that municipalities may be liable for MSW as a CERCLA hazardous substance, while arguably consistent with the terms of CERCLA, is incompatible with the nature of MSW in light of CERCLA’s origin and its goals.363

Options available to the courts to determine and apportion liability for MSW appear to be unworkable. Administrative attempts to supplement the Interim Policy moved closer to resolving the issue. EPA’s attempts to produce a “fair share” plan, however, have not and will not materialize anytime soon. A recent court ruling364 and EPA’s decision to drop its plan to supplement the Interim Municipal Settlement Policy pending the Superfund reauthorization debate indicates that both the judiciary and the EPA anticipate that the issue of MSW-CERCLA liability will be decided in Congress. A legislative resolution to the MSW-CERCLA liability issue would remove the ambiguity and uncertainty that pervades the issue.

The Toxic Cleanup Equity and Acceleration Act of 1993 directly answers most of the concerns of an appropriate resolution to the issue of MSW liability under CERCLA. By fairly and efficiently apportioning liability, and by encouraging swift settlement, the TCEAA promotes site cleanup. Congress should act this session to amend CERCLA by passing the Toxic Cleanup Equity and Acceleration Act of 1993.

363 The possibility that the original victims of Love Canal might be responsible for some portion of cleanup costs under CERCLA had their municipalities disposed of MSW at the Hooker facility illustrates the absurdity of the possibility that municipalities should be liable for a large share of the cleanup costs at CERCLA co-disposal facilities.