The Battle over Municipal Liability under CERCLA Heats Up: An Analysis of Proposed Congressional Amendments to Superfund

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THE BATTLE OVER MUNICIPAL LIABILITY UNDER CERCLA HEATS UP: AN ANALYSIS OF PROPOSED CONGRESSIONAL AMENDMENTS TO SUPERFUND

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I. Introduction

The passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), commonly referred to as "Superfund," was truly a monumental legislative achievement. In the ensuing years, CERCLA has proven to be the cornerstone of both federal and state efforts to clean up hazardous waste sites. By establishing a broad range of potentially responsible parties ("PRPs") within the context of strict and joint and several liability, CERCLA has become a bulwark against the ongoing problem of hazardous waste.


3. Potentially responsible party ("PRP") refers to a "covered person" who may be liable under § 107(a) of CERCLA. CERCLA § 107(a), 42 U.S.C. § 9607(a). Pursuant to § 107(a), anyone is a "covered person" who is:
   1. the owner and operator of a vessel or a facility,
   2. any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
   3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity and containing such hazardous substances, and
   4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites.
eral liability.4 CERCLA creates a powerful arsenal aimed at attacking the growing environmental problem of hazardous waste.5

CERCLA authorizes the United States Environmental Protection Agency ("EPA") to place the most egregious hazardous waste sites on a National Priority List ("NPL").6 In 1992, there were approximately 1,200 sites on the NPL.7 It is estimated that at anywhere from one-fifth to as many as one-third of these sites, municipalities are involved as generators, transporters, or site owners.8 Since municipalities may be PRPs under CERCLA, a significant number of local governments have found themselves potentially liable. Considering that the average cost of cleaning up a Superfund site is between 25 and 30 million dollars, the aggregate amount of liability which municipalities may face nationwide is staggering.10

From the standpoint of municipalities, CERCLA has therefore proven to be a mixed blessing. While having a vested interest in the cleanup of hazardous waste sites, municipalities must be wary of being caught in CERCLA's large liability web themselves. Although EPA has primarily focused its enforcement efforts on private industrial polluters, less traditional polluters like municipalities are not

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 . . . .

Id. "Person" is defined 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." CERCLA § 101(21), 42 U.S.C. § 9601(21) (emphasis added).


5. See Steinzor, supra note 2, at 79.


9. For the definition of "PRP" under CERCLA, see supra note 3.

immune from liability under CERCLA.\textsuperscript{11} Furthermore, even if EPA chooses not to actively pursue potentially liable municipalities, private parties liable under CERCLA are becoming increasingly aware of the possibility of suing municipalities for contribution to the cleanup of hazardous waste sites.\textsuperscript{12} In addition, recent court decisions interpreting the scope of CERCLA have shown that municipalities may face liability for providing traditional government services, such as collecting ordinary household garbage, which are not ordinarily thought of as involving hazardous waste.\textsuperscript{13}

Regardless of whether an action is brought by EPA or a private party, liability under CERCLA can present enormous financial problems for municipalities already faced with tight budgetary constraints.\textsuperscript{14} Until recently, municipalities have by and large been passive observers of CERCLA’s evolution.\textsuperscript{15} Only in the past several years, as they have become cognizant of the massive potential liability under CERCLA, have municipalities actively sought relief through the political process.\textsuperscript{16}

This article focuses on the current major legislative proposals for amending CERCLA to eliminate or modify municipal liability. However, in order to provide a framework for understanding these proposals, we first briefly discuss the previous administrative and judicial responses to the problem of municipal liability under CERCLA and the criticisms of these approaches by municipalities and representatives of industry. We then outline and critique the major

\textsuperscript{11} See, e.g., Reardon, \textit{supra} note 10, at 534; Reinders, \textit{supra} note 1, at 420-21; Torricelli, \textit{supra} note 7, at 494. EPA institutionalized its “hands off” approach towards municipalities in 1989 when it promulgated its Interim Municipal Settlement Policy, discussed infra notes 32-76 and accompanying text.

\textsuperscript{12} See Reardon, \textit{supra} note 10, at 534-35; Reinders, \textit{supra} note 1, at 421; Steinzor, \textit{supra} note 2, at 81.


\textsuperscript{14} Since 1989, over 450 third-party contribution suits for hundreds of millions of dollars in damages have been brought against municipalities across the nation. See Reardon, \textit{supra} note 10, at 535-36; Reinders, \textit{supra} note 1, at 424 n.24; Torricelli, \textit{supra} note 7, at 492.

\textsuperscript{15} See Steinzor, \textit{supra} note 2, at 80, 137.

\textsuperscript{16} See Reinders, \textit{supra} note 1, at 440. Since 1990, various special interest groups have supported legislation which would protect municipalities from liability. These groups include: American Communities for Cleanup Equity, U.S. Conference of Mayors, National Association of Counties, Sierra Club, Natural Resources Defense Council, Clean Water Action, Environmental Defense Fund, and U.S. Public Interest Research Group (“PIRG”). See \textit{id.} at 440 n.130.
aspects of the proposed federal legislation and summarize the debate between municipalities and industry over its content. Finally, we examine the practical consequences which this legislation will have for municipalities if it is enacted into law.

II. BACKGROUND

A. Municipalities Are Not Exempt from CERCLA Liability for Household Waste Sent to Landfills.

Municipalities seeking protection from CERCLA liability had hoped that the courts would interpret the statute narrowly to exclude them from the section 107(a) list of "covered persons." Recent federal court decisions have extinguished any hope municipalities had of obtaining meaningful relief through judicial action. Instead of providing relief from liability, federal courts have consistently interpreted CERCLA broadly, holding that municipalities may be found liable under CERCLA as owners and operators of hazardous waste sites as well as transporters and generators of hazardous waste.17

Perhaps even more troublesome for municipalities is the literal reading courts have used in interpreting what constitutes "hazardous waste"18 under CERCLA. The most significant case on this sub-

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(A) any substance designated pursuant to section 1321(b)(2)(A) of title 33 [the Federal Water Pollution Control Act], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9062 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [Resource Conservation and Recovery Act] . . ., (D) any toxic pollutant listed under section 1317(a) of title 33 [the Federal Water Pollution Control Act], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act . . . and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken
ject is B.F. Goodrich Co. v. Murtha, in which the Second Circuit held that municipalities that sent their residents’ household waste to landfills can be held liable under CERCLA. In its opinion, the court rejected the following arguments made by municipalities: (1) that a municipality cannot be liable under CERCLA for the disposal of hazardous substances since it is acting in its sovereign capacity; action pursuant to section 2606 of title 15 [the Toxic Substances Control Act]. CERCLA, § 101(14), 42 U.S.C. § 9601(14) (1988).

Somewhat ironically, regulations under RCRA exclude household hazardous waste from regulation. 40 C.F.R. § 261.4(b) (1990). However, arguments by municipalities that this exemption is implicitly incorporated into CERCLA have been unsuccessful. See, e.g., B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992). For a brief discussion of the municipalities’ arguments in Murtha, see infra notes 20-24 and accompanying text.

CERCLA liability can most naturally arise when municipalities engage in industrial type operations such as electric power generation, water treatment and distribution, and land use management through the use of pesticides. See Steinzor, supra note 2, at 116. On a smaller scale, items which qualify as hazardous substances can be found in a wide array of household products which are discarded and become Municipal solid waste (“MSW”). These products include household cleaners, furniture polishes, paint, motor oil, chemical drain openers, antifreeze, batteries, wood preservatives, cosmetics, grease, aerosols, and dyes. See Steven Ferrery, The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste, 57 GEO. WASH. L. REV. 197, 205 (1988).

19. 958 F.2d 1192 (2d Cir. 1992). Murtha involved two landfills located in Connecticut. Id. at 1195. A coalition of corporations headed by B.F. Goodrich, EPA, the Connecticut Department of Environmental Protection, and Uniroyal Chemical Corp. sought reimbursement under CERCLA for cleanup costs incurred at the sites from the owners and operators of the landfills. Id. The landfill owners then commenced third party contribution actions against approximately 200 third parties. Id. A large number of these third parties were cities and towns in Connecticut who had sent municipal waste to these landfills. Id.

Although the defendants successfully persuaded the Second Circuit that municipalities should be covered persons under CERCLA, Judge Dorsey granted the municipalities’ second summary judgment motion because the defendant companies had failed to demonstrate that the waste disposed of by the municipalities contained any hazardous waste. B.F. Goodrich v. Murtha, 840 F. Supp. 180 (D. Conn. 1993). In the ruling, Judge Dorsey stated that “the fact that waste contains items which were made with, by use of, or incorporated components or elements which constituted or in turn contained [hazardous substances] is not a sufficient basis for finding that disposal of such waste constitutes disposal of [hazardous substances].” Additionally, Judge Dorsey held that the defendant companies could not rely upon generic studies of municipal waste to show that the waste disposed of by the municipalities contained hazardous substances. Id.

The government has requested that Judge Dorsey reconsider his opinion because the government believes that the opinion’s interpretation of hazardous substance under CERCLA is much narrower than provided for under CERCLA. The government also requested reconsideration because the opinion does not permit the use of generic studies to demonstrate the presence of hazardous substances in a PRP’s waste stream, regardless of whether the PRP is a municipal PRP or an industrial PRP. As such, the decision could have a dramatic impact on the United States’ CERCLA enforcement efforts.

20. Murtha, 958 F.2d at 1198-99. The court, following Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), held that the plain language of the statute showed
(2) that "[C]ERCLA's silence regarding municipal solid waste is evidence that Congress aimed to have it excluded from the definition of hazardous substances;"\(^{21}\)

(3) that the exemption for household hazardous waste under the Resource Conservation and Recovery Act is incorporated into CERCLA's definition of hazardous substances;\(^{22}\)

(4) that CERCLA's legislative history evinces a clear intent to exclude municipalities from liability for the disposal of municipal solid waste ("MSW");\(^{23}\)

and (5) that EPA interprets CERCLA as imposing no liability on municipalities for the disposal of municipal waste.\(^{24}\)

Congress' clear intent to abrogate sovereign immunity. See id. In addition, municipalities that have tried to argue that they should be protected under the sovereign immunity granted to the states by the 11th Amendment to the United States Constitution have generally been unsuccessful. See Ferrey, supra note 18, at 248 (citing Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Moor v. County of Alameda, 411 U.S. 693 (1973); Lincoln County v. Luning, 133 U.S. 529 (1890)). Municipal governments are considered separate entities, distinct from the state and having the capacity to sue and be sued. Id. at 248-49. Therefore, even if a state would have a valid defense under CERCLA based upon sovereign immunity, it is doubtful that a municipality would enjoy the same defense. Id.

21. Murtha, 958 F.2d at 1200. The court found that when Congress wanted to exclude a substance from the definition of "hazardous substances," they knew how to do so, as they had excluded oil and natural gas. Id. at 1201. This fact, combined with the comprehensive nature of the definition, led the court to reject the municipalities' argument. Id.

22. Id. at 1201. The court recognized that both Congress and EPA have distinguished between "wastes" under RCRA, and "hazardous substances" under CERCLA. Id. at 1202 ("This statutory and regulatory distinction is a substantial one and should be preserved absent a clear legislative intent to the contrary.").

23. Id. at 1203-04. The municipalities argued that by holding municipalities liable under CERCLA, local taxpayers would inevitably be forced to pay for the cleanup. Id. at 1204. The court responded as follows:

We agree that this will inevitably be the result, but are unable to agree that it is adverse to Congress' aim. To the contrary, a narrow interpretation of CERCLA that exempts municipalities arranging for the disposal of municipal solid waste from liability increases the probability that cleanup costs will never be recovered, and will be paid instead from the Superfund funded in part by the taxpayers at large. To accept the municipalities' argument . . . would free a potentially responsible party from liability in blatant contravention of the statute's goals.

Id.

24. Id. at 1205. The Second Circuit agreed that under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 476 U.S. 837 (1984), deference should be given to EPA's construction of CERCLA. Id. However, the court found that the municipalities were misconstruing EPA's policy. Id. The court said that in fact, EPA's policy did not establish a per se exclusion for municipalities for the disposal of household waste but rather was only an expression of the agency's enforcement decision not to actively pursue municipalities under CERCLA in most cases. Id. Furthermore, the court said that EPA's policy noted that it did not exclude municipalities from liability under CERCLA or affect in any way the rights of third parties to seek contribution against municipalities. Id. The municipalities involved in the case had made their argument primarily based upon EPA's Interim Municipal Settlement Policy, discussed infra at notes 32-76.

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Those in favor of limiting municipal liability argue that Murtha decision undermines the underlying policy of CERCLA and shifts the costs of liability from industry to local taxpayers.\(^{25}\) They argue that Congress did not intend for taxpayers to pay for the cleanup of household garbage,\(^{26}\) and that household hazardous waste causes only minimal harm to the environment when compared to waste generated by private industry.\(^{27}\) Furthermore, supporters claim that by enacting CERCLA, Congress recognized this and intended to force industry to pay for the cleanup of hazardous waste sites rather than individual taxpayers.\(^{28}\)

Although it is always possible that other circuit courts will reject the holding in Murtha, it is more likely that Murtha will prove to be the rule rather than the exception.\(^{29}\) Even if municipalities were ultimately able to persuade courts to reject the rationale of Murtha, the litigation costs in doing so could prove to be astronomical. Thus, even from the most favorable perspective for municipalities, the trend of recent court decisions has left municipalities highly vulnerable to third-party contribution actions.\(^{30}\) This has alerted municipalities to the precariousness of their situation and fueled their desire for statutory reform. As Murtha makes clear, meaningful relief from liability is not likely to come from judicial action. Any such relief will likely only result from legislative amendments to CERCLA.\(^{31}\)

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25. See, e.g., Reinders, supra note 1, at 423 n.22. See also Superfund: Options for Municipal Liability Relief Considered by Members of Advisory Group, 24 Env't Rep. (BNA) 876 (Sept. 17, 1993) [hereinafter Superfund Options for Municipal Liability Relief]; Uncertainty on Key CERCLA Liability Issues Challenges Lawyers Seeking to Guide Clients, 22 Env't Rep. (BNA) 2414 (Feb. 21, 1992) [hereinafter CERCLA Liability Issues]. Municipalities argue that Congress imposed the financial burden of Superfund on industry rather than on taxpayers. See Reinders, supra note 1, at 436 n.102.


27. See, e.g., Reardon, supra note 10, at 586; Torricelli, supra note 7, at 496. But see Ferrey, supra note 18, at 200-210 (providing overview of scientific evidence which indicates that MSW is more toxic and is a greater threat to environment than previously realized).

28. See Reardon, supra note 10, at 586.

29. See id. at 557; Reinders, supra note 1, at 440. Court decisions since Murtha are in accord with that of the Second Circuit. See Reinders, supra note 1, at 440. In fact, these authors have not been able to find a single case with a holding contrary to Murtha.

30. See Reardon, supra note 10, at 570, 577-78.

31. See id. at 574.
B. EPA Interim Municipal Settlement Policy

In December 1989, EPA announced an Interim Municipal Settlement Policy ("Interim Settlement Policy") to clarify the approach which the agency would take towards municipalities in prosecuting claims under CERCLA. Although it rejected the contention that municipalities fall outside the scope of CERCLA altogether, the EPA attempted to ameliorate the perceived harshness of CERCLA as applied to municipalities.

Under the Interim Settlement Policy, EPA committed itself to three courses of action. First, EPA stated that it would not pursue municipalities under CERCLA as generators or transporters of MSW unless the MSW contains hazardous substances derived from commercial, institutional or industrial activity. Second, EPA promised to treat municipalities the same as private parties in the information gathering process. Third, EPA said it would ordinarily treat municipalities the same as private parties in the notification and settlement process.

For municipalities, the Interim Settlement Policy has proven to be of little help in many ways. Although it purports to protect municipalities from liability, the Interim Settlement Policy is inadequate in several respects. First, it does not address the potential liability problems of municipalities who are owners or operators of landfills. Publicly owned landfills are a necessity in a modern industrial society, and, by owning or operating landfills, municipalities

33. See id.; Municipalities that Transport Household Waste May Avoid Liability for Superfund Under Policy, 20 Env't Rep. (BNA) 1412 (Dec. 15, 1989); Meske, supra note 8, at 555-57.
34. Interim Settlement Policy, supra note 32, at 51,071. As an important exception to this rule, however, EPA may consider pursuing generators and transporters of MSW as PRPs if the total amount of waste from commercial, institutional and industrial sources is insignificant compared to the MSW at a particular site. Id.
35. Id. However, EPA will not notify municipal generators and transporters, unless it obtains site specific information that the MSW contains a hazardous substance derived from commercial, institutional or industrial processes. Id.
36. Id. Under the Interim Settlement Policy municipalities will not be notified or included in the settlement process if it is initially determined that the policy's general exemption applies. Therefore, as a practical matter, municipalities will not be notified in most cases. It is only where the threshold requirement of "site specific information" is met and EPA decides to pursue a particular municipality, that a municipality will receive notification and be included in the settlement process to the same extent as a private party. Id.
38. See Reardon, supra note 10, at 568.
ties are performing a public service and are not engaged in a profit making activity. Municipalities are left in a no-win situation; they cannot stop providing services—it is unrealistic and sometimes illegal for them to do so—but by providing these services, municipalities subject themselves to joint and several liability under CERCLA. Furthermore, because CERCLA applies to past disposal activity, even the most diligent municipalities may find themselves facing millions of dollars in cleanup costs and legal fees.

Second, even if a municipality is not an owner or operator of a facility, but only a generator or transporter of MSW, the Interim Settlement Policy provides only partial protection. If the MSW contains a hazardous substance obtained from commercial, industrial, or institutional processes or, if the total contribution of hazardous waste by private parties at a site is insignificant, then EPA will pursue municipalities who are generators or transporters, notwithstanding the general exclusion of these parties under the Interim Settlement Policy. More significantly, the Interim Settlement Policy does nothing to immunize municipalities from third-party suits for contribution. Although municipalities may have initially benefitted from EPA's decision not to actively pursue them, as private parties have become aware of the possibility of suing municipalities for contribution, the benefits of the policy have diminished.

Third, since EPA often will not notify municipalities as PRPs or include them in settlement negotiations, municipalities may be left in a worse position in the long run than they would have been if EPA itself had initiated action against them. This is because the costs incurred by a municipality in a contribution action may ultimately prove to be greater than the costs which it would have incurred if it had entered a settlement agreement with the govern-

39. See, e.g., Reardon, supra note 10, at 568; Steinzor, supra note 2, at 111; Superfund: Options for Municipal Liability Relief, supra note 25, at 876.
40. See William A. Butler et al., Municipal Superfund Liability, C778 ALI-ABA 319, 324 (Oct. 29, 1992) (listing arguments against municipal liability).
41. See Mank, supra note 4, at 244.
42. Interim Settlement Policy, supra note 32, at 51,071 (“EPA expects this exception to be sparingly applied.”).
43. Interim Settlement Policy, supra note 32, at 51,076; Mank, supra note 4, at 250.
44. See Reardon, supra note 10, at 534; Torricelli, supra note 7, at 494-95.
45. See Reardon, supra note 10, at 535.
46. See id. at 552.
ment from the outset.47 Ironically, the effect of the Interim Settlement Policy may harm the long-term interests of municipalities.

A few years ago, some municipalities may have hoped that the courts would expand upon the protections given to municipalities by EPA's Interim Settlement Policy. Unfortunately for them, this did not occur.48 Murtha and other federal cases have shown that the judiciary does not consider any exclusions for municipalities contained in the Interim Settlement Policy as authoritative or binding on the courts. According to these cases, the language of CERCLA is clear and unambiguous in imposing municipal liability;49 any language to the contrary contained in the Interim Settlement Policy is viewed as relevant only for the internal operations of EPA.50 Furthermore, the Murtha court found that the Interim Settlement Policy actually supported its interpretation of CERCLA.51 The Murtha court found EPA's policy to be a statement by EPA interpreting CERCLA as imposing liability on municipalities when any amount of hazardous waste is found in MSW sent to landfills.52 Therefore, the effect of EPA's Interim Settlement Policy, in conjunction with recent court decisions, is that municipalities feel they are losing the battle on two fronts.53 This has convinced many municipalities that further attempts to obtain relief through administrative or judicial channels is futile, and that meaningful change can only be achieved through the legislative process.54

47. First, a municipality in this situation would face increased litigation costs in attempts to minimize its liability. See Reardon, supra note 10, at 536. Also, settlement options which might be available through EPA at an earlier stage of the cleanup, such as in-kind contributions and delayed payments, may not be available with a third party at a later time. See id. at 552. In addition, other parties may have the opportunity to enter into settlement agreements with EPA before the full costs of cleanup are fully understood. In this situation, municipalities who are only belatedly brought into the process may find themselves charged with a higher proportion of the cleanup costs than if they had been allowed the opportunity to settle earlier. See id. at 536, 552; Torricelli, supra note 7, at 494.

48. For a discussion of judicial decisions holding that there is no exclusion from liability for municipalities under CERCLA, see supra notes 17-31 and accompanying text.

49. See, e.g., Murtha, 958 F.2d 1192 (2d Cir. 1992)

50. See id. at 1205. "No provisions of the [Interim] Settlement Policy are intended to interfere with 'any parties' potential legal liability under CERCLA.' Interim Settlement Policy, supra note 92, at 51,071. The agency promulgated the Interim Settlement Policy to provide guidance to EPA personnel 'on how they should exercise their enforcement discretion in dealing with municipalities and municipal wastes in the Superfund settlement process.' Id. at 51,072.

51. See Murtha, 958 F.2d at 1206.

52. Id.

53. See Reardon, supra note 10, at 570; Torricelli, supra note 7, at 497.

54. See Reardon, supra note 10, at 574; Torricelli, supra note 7, at 497.
As unhappy as municipalities have been concerning their current treatment from EPA and the courts under CERCLA, members of industry are equally upset by what they perceive to be preferential treatment given to local governments by EPA.\textsuperscript{55} While acknowledging that CERCLA is in many ways burdensome and unfair to municipalities, they believe that the same argument can be made with respect to industry.\textsuperscript{56} Instead of providing piecemeal relief for select special interest groups like municipalities, industry argues that CERCLA should be completely overhauled in order to make it more fair for everyone.\textsuperscript{57} They further maintain that EPA’s Interim Settlement Policy and other administratively created solutions to municipal liability problems run counter to CERCLA’s intent.\textsuperscript{58} CERCLA was intended to create a wide net of liability to facilitate cleanup of hazardous waste sites, encourage conservation efforts, and encourage future compliance with environmental laws. According to industry, schemes which relieve municipalities from potential liability only serve to hamper the remediation process, and provide no incentive for municipalities to implement more environmentally sound procedures for handling MSW.\textsuperscript{59}

Some industry groups believe that it would be particularly unfair to relieve municipalities of liability since it is often the volume of MSW at a landfill which makes cleanup so expensive.\textsuperscript{60} They argue that EPA should adopt a policy for allocating response costs in settlement agreements with PRPs based on the volume of waste which a party produced at a site.\textsuperscript{61} Various plans along these lines have been proposed by industry including the “Delta Theory,”\textsuperscript{62} the


\textsuperscript{56} See Washington, supra note 37, at 812.


\textsuperscript{59} See Meske, supra note 8, at 375; Washington, supra note 37, at 824.

\textsuperscript{60} Mank, supra note 4, at 250; Steinzor, supra note 2, at 123; Washington, supra note 37, at 814. For a discussion of the volume-based and toxicity-based approaches to cost allocations, see infra notes 62-70 and accompanying text.


\textsuperscript{62} See Municipal Cleanup Cost-Allocation Policy, supra note 61, at 2333. Under the “Delta Theory,” municipalities would have to pay for costs which arise from the huge volume of MSW at a landfill “including capping, lining, walling, and ground-
“Double Delta Theory”\textsuperscript{63} and a “volume times toxicity” formula.\textsuperscript{64} Although these approaches each provide a different solution to the problem of allocation, they all would shift a larger portion of cleanup costs onto municipalities.

As should be expected, municipalities have not been receptive to these proposals. According to the municipalities, it is the high toxicity levels present in industrial waste, not the volume of waste, which makes cleanup of landfills so expensive.\textsuperscript{65} Municipalities, therefore, believe that allocating costs based on volume is inherently unfair to municipalities.\textsuperscript{66} Of course, municipalities would prefer to be exempted altogether from liability.\textsuperscript{67} However, absent a full exemption, they favor an allocation formula which would force municipalities to pay only for those cleanup costs attributable to MSW and not for the increased costs created by the commingling of industrial waste with MSW.\textsuperscript{68} Proposals made along these lines

water purification in the whole landfill, in accordance with evolving and increasingly strict federal landfill closure standards.” Steinzor, \textit{supra} note 2, at 124. Industry representatives believe that these costs would comprise the bulk of all cleanup costs. \textit{Id.} Under this plan, industry would only pay for those additional costs attributable to industrial waste. \textit{See id.} at 124-25. For a further discussion of the Delta Theory, \textit{see infra} notes 127-35 and accompanying text.

63. \textit{See Municipal Cleanup Cost-Allocation Policy, supra} note 61, at 2333. Under the “Double Delta Theory,” one would compare the cost of cleaning up a ton of MSW with the cost of cleaning up a ton of industrial waste. This ratio would be used to determine the cost allocation between municipal governments and industry at a site. Reinders, \textit{supra} note 1, at 455. This approach was suggested by EPA as a “trial balloon” in 1991, but was soon abandoned under stiff opposition from municipalities who claimed it did not sufficiently account for the toxic differences between industrial waste and MSW. \textit{Id.} at 456.

64. \textit{See} Reinders, \textit{supra} note 1, at 457. Under this formula, the percentage of waste that is MSW would be multiplied by the percentage of hazardous substances present in the MSW. \textit{Id.} This figure would be the percentage of total costs for cleaning up the site which municipalities would have to pay. \textit{Id.}

65. \textit{See} Reardon, \textit{supra} note 10, at 562; Torricelli, \textit{supra} note 7, at 496.

66. \textit{See Municipal Cleanup Cost-Allocation Policy, supra} note 61, at 2333; Reardon, \textit{supra} note 10, at 560-61.

67. \textit{See}, e.g., \textit{Superfund: Options for Municipal Liability Relief, supra} note 25, at 876 (“Landfill Solutions Group supports an approach that involves removing municipal solid waste from CERCLA entirely . . .’’).

include the "unit cost" approach and the "Reverse Delta" theory.

EPA has recognized that its Interim Settlement Policy has not resolved many of the problems facing municipalities and has created a few new problems as well. In response to the judiciary's willingness to allow industry to bring contribution actions against municipalities, EPA attempted to redefine its policy towards municipalities. EPA has realized that under current law, it is often in the best interests of municipalities to be included in the settlement process as soon as possible rather than being left vulnerable to third-party contribution actions. Although different proposals for the allocation of liability between industry and municipalities in the settlement process have been actively analyzed and discussed within EPA, the conflict between the opposing interests of industry and municipal government has not been resolved, and, as of now, no consensus has emerged as to which approach to adopt. Therefore, the agency is gridlocked on this issue and is currently considering municipal liability on a case by case basis. EPA is unlikely to make any substantial progress in resolving this problem any time soon. Instead, the agency appears content to allow Congress to tackle the problem through new legislation.

69. Under the Unit Cost approach, EPA would apportion liability by comparing the average cost of cleaning up a site consisting solely of industrial waste with the average cost of cleaning up a site consisting solely of municipal waste. See Reardon, supra note 10, at 561. EPA has determined that the municipal waste share at a "co-disposal site" under this approach will be about four percent of total costs. Id.

70. Under the "reverse delta" approach, EPA would calculate the cost of cleaning up the amount of industrial waste if the municipal waste were not present. Municipalities would only pay for the difference between this figure and the actual cost of cleanup. See Municipal Cleanup Cost-Allocation Policy, supra note 61, at 2333.

71. See Reardon, supra note 10, at 559.

72. See id.

73. Conference on Municipal Liability Planned, supra note 55, at 1368 ("EPA said the only way municipalities can limit their liability under [CERCLA] is to enter into early settlement with EPA to resolve liability for a particular site.").

74. Industry, Local Governments Continue Battle Over Liability for Site Cleanups, 23 Env't Rep. (BNA) 3020 (March 19, 1993); Superfund: NACEPT Panel Offers Position Papers with Draft Options on Superfund Reform, supra note 57, at 1132 ("Although there was agreement that there should be changes to the program to provide municipalities some relief from liability, members disagreed on the means to provide that relief."); Reardon, supra note 10, at 561-62.

75. Reardon, supra note 10, at 562.

76. See id.
III. PROPOSED FEDERAL LEGISLATION TO ELIMINATE OR MODIFY MUNICIPAL LIABILITY

Various legislative efforts have been proposed to amend CERCLA to eliminate and/or modify municipal liability. Two of the most comprehensive measures introduced into both the House and Senate are the Toxic Cleanup Equity and Acceleration Act of 1993 ("TCEAA"),77 and the Toxic Cleanup Equity Act of 1993 ("TCEA").78 A less comprehensive act introduced into the House was the Toxic Pollution Responsibility Act of 1993 ("TPRA").79 The most recent legislative initiative is the Superfund Reform Act of 1994, which was introduced in the Senate on February 7, 1994. This bill proposes changes to CERCLA which would make settlement procedures more efficient and more equitable. The major premise underlying all of these legislative initiatives is that MSW is not equivalent to the waste generated by industrial sources, and municipalities should therefore not be unfairly burdened with excessive litigation and cleanup costs.80

A. Toxic Cleanup Equity and Acceleration Act of 1993

1. Municipal Generator/Transporter Liability for Contribution Claims Eliminated

The TCEAA would amend CERCLA to eliminate municipal liability for claims of contribution or other response costs arising from the generation, transportation or arrangement for the transporta-


80. See Torricelli, supra note 7, at 497; see also Reardon, supra note 10, at 534. "[Contribution lawsuits by industrial PRPs against municipalities and other small businesses] rest on the outrageous assumption that the household garbage sent to landfills by municipalities and small businesses pose the same threat to the environment and the same cleanup costs as the dangerous chemicals dumped by industry." 139 CONG. REC. E277 (daily ed. Feb. 4, 1993) (statement of Rep. Torricelli).
tion, treatment or disposal of MSW,\textsuperscript{81} or sewage sludge.\textsuperscript{82} This legislative proposal responds to the growing litigation municipalities are facing from industrial PRPs seeking to force municipalities to help "shoulder the costs of Superfund liability."\textsuperscript{83} Contribution actions, however, could still be brought against a municipality where it has generated or transported waste other than MSW as defined by the bill.\textsuperscript{84}

2. \textit{Settlement Procedures for Municipal Generators/Transporters of MSW}

The proposed Act, which in part codifies EPA's Interim Settlement Policy, would also provide a mechanism for municipalities to reach settlements with EPA for the generation or transportation of MSW or sewage sludge.\textsuperscript{85} Under the TCEAA, a municipality or other person\textsuperscript{86} subject to liability under CERCLA for the generation or transportation of MSW or sewage sludge, could initiate settlement discussions with EPA, even though the municipality may be liable for the generation or transportation of substances other than MSW or sewage sludge.\textsuperscript{87} Provided the municipality has acted in good faith, any administrative or judicial action against the municipality could be stayed. The advantage for municipalities would be

\textsuperscript{81} The TCEAA defines "municipal solid waste" as follows: [A]Il waste materials generated by households, ... hotels and motels. The term also includes trash generated by commercial, institutional, and industrial sources (A) when such materials are essentially the same as waste normally generated by households, or (B) when such waste materials were collected and disposed of with other municipal solid waste or sewage sludge and, regardless of when generated, would be considered conditionally exempt small quantity generator waste under section 3001(d) of the Solid Waste Disposal Act. ... The term does not include combustion ash ... or waste from manufacturing or processing (including pollution control) operations not essentially the same as waste normally generated by households.

H.R. 870 § 2(a)(69).

\textsuperscript{82} The TCEAA defines "sewage sludge" as "any solid, semisolid, or liquid residue removed during the treatment of municipal waste water, domestic sewage, or other waste waters at or by a publicly owned treatment works." \textit{Id.} § 2(a)(40).


\textsuperscript{84} \textit{See also} Reardon, \textit{supra} note 10, at 563 (discussing block on third-party contributions suits under TCEAA).

\textsuperscript{85} \textit{See} H.R. 870 § 2(c); Torricelli, \textit{supra} note 7, at 498. For a discussion of EPA's Interim Municipal Settlement Policy, \textit{see supra} notes 92-76 and accompanying text.

\textsuperscript{86} \textit{See} H.R. 870 § 2(c) (defining "eligible persons" permitted to enter into settlement agreements with EPA).

\textsuperscript{87} \textit{See} \textit{id.}
in allowing them to initiate the settlement process, rather than having to wait for EPA to do so.

The TCEAA would also obligate EPA to exercise good faith and take equitable considerations into account in reaching settlement agreements. Every effort is made in the proposed Act's settlement mechanism to provide municipalities with relief from potentially excessive liability, which would ultimately be placed on the taxpayer. Under the TCEAA, settlement agreements with all municipalities having potential liability at a particular site for the generation or transportation of MSW or sewage sludge would cap liability at four percent of the total response costs incurred at the site. EPA would have the authority to reduce this percentage if the "presence of [MSW] and sewage sludge is not significant at the facility." Each municipality would only be required to pay its equitable share of the four percent of the total response costs. Additionally, EPA would be required to consider equitable factors, such as "inability to pay, litigative risks, or public interest considerations," when determining a municipality's contribution.

A municipality unable to make cash payments for its share of liability would be afforded the opportunity to provide "in-kind services" in lieu of cash payments. These services would be credited at fair market value. This would enable municipalities with abundant resources and strapped cash flow to continue satisfying their liability in means other than cash contributions. Furthermore, the proposed Act would require EPA to limit payments from publicly owned treatment works ("POTWs"), which recycle sewage sludge for fertilizer or some other beneficial land application. This provision is only available if the basis of liability arises from the generation or transportation of sewage sludge occurring within three years after enactment, thus promoting the recycling of wastes and providing an incentive to adopt such methods to reduce liability.

Finally, the TCEAA would require EPA to make a good faith effort to reach a settlement agreement with a municipality as promptly as possible, even if that municipality would be liable under CERCLA for the generation or transportation of substances

88. See id.
89. Id.
90. H.R. 870 § 2(c).
91. Id.
92. Id.
93. Id.
94. H.R. 870 § 2(c).
other than MSW or sewage sludge.\footnote{Id.} Once a settlement agreement has been reached, the proposed Act provides that EPA would agree not to sue the municipality unless the settlement was contrary to public policy.\footnote{Id.} Also, the municipality would not be liable for any contribution claims or other response costs associated with matters provided for in the settlement agreement.\footnote{Id.}

3. Future Disposal Practices

The TCEAA’s settlement provisions also limit liability of a municipality or operator of a POTW for its future disposal practices if the municipality or owner can demonstrate that it meets certain defined criteria. The proposed Act would limit a municipality’s liability arising from the generation or transportation of MSW occurring three years after the enactment of the bill, provided the municipality has a “qualified household hazardous waste collection program” in effect at the time of the collection and disposal of the MSW.\footnote{H.R. 870 § 2(c). The bill defines “qualified household hazardous waste collection program” as a program with the following characteristics:
  (A) at least semiannual, well-publicized collections at conveniently located collection points with an intended goal of participation by ten percent of community households;
  (B) a public education program that identifies both hazardous household products and safer substitutes (source reduction);
  (C) efforts to collect hazardous waste from conditionally exempt small quantity generators under section 3001(d) of the Solid Water Disposal Act, with an intended goal of collecting wastes from 20 percent of such generators doing business within the jurisdiction of the municipality; and
  (D) a comprehensive plan, which may include regional compacts or joint ventures, that outlines how the program will be accomplished.\footnote{Id. § 2(c)(proposal would insert this provision at CERCLA § 122(o)(3)).} Similarly, the provisions would apply to limit the liability of owners and operators of POTWs as long as the POTW was in compliance with section 405 of the Clean Water Act when the sewage sludge was generated.\footnote{Id.}

4. Administrative and Judicial Bar

The provision which holds the most significance for municipalities is the statutory bar on any administrative or judicial action against a municipality regardless of whether any “constituent component of [MSW] or sewage sludge may be considered a hazardous substance under [CERCLA] when the constituent component exists

apart from [MSW] or sewage sludge." This provision presents a serious concern to industry advocates who argue that the presence of hazardous waste in MSW should make municipalities liable under CERCLA. Further, upon enactment of the bill, the bar would have an immediate effect on any proceedings initiated prior to its effective date. This provision would not apply if a final court judgment had been rendered against the municipality or final court approval of a settlement agreement resolving the liability of a municipality had been granted.

B. Toxic Cleanup Equity Act of 1993

1. Municipal Owner/Operator Liability for Contribution Claims Eliminated

Unlike the TCEAA, the most important feature of the TCEA is its provisions relating to municipal owners and operators of waste facilities. The TCEA, in addition to eliminating contribution actions against municipalities for liability for the generation or transportation of MSW or sewage sludge, would also eliminate contribution actions for liability associated with waste facilities owned or operated by "eligible municipalities." An eligible municipality is defined as an owner or operator of a facility, the majority of whose waste, by overall volume, is only of MSW or sewage sludge produced by municipal operations. Further, the municipality would have to have owned or operated that facility prior to enactment of the bill and would have to have been subject to a response action. Finally, no waste could have been received by the facility after enactment of the bill.

2. Settlement Procedures for Municipal Owners/Operators

The TCEA provides almost identical settlement procedures as those found in the TCEAA for municipalities who are generators and transporters of MSW or sewage sludge. In addition, however, it also provides separate settlement provisions for municipal owners or operators of waste facilities. Under the bill's provisions, an eligible municipality who owned or operated a waste facility and was subject to liability could initiate good faith settlement discussions

100. H.R. 870 § 2(g).
101. Id. § 2(h).
102. H.R. 2137 § 3(b).
103. Id.
104. Id. § 3(c).
105. Id.
with EPA to settle any potential liability faced by the municipality, with all administrative and judicial actions stayed during settlement negotiations. As with the TCEAA, under the settlement agreement, municipalities would be permitted to substitute in-kind services for cash payments. However, unlike the TCEAA, there is no four percent maximum limit on liability. Under the TCEAA, EPA's settlement demand may neither force the municipality to enter into bankruptcy, nor affect any services provided by the municipality which preserve public health and safety. This would ensure that essential services provided to the public were not affected by the amount of municipal liability established in the settlement agreement. In determining a municipality's ability to pay, EPA would also have to consider the costs of any other applicable environmental obligations the municipality is required to comply with under existing law.

These settlement procedures would also apply in a situation where significant response costs remained even after the entry of a consent decree by EPA with other PRPs. Although the provision is somewhat unclear, a court may interpret it as evidence that Congress did not intend for a municipal owner or operator of a waste facility to be held jointly and severally liable for the remaining response costs. Finally, the bill allows for settlements to be consolidated where a municipality is attempting to settle its liability for the generation or transport of MSW or sewage sludge.

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106. H.R. 2137 § 3(c).
107. Id.
108. Id.
109. Id. The factors EPA must consider in settlement negotiations are:
(I) The ratio of debt service to operating revenues, other than obligated or encumbered revenues, (II) the ratio of total funds, other than dedicated funds, to total expenses, (III) the ratio of total revenues, other than obligated or encumbered revenues, to total expenses, (IV) the ratio of debt service to population, (V) the ratio of operating revenues, other than obligated or encumbered revenues, to population, (VI) the ratio of total expenses to population, (VII) the ratio of total funds, other than dedicated funds, to total revenues, (VIII) the ratio of total funds, other than dedicated funds, to population, (IX) the impact of the settlement on essential services the municipality must provide, and (X) the feasibility of making delayed payments and payments over time.

Id. (proposal would insert this provision at CERCLA § 122(p)(4)(B)). Recreational activities and aesthetic civic improvements are not included in municipal operations intended to protect public health and safety. Id.

110. H.R. 2137 § 3(c).
111. Id.
112. Id.
C. Toxic Pollution Responsibility Act of 1993

The TPRA\textsuperscript{113} is another house bill introduced to amend CERCLA to eliminate liability for the generation or transportation of MSW.\textsuperscript{114} Under the bill, no liability would exist for any municipality or other person for the generation or transportation of MSW. The bill gives EPA the authority to promulgate guidelines for determining which waste qualifies as MSW under the definition.\textsuperscript{115}

However, the bill only vaguely defines MSW, and its breadth would generate a plethora of litigation simply in refining the definition.\textsuperscript{116} A significantly more specific definition of MSW would need to be written into the bill to avoid an avalanche of litigation. Furthermore, it is unclear how the bill’s provisions would apply to a settlement agreement reached by the municipality with EPA or other PRPs.

Another version of the TPRA\textsuperscript{117} introduced at the same time would establish a four percent maximum limit on liability for municipalities or other persons who have generated or transported MSW.\textsuperscript{118} The same vague definition of MSW is used and no mention of sewage sludge appears in the bill.\textsuperscript{119} Further, unlike the settlement agreement procedures in the TCEAA or the TCEA, the TPRA would not limit a municipality’s liability to an equitable share of the four percent maximum limit.\textsuperscript{120} Theoretically, a number of municipalities and any other “eligible” persons could each be liable for four percent of the total liability, effectively defeating the purpose of limiting liability on actions by non-municipal PRPs. Each municipality would be targeted to provide the four percent liability limit towards total cleanup costs, thus limiting the total liability incurred by all other PRPs. Finally, this version of the bill provides the same authority to EPA to establish guidelines defining MSW.\textsuperscript{121}

\textsuperscript{114} See id. § 2(a).
\textsuperscript{115} Id.
\textsuperscript{116} The bill defines MSW as “solid waste generated by households and includes waste from commercial, institutional, and industrial sources if the amount and toxicity of substances contained in the waste do not exceed that which one would expect to find in waste generated by households.” Id. § 2(a).
\textsuperscript{117} H.R. 541, 103d Cong., 1st Sess. (1993).
\textsuperscript{118} Id. § 2(a).
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} H.R. 541, § 2(a).
D. Superfund Reform Act of 1994

In February 1994, a bill, setting forth the Clinton Administration's reauthorization proposal, was introduced before the Senate. As proposed, The Senate Reform Act of 1994\(^{122}\) would affect municipal liability in several ways.

The bill proposes to replace the current CERCLA section 122(g) de minimis settlement provision with a provision authorizing "Expedited Final Settlement[s]."\(^{123}\) In order to qualify for an expedited settlement, the PRP must either be a de minimis contributor at the facility,\(^{124}\) a section 107(a)(3) or (a)(4) generator/transporter whose involvement resulted solely from its handling of MSW or sewage sludge,\(^ {125}\) or a small business or municipality with limited ability to shoulder response costs.\(^{126}\) Thus, a municipality could qualify for an expedited settlement if its sole involvement was as a generator or transporter of MSW or if it was sufficiently strapped financially.

The proposal also sets forth allocation procedures. The bill would prohibit continuation and commencement of suits regarding

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122. Superfund Reform Act, S. 1834, 103d Cong., 2nd Sess. (1994). This bill was also introduced in the House of Representatives by Congressman Al Swift of Washington. See H.R. 3800, 103d Cong., 2nd Sess. (1994). For simplicity, subsequent references will cite only to the Senate version.

123. S. 1834 § 408(k).

124. Id. The bill provides that a PRP's contribution is presumed de minimis if the volumetric contribution is less than 1% of the total at the site, and the contribution is not of "significantly greater" toxicity than other hazardous substances present. Id. (proposing to amend CERCLA § 122(g)(1)(A)).

125. Id. § 408(l). The bill defines municipal solid waste as: all waste materials generated by households, including single and multifamily residences, and hotels and motels. The terms also include waste materials generated by commercial, institutional, and industrial sources to the extent such wastes (A) are essentially the same as waste normally generated by households, or (B) were collected and disposed of . . . as part of normal municipal solid waste collection services, and . . . would be considered conditionally exempt small quantity generator waste under [RCRA] . . . .

Id. § 605(i). Sewage sludge would be defined as "solid, semisolid, or liquid residue removed during the treatment of municipal waste water, domestic sewage, or other waste water at or by publicly-owned or federally-owned treatment works." Id.

126. S. 1834, § 408(l). In determining whether a municipality qualified for an expedited settlement under this section, EPA must consider the entity's bond rating, amount of available (nondedicated) funds, operating revenues, expenses, total debt and debt service, per capita income and real property values. Id. (proposing to amend CERCLA § 122(g)(1)(D)). Remarkably, EPA would be required to consider these factors only "to the extent the information is provided by the municipality." Id. EPA may also consider other equitable factors, such as in-kind services the entity may contribute, in determining whether to grant a municipality a settlement under this section.

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a response action for which an allocation is required.\textsuperscript{127} The allocation process would be required for each non-federally owned facility involving multiple parties on the NPL.\textsuperscript{128} The allocation process would have to commence within sixty days of a site being placed on the NPL.\textsuperscript{129} Further, PRP notification would be required "as soon as practicable . . . but not more than eighteen months" after the remedial investigation began.\textsuperscript{130} Finally, an "allocator" would be appointed within thirty days to facilitate the allocation process.\textsuperscript{131}

Under the proposal, once the allocation process is complete, the President is obligated to accept a settlement proposal from a PRP involved in the allocation process, unless EPA and the Attorney General agree that the offer is unfair or unreasonable.\textsuperscript{132} The bill encourages settlement by providing that the share allocated to MSW contributors, to the extent it exceeds a settlement with the federal government, will be attributed to an orphan share, separately funded by the Superfund under the proposed bill.\textsuperscript{133}

E. The Debate Between Industry and Municipalities Over Proposed Legislation

1. Industry

a. MSW and Hazardous Waste

Many industry advocates argue that there is an impression that the composition of MSW is "sanitary, non-hazardous rubbish,"\textsuperscript{134} when in reality much of its composition is indeed hazardous.\textsuperscript{135} Household waste that would otherwise be considered "hazardous substances" under CERCLA would be exempted under the proposed legislation, contrary to the policy of CERCLA to make the "polluters pay."\textsuperscript{136} Further, EPA has been unable to make consistent decisions as to what waste constitutes exempt MSW or a legally

\textsuperscript{127} Id. \textsuperscript{128} Id. \textsuperscript{129} Id. (additional section would appear as CERCLA \textsuperscript{130} S. \textsuperscript{131} Id. \textsuperscript{132} Id. (additional section would appear as CERCLA \textsuperscript{133} Id. (provision would insert this provision at CERCLA \textsuperscript{134} S. \textsuperscript{135} Id. (provision would insert this provision at CERCLA \textsuperscript{136} See id. at 202 (finding that chemical outflow from household waste becomes hazardous during decay and decomposition process); Washington, supra note 37, at 808 ("MSW decomposition at landfills generates methane gas, which can cause explosions and underground fires.").
hazardous substance. As a result, EPA has often taken contradictory positions.137 Industry contends that although MSW may not be hazardous when it enters a landfill, it nevertheless may be regulated under CERCLA, and thus liability should be imposed.138

b. The Delta Theory

Roughly twenty percent of the Superfund sites in 1990 were municipal landfills,139 and there is increasing evidence to suggest that those municipal landfills which contain only household waste pose the same contamination dangers as co-disposal sites (municipal landfills with MSW and industrial waste).140 Therefore, industry argues, municipalities should share the burden of cleaning up hazardous waste. They argue that eliminating municipal liability will only transfer the costs and burden of cleanup of MSW, onto industrial PRPs.141 Instead, industry argues that imposing liability on municipalities would result in volume reduction of hazardous wastes at these landfills which would eliminate the now-realized environmental threat posed by MSW.142

All of the proposed legislation dealing with municipal liability would, in some degree, eliminate municipal liability for MSW. In opposition to these legislative proposals, industry is promoting several alternative liability schemes which increase the municipalities’ share while decreasing industry’s. One of these is the “Delta Theory.” Under the Delta Theory, municipalities would be “required to pay the entire cost of capping, lining, walling, and groundwater purification” in municipal landfill sites where the major pollution problems result from the mass volume of MSW and relatively small amounts of industrial waste.143 According to industry, the existence of these vast amounts of MSW increase the costs of treating that portion which is industrial material. Therefore, industry argues, the only fair means to apportion the costs of site cleanup is on a

note 18, at 205. Many of these are expressly excluded under the definition of MSW under the TCEAA and TCEA.

137. Id. at 256, 261-62.
138. Id. at 269 (citing 42 U.S.C. § 9601(14) (Supp. IV. 1986)).
139. See Steinzor, supra note 2, at 79; Torricelli, supra note 7, at 491-92. Of the 1,226 sites listed on the Superfund National Priorities List, approximately 400 are municipal landfills. Id. (citing U.S. GEN. ACCT. OFF. PUB. NO. GAO/RCED-89-165, NONHAZARDOUS WASTE: STATE MANAGEMENT OF MUNICIPAL LANDFILLS AND LANDFILL EXPANSION 2 (1989)).
140. Reinders, supra note 1, at 444-45.
141. See Washington, supra note 37, at 814.
142. See id.
143. Id.
"volumetric basis," with municipalities responsible for their volume of MSW. Arguably, eliminating municipal liability altogether would place the cost of cleaning up the vast amounts of MSW contaminated with hazardous waste on industrial PRPs not responsible for the MSW. Industry argues that to eliminate municipal PRPs or to limit their liability is to contradict the policy of CERCLA. A four percent maximum limitation on liability may be insignificant compared to the actual cost of cleaning up waste created by municipalities.

Under the rationale of the Delta Theory, municipalities should be responsible for reducing the amount of waste they produce, and industry should only be liable for the remaining costs, because it is the MSW which "spreads the industrial waste into the environment." This theory may be the main reason why the proposed legislation has not capped the liability for municipal owners or operators of waste facilities.

c. Anti-Deterrent Effect

Industry also argues that municipalities already make little effort to segregate and properly dispose of household hazardous waste. The elimination of municipal liability will only lead to increased deterioration of collection and disposal standards by municipalities, thus leading to increased costs in the long-term. Further, industry argues that eliminating municipal liability will result in less funds being available for cleanup costs, creating a greater risk because exposed hazardous waste sites will not be cleaned up for longer periods of time. Granting an exemption from liability for municipalities may actually have an anti-deterrent effect whereby municipalities are less concerned about the amount of hazardous waste which may be generated or collected and end up in the resultant composition of MSW. Industry advocates argue that municipal liability will encourage effective collection and disposal of MSW, and that by imposing municipal liability, mun-

144. Reinders, supra note 1, at 444-45.
145. See Washington, supra note 37, at 814.
146. Mank, supra note 4, at 251.
147. Steinzor, supra note 2, at 124.
148. See Ferrey, supra note 18, at 206-07.
149. See Washington, supra note 37, at 816.
150. See id. "[The elimination of municipal liability] implies that municipalities owe a lesser degree of environmental responsibility to citizens than do private entities." Id.
151. Id. at 818.
municipalities will increase "awareness of MSW toxicity, decrease volume of MSW produced, and force investment in improved disposal alternatives." 152

\[ \text{d. Better Position to Spread Costs} \]

Industry advocates argue that spreading the loss among municipal populations is better than spreading the loss among industry because industry must rely on its customer base to cover the costs of liability. This means increasing consumer prices for its products. 153 Furthermore, although municipal liability increases financial burdens on municipalities, it upholds the important underlying policy of CERCLA: that responsible parties "bear the costs that they have imposed on society, regardless of the amount." 154 The proposed legislation discussed above is purportedly more equitable to taxpayers since it ensures that a municipality's liability is limited to the municipality's equitable share. 155

However, industry argues that under a four percent cap, municipalities may not be required to pay their full and fair share of cleanup costs; the remaining costs will be imposed on industry. Industry further argues that municipalities may be in a better position to facilitate the cleanup of waste sites. 156 All of these arguments add up to the proposition that the cost of cleaning up the nation's hazardous waste problem should be spread among municipalities as well as industry.

\[ \text{2. Municipalities} \]

\[ \text{a. Contribution Lawsuits} \]

Municipalities argue that the proposed legislation is necessary to overcome the irrational escalation of third-party contribution lawsuits against municipalities, especially where a municipality is a generator or transporter of MSW. 157 Unlike industry, municipalities have difficulty obtaining insurance. 158 Further, they argue that the proposed settlement procedures would allow municipalities to acknowledge some liability for cleanup measures while at the same

152. Id. at 816-17.
153. Washington, supra note 37, at 817, 819.
154. Id. at 821.
155. For further discussion of the proposed legislation and the municipality's equitable share, see supra notes 89-92 and accompanying text.
156. See Washington, supra note 37, at 817.
157. Torricelli, supra note 7, at 494-96.
158. Ferrey, supra note 18, at 273.

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time recognizing the unique role of municipalities in providing services to the public.

b. MSW and Hazardous Waste

Municipalities argue that MSW contains very little hazardous waste,159 and most municipal landfills on the NPL "have been contaminated by the co-disposal of industrial waste with MSW."160 There is only scant information available as to the actual cause of contamination at municipal Superfund sites,161 but municipalities argue that any danger posed by MSW or sewage sludge does not rise to the level of danger posed by industrial hazardous waste.162 Thus, municipalities favor the proposed legislation because it adequately addresses these concerns.163 They contend that the four percent maximum liability accurately reflects the insignificant amount of actual hazardous waste disposed of by municipalities. The proposed legislation would therefore properly allocate liability on the basis of toxicity, rather than volume.164 Municipalities argue that imposing liability on a volumetric basis is inequitable, especially where the toxicity of MSW is very low relative to industrial waste.165

c. Financial Burden

Municipalities maintain that the financial burden of response costs, as well as the continual litigation costs, have hampered municipal services to the public.166 Municipalities must rely on their tax base in order to absorb the costs of disposing MSW, but they do not profit from the disposal as industrial polluters do.167 The provisions in the various proposed legislation for staying administrative and judicial proceedings, as well as the equitable considerations re-

159. See Reardon, supra note 10, at 546 (noting studies indicating low amount of hazardous waste found in MSW).
160. Reinders, supra note 10, at 422-23.
161. Steinzor, supra note 2, at 125.
162. See Reinders, supra note 1, at 450 (noting that to equate one ton of one industrial waste to one ton of MSW is erroneous).
163. See Mank, supra note 4, at 250 (contending that home pesticides, cleaning agents, and other commonly used household toxics comprise between .01% and .04% of MSW waste stream).
164. Reinders, supra note 1, at 446 (noting that given MSW's low toxicity, co-disposal with industrial waste is major cause of dangerous conditions created at Superfund sites).
165. Id. at 451 (noting that using volumetric approach may force municipalities to pay as much as 90% of cleanup costs).
166. Torricelli, supra note 7, at 497.
167. See Reinders, supra note 1, 446-47; see also Reardon, supra note 10, at 568 (noting inherent differences between industrial polluters and municipalities).
quired under the settlement provisions, would ensure that municipalities continue to provide services to protect the safety and welfare of the public. The proposed legislation would spread the costs of hazardous waste sites primarily on those PRPs responsible for disposing such hazardous wastes, i.e., industry, rather than on municipalities, whose waste is not typically considered the target of CERCLA.168 This is accomplished in part by requiring EPA to consider a municipality's inability to raise revenue or obtain funding from other sources in fashioning a remedy, thereby preventing a municipality from being forced into bankruptcy.169 It is important to keep in mind, however, that even under the proposed bills, municipalities would still be liable for generating or transporting hazardous waste other than MSW or sewage sludge, where the amount involved is significant.170

d. Deterrence

Municipalities also argue that the elimination of municipal liability would not threaten the safe collection and disposal of MSW because of the proposed provisions which require qualified MSW collection programs to be implemented for municipalities seeking to settle.171 Further, the legislation recognizes that implementing such collection efforts would be more than adequate to effectively collect the small percentage of hazardous household waste present in MSW.172

IV. Conclusion

At the present time, it is by no means certain that any of the legislative proposals discussed in this article will be enacted into law. Even if proposed or similar legislation is enacted, it is still uncertain to what extent municipalities will be protected from liability for the cleanup of hazardous waste sites. While these proposals

168. See Torricelli, supra note 7, at 497. "Congress never intended [CERCLA] to financially cripple local governments, nor was it constructed to provide convenient scapegoats for corporate polluters." Id. at 501.

169. See Reinders, supra note 1, at 449 ("[L]imited financial resources force [municipalities] to make other compromises, such as raising taxes, increasing trash-hauling fees, laying off public employees, or cutting public services.").

170. See H.R. 870 § 2(a).

171. For the definition of a qualified household hazardous waste collection program, see supra note 96.

172. See generally Reinders, supra note 1, at 452 (noting that imposing Superfund liability for deterrent effect of improving hazardous waste disposal impractical when applied to municipalities because of low hazardous content of MSW).
would provide some protection against third-party contribution suits under CERCLA, municipalities would still face the possibility that EPA would decide to actively pursue them for cleanup of particular sites. Considering the enormous costs of cleaning up a Superfund site, a cap on municipal liability will probably be of small comfort to those municipalities which EPA chooses to pursue. In addition, at least under some of the proposed legislation, municipalities would still face liability as owners and operators of landfill sites, as well as liability for the generation or transportation of hazardous waste other than MSW or sewage sludge.

Furthermore, unless the proposed amendments to CERCLA preempt state law, municipalities could find themselves subject to liability under state, so-called "little" Superfund laws. 173 Although CERCLA is broad and comprehensive legislation, it is intended to complement state efforts to remediate hazardous waste sites rather than preempt such efforts. 174 None of the legislation presently before Congress expressly excludes the possibility of municipal liability under state law. It is conceivable that the courts could find that the legislation implicitly preempts state superfund laws, prohibiting all contribution actions against municipalities; however, absent a clear indication of that intent by Congress, it is unlikely.

If CERCLA is amended, municipalities may have won an important battle, but the war over the allocation of liability between municipalities and industry will by no means be over. Litigation over the parameters of the new amendments, as well as the question of preemption of state superfund law, would almost surely follow their passage. If the amendments were found not to preempt state law, municipalities would be forced to lobby for changes in the "little superfunds" at the state level. Since the financial burden of such changes might very well fall upon the states themselves or upon highly influential state industries, the chances of successfully changing state superfund laws to favor municipalities may prove to be minimal at best. This, in turn, may force municipalities to return to Congress in the future to amend CERCLA once again.

173. See, e.g., Hon. James J. Florio et al., Too Strict Liability: Making Local Government Entities Pay for Waste Disposal Cleanup, 1 VILL. ENVTL. L.J. 105, 106-07 (1990) (discussing how municipalities can be held liable under the New Jersey Spill Act); Hyson, supra note 2, at 32-33 (discussing how municipalities can be held liable under Pennsylvania’s Hazardous Sites Cleanup Act).

174. Section 114(a) of CERCLA provides that "[n]othing in this chapter shall be construed or interpreted as preemiting any state from imposing any additional liability or requirements with respect to the release of hazardous substances within such state." CERCLA § 114(a), 42 U.S.C. § 9614(a) (1988).

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Thus, it is clear that whatever the outcome of the current debate in Congress, the issue of municipal liability under CERCLA is one that will not go away anytime soon.