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OPENING REMARKS OF THE PANELISTS

On February 20, 1993, *The Villanova Environmental Law Journal* held its Fourth Annual Symposium. The topic of the symposium was “Municipal Liability under CERCLA.” The panelists who took part in the symposium represented a wide range of interests and experiences: Ellen Friedel, Assistant General Counsel to Rohm and Haas Company; Charles B. Howland, Senior Assistant Regional Counsel at EPA; Joseph Manko, Partner, Manko, Gold & Katcher; Robert B. McKinstry, Partner, Ballard, Spahr, Andrews & Ingersoll; Mary E. Rugala, Senior Assistant Regional Counsel to EPA; David B. Van Slyke, Partner, Preti, Flaherty, Beliveau & Pachios; and Helena Wolcott, attorney with the Hazardous Waste Treatment Council.

The following remarks were given by the panelists at the commencement of the symposium. These remarks are intended to give a general overview of the issues involved in the debate over municipal liability under CERCLA. Following these remarks are articles written by symposium participants which examine the issues in more depth.

Joseph M. Manko, Esquire - Moderator†

For today’s symposium, I would like to suggest several things to keep in mind so you can keep such things separate that belong separate. Before we start, I would like to provide a little background, to set up what I think will comprise the bulk of the discussion by the panel, regarding where Superfund reauthorization may be going in the area of municipal solid waste.

There are four things to keep in mind before we start. Number one, you need to identify the difference between liability under CERCLA for municipal solid waste disposal, and the allocation of responsibility. This is the biggest problem I have in teaching because people often do not maintain the separation between the two. We will be talking about both, whether municipalities should be liable and whether if municipalities are liable, what share of the

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responsibility should be allocated to the municipalities with respect to a clean up.

Allocation only comes if you are liable. If you are not liable, you don’t have to worry about allocation. If you are liable, you then turn to the question of “how liable am I?” which generally arises in a joint and several setting.

Number two, most people think of municipal solid waste as what goes outside the house into the trash can. It is non-hazardous waste, household hazardous waste, and small-quantity generator waste. Municipal waste is going to be an aggregate of these waste streams.

Third, the potentially responsible party (“PRP”) for municipal solid waste is typically the municipality itself. The municipality is going to be liable in one of two formats: either they owned or they operated the landfill. In CERCLA parlance, they are section 107(a)(1) owners or operators or section 107(a)(2) former owners or operators. I think that is a different setting than the situations we will discuss today. Our discussion today will focus on situations where the municipality did not own or operate the facility. All they did was collect the trash or waste, or authorize someone else to collect it and take it to a landfill. Such a municipality, therefore, would be liable under section 107(a)(3), as a generator who arranged for disposal, or under section 107(a)(4) as a transporter of the waste. Philadelphia is a classic example of a collector and transporter, and therefore, arguably liable under section 107(a)(3) and section 107(a)(4). Similarly, Lower Merion Township, which collects all the waste in its own trash trucks, takes the waste to a transfer station, and then contracts out the removal of that waste from the transfer station to a municipal solid waste incinerator in another township is another example.

A third way of handling the situation for a municipality - and I think that most municipalities in Pennsylvania would fall into this category - is to contract out the whole process. Either the municipality franchises or licenses someone who comes in and does the collection and the disposal. The furthest extreme is a rural area where people bring it someplace and there is no municipality involvement as such.

In any of these cases, it is important to determine in what role the municipality is being identified - as owner/operator or generator/transporter. This is going to be important as we look at some of the cases. Beyond that role, however, there’s the question that
came up with the *B.F. Goodrich v. Murtha* case that was just handed down. In that case, the PRP tried to go beyond bringing in the municipality to trying to bring in people who gave the municipality their waste as PRPs. The PRP raised the issue of whether residents can be considered generators of municipal waste by putting out their trash can. Can an apartment building? Can a store? Can a small industry? Can you go beyond the municipal entity in assigning responsibility for municipal waste?

There are two other things we should note at the beginning - both of them concern EPA's reaction to the unique problem posed by municipal liability under CERCLA. EPA's first reaction was the Interim Municipal Settlement Policy which EPA issued in 1989. With the Settlement Policy, EPA basically said that they would not go against municipalities for household waste, with certain limited exceptions.

A year and a half later EPA shifted its approach to providing guidance for a fair and appropriate cost allocation of municipal liability. EPA has gone from a position where it was not even going to deal with liability or go against municipalities, pretending they were not liable, to a position which accepts the courts' determination of liability and provides guidance to the courts in allocating cost of cleanup to the municipality. EPA then goes through a whole series of factors, but the bottom line was a recommendation for a four percent carve out. These contradictory positions taken by EPA will be, I am sure, very heatedly discussed today and in the future.

All of this is background as we head towards Superfund reauthorization during the current Congress. There are lobbying groups that are looking for very different things from this process. Our panel here today represents people who are going to be on very different sides of this issue.

Robert B. McKinstry, Jr., Esquire†

I'd like to give a more basic orientation and focus the problem a little bit first. I don't think that anyone sitting here would dispute the fact that when Congress first enacted CERCLA in 1980 and

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1. 958 F.2d 1192 (2d Cir. 1992). Since the date these remarks were delivered, the Federal District Court for the District of Connecticut delivered another opinion addressing the municipalities' liability in this case. *See B.F. Goodrich Co. v. Murtha*, 840 F. Supp. 180 (D. Conn. 1993).

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even when it amended CERCLA in 1986, the members of Congress believed that they were dealing with sites like Love Canal and Tennessee's Valley of the Drums - chemical waste sites with allegedly severe problems. I don't think anyone would disagree that if you had asked a member of Congress whether Superfund was intended to address the local municipal landfill or create liability for cities like Philadelphia picking up their trash and dumping sewage sludge, that Congressperson would have probably said, "Of course not. We are using the term 'hazardous substance' to address something that is hazardous. That is not municipal waste."

On the other hand, while this issue has been disputed in some of the recent litigation like Murtha, I think it is also quite clear at this stage that under CERCLA there is no minimum concentration of hazardous substances necessary to establish liability. That principle was established early, ironically in a suit brought by the City of Philadelphia, City of Philadelphia v. Stepan Chemical. In that case, the court suggested that a copper penny in a load of waste might be enough to establish liability. I call this ironic because now the City has been brought in as a defendant in a lot of sites where it has dumped its solid waste.

It is also clear, based on Stepan Chemical, that municipal solid waste and sewage sludge will virtually always include some level of a hazardous substance. I cannot imagine someone who has not disposed of some copper or zinc or some other substance, simply by throwing a nail or some other household item into their trash. So everyone has disposed of hazardous substances. Everyone has put a hazardous substance into their trash. I think there is also a difficult problem in that if there were any attempts to create loopholes or create exemptions to Superfund's liability scheme based on concentration, it would make EPA's task more difficult. This would impede establishing liability and limit the government's ability to get companies to step up to the plate and clean up contaminated sites.

The real issue that everyone is talking about here is like liability, but it isn't the same - it is allocation. How much should generators and transporters of municipal solid waste and sewage sludge pay, and how do you rack up liability amongst those who sent waste to a site?

The statute doesn't give us any guidance other than the directive that a court should do what is equitable. I think everyone knows how much guidance that is. There are a few cases that have

been decided under that standard, which was added under the 1986 amendments. But those cases primarily deal with dividing the liability between buyers and sellers of contaminated property. They do not deal with the issue that has been most difficult and has created the real problem, which is how do you divide liability in what is called your typical mixed-waste site.

The typical mixed-waste site was developed as follows. In the 1970's, when hazardous waste was not heavily regulated, hazardous waste liquids were dumped at a site. The general wisdom in the solid waste industry was also to put an abundance of municipal solid waste in there so you could absorb the solvents. You could then get more solvents into your landfill. When the regulations changed under RCRA in the 1980's, these sites were then covered with tons more municipal waste, creating hundreds of generators and mixed municipal waste and hazardous waste in a landfill.

We have no guidance from EPA on this issue yet. EPA began struggling with this issue but ducked out when it became too politically hot at the end of the decade. The issue is very difficult for practitioners because you are trying to rack up liability in a situation where you have no information, no guidance, and hundreds of parties. The individuals involved with the situation are mostly lawyers who are not particularly good at developing information in a rational way (as opposed to a litigious way). These are some of the major issues and questions that I think we are going to try to deal with in the discussion that follows.

Some of these questions follow. First, how do you take differential toxicity into account when allocating liability? Second, what factors are relevant in allocating liability? Should you, and can you, base allocation on the “Delta Theory,” which is the difference in the cost of remediating a hazardous waste landfill and the cost of remediating a municipal landfill? Furthermore, if you do use the Delta Theory, which difference do you take? Do you subtract the cost of the chemical waste, or subtract the cost of cleaning up a municipal waste landfill from the total cost of cleaning up the hazardous waste site. Third, how do you account for the fact that most toxic wastes in most landfills were disposed of in the 60's and 70's when no detailed records were kept? Fourth, a lot of states have addressed the issue and have created exemptions or limited differential liability under their state “little Superfunds.” Should these be considered in allocation of costs decisions? I think they should be. Fifth, how should the litigation be managed? That's a major issue. Should litigation be used at all? Are there appropriate alternative
procedures to handle cases that cannot be litigated? Finally, is there any sense in amending the statute, and if so, what are the policy decisions that are at issue in so doing?

Mary E. Rugala, Esquire†

Good morning. I hope that Charlie Howland's and my views on these very topical issues and our experiences in dealing with them at EPA will be useful in sorting out these issues and our differences on them. Perhaps we could even reach some points of consensus through our discussion today.

Returning to the subject at hand. I would like to lay out the statutory background and the background on EPA's Guidance that has been promulgated for those of you that don't have as much background with CERCLA.

Basically, section 107(a) of CERCLA, provides that any person (and the definition of person under the statute includes municipality) who owns or operates or owned or operated at the time of disposal, a facility from which there is a release or threatened release of a hazardous substance, or any person who arranges for the disposal, or arranges with a transporter for the disposal of a hazardous substance at such a facility (typically called generators) or transports a hazardous substance to such a facility which he or she selected, shall be liable for response costs.

Questions have arisen concerning how to deal with the generation, disposal, or transportation of municipal solid waste under the CERCLA liability scheme. One response from EPA, and the only guidance which has been issued on this topic, is EPA's Interim Municipal Settlement Policy of 1989. This policy defines how EPA will exercise its enforcement discretion in choosing who to notify as a potentially responsible party when pursuing settlement of sites which involve municipalities or municipal waste. Significantly, it is not a limitation on liability under CERCLA.

The policy essentially has two parts, although there are some other subparts of particular interest. The first major part outlines how EPA will exercise its enforcement discretion in notifying par-

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These remarks were presented by Ms. Rugala in her private capacity. No official support or endorsement by the Environmental Protection Agency or any other agency of the United States Federal Government on any matter, including pending litigation, is intended or should be inferred.
ties of potential liability. The second part addresses the methods by which the municipality can meet its obligations in settlement, given their somewhat unique characteristics of government financing. The policy notes, however, that some of the settlement tools are also available to private parties - this may be particularly true of small businesses.

Charles B. Howland, Esquire†

Let me briefly discuss EPA’s enforcement policy for dealing with municipal liability under CERCLA. Concerning municipal solid waste ("MSW"), EPA will generally not notify generators or transporters of MSW that they could be potentially responsible parties unless (a) the EPA regional office obtains site specific information showing that MSW contained hazardous substances, and (b) the EPA regional office has reason to believe that the MSW came from a commercial, institutional, or industrial activity.

This policy does not just apply to municipalities, it is EPA’s policy towards any generators including businesses. EPA will apply this policy to a business where the business can show that the trash that came from its facility did not have any hazardous substances in it which originated from commercial, institutional, or industrial activity, and that the amount and toxicity of the hazardous substances contained in its trash do not exceed those that are commonly found in MSW.

Recognize that under this policy there are cases where an MSW generator will be notified that it is a PRP. It should also be noted that EPA’s Settlement Policy also contains some mechanisms whereby a municipality PRP may provide for in-kind services or delayed payments if it has particular funding constraints.

Some have suggested that EPA should more actively pursue settlements with municipalities alone. In light of the goals of CERCLA, it makes sense for EPA to resolve liability issues in one settlement, one document, at one time. Obviously, if we resolve only part of the liability issues arising from a cleanup of a hazardous waste site, i.e., the MSW issues, we still have all of the costs of litigat-

† Mr. Howland is a Senior Assistant Regional Counsel in the CERCLA Removal and Pennsylvania Branch of Region III of EPA. Mr. Howland is the staff attorney on *U.S. v. Aluminum Co. of America*, one of the Region’s largest cost recovery suits. Before joining EPA he practiced products liability and environmental law.

These remarks were presented by Mr. Howland in his private capacity. No official support or endorsement by the Environmental Protection Agency or any other agency of the United States Federal Government on any matter, including pending litigation, is intended or should be inferred.
ing the liability for the rest of the site - that is not as productive. That is why EPA's guidance statements on this issue are aimed toward one global settlement when it's possible.

Nonetheless, EPA has at times reached settlements with just municipalities. EPA's door is always open and we will listen to folks' complaints about what's happening in the private sector, and any offer they make. That is part of the process. Our main goal is to maximize cost recovery through complete settlement, but we will consider any offer. Whether there is or is not a "problem" concerning liability for MSW transportation and disposal is, of course, not for me to say. However, I would offer for debate today, and I'm sure it will be debated very heavily, the proposition that there is not necessarily a problem.

It has been settled that joint and several liability exists under CERCLA for those sued directly for cleanup costs. Once liability is established, it is up to the PRPs to allocate amongst themselves how to split the costs. In accordance with EPA's Settlement Policy, municipalities are typically brought into these lawsuits, not as part of the government's case-in-chief, but in contribution actions. It is fairly clear under the 1986 CERCLA amendments, and most of the courts who considered the issue have recognized, that the standard of liability in a contribution action is not joint and several. In a contribution action, the court can use equitable factors in allocating liability. Indeed, I am not aware of any court that has imposed a money judgment for generator liability against a municipality, let alone one that could be considered unfair.

Is the debate on municipal liability under CERCLA anything other than the initial uncertainty that follows any change in liability standards under a statute or common law? We saw a similar debate when strict liability was first recognized in product liability actions in the 1960's. While today some aspects of common law products liability remain debated and are being legislatively modified, the core public policy underlying these cases is essentially accepted. Will the same be said about CERCLA in twenty years? Perhaps we should be looking for some creative ways in the litigation to deal with municipalities' liability instead of looking to change the law or policy.
David B. Van Slyke†

I cut my CERCLA teeth in the ranks of EPA's CERCLA and RCRA enforcement attorneys, but more recently, in private practice, I have represented both industry and municipalities in various capacities in the Superfund program. Therefore, because I don't come here with an ingrained viewpoint, having seen this from several perspectives, I thought I would address the issue from a different direction.

This issue, like the Superfund lender liability issue, has been looked at, and is still being looked at, by all three branches of the federal government. I am going to spend a few minutes reviewing the actions taken by each.

First, the Executive Branch has been wrestling with the issue for sometime. Their goal is to come to some policy decision that hurts the most people the least. In July 1991, former EPA Administrator Riley announced his intention to issue a policy defining the best way to slice the CERCLA liability pie in the context of municipal liability. That summer, EPA floated a trial balloon that sent the municipalities into orbit. Under that proposed formula, municipalities would have been in for a 30-50% cost share in the generator and transporter context. Clearly that approach wouldn't work. So the Agency went back to the books.

The next solution the Executive Branch proposed was something called the "four percent solution." EPA floated that in the spring of 1992; however, that sent the chemical and industrial players into a tizzy. Apparently they convinced the White House to intervene and the proposal ended up before Dan Quayle's Competitiveness Council. As a result, the whole effort ground to a halt in the Executive Branch before the end of the Bush Administration.

At the legislative level, Congress also has been working to resolve the problem of municipal liability under CERCLA. In 1991, Senator Lautenberg of New Jersey proposed a bill called the Toxic Cleanup Equity and Acceleration Act of 1991. This bill embraced the principles of EPA's Interim Municipal Settlement Policy regarding enforcement discretion in terms of the statute saying that "the

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Agency shall not sue municipalities or seek recovery of monies from municipalities under certain circumstances." A modified version of that bill almost made it through the 102d Congress. While it passed the Senate, a procedural snafu at the end of that congressional session stymied the effort and the bill died. Senator Lautenberg proposed the same bill at the start of the 103d Congress. On February 4, 1993, the bill was introduced in both houses - in the Senate by Lautenberg and nine co-sponsors and in the House by Representative Torricelli of New Jersey.

In essence this bill embraces the four percent solution. The lobbyists are gearing up on both sides to deal with it. An entity called the American Communities for Cleanup Equity is lobbying very hard because this is in essence their cause. It is anyone's guess how that bill will fare. I don't know where it's going to go.

A footnote to all of this is that since 1986, when the SARA amendments were passed, the Administration has been chanting the mantra "no piecemeal amendments to Superfund." That mantra successfully fended off the Superfund lender liability amendments; however, whether the liability scheme in general remains intact is, at best, uncertain as we head towards Superfund reauthorization.

Turning now to the Judicial Branch, litigation over the CERCLA municipal liability issue has been focused on in cases on the West Coast and the East Coast. The West Coast litigation involves a mountain of garbage known as the Operating Industries site. Driving east from Los Angeles on the Pomona Freeway, you are surprised to see what appears to be the first of the foothills so close to Los Angeles. A man-made mountain of garbage, that foothill is the Operating Industries landfill. There are cliffs formed by this landfill with a difference in elevation of 600 feet on either side. During construction of the Pomona Freeway, the engineers cut a trench through this landfill much like a rock cut in other locations. Estimates have placed cleanup cost at up to three-quarters of a billion dollars. Industrial generators in that case have pushed very hard to have the municipalities pick up a fairly large share of the cleanup costs.

On the East Coast there is the B.F. Goodrich v. Murtha litigation, dealing with the Beacon Heights and Laurel Park landfills. In

3. 958 F.2d 1192 (2d Cir. 1992). Since the date these remarks were delivered, the Federal District Court for the District of Connecticut delivered another opinion addressing the municipalities' liability in this case. See B.F. Goodrich Co. v. Murtha, 840 F. Supp. 180 (D. Conn. 1993).
that case, a group of settling industrial generators sued several communities, numerous companies, small businesses, and individuals as generators of hazardous substances due to their disposal of municipal solid waste.

Is municipal liability an important issue in the CERCLA program? If a high level of activity in all three branches of the federal government regarding this subject is any indicator, sure it's an important issue. And the numbers bear this out. According to an EPA study, there are 318 municipal sites on the National Priorities List. Forty of those sites are in this EPA Region, and twenty five of those forty are in Pennsylvania. So it is an issue right here. The issue is important. It is important now, and it is important locally as well as nationally.

Ellen Friedell, Esquire†

The language of the debate on municipal liability for waste site cleanup is fascinating to me because I love words and have a keen interest in how they are used. The fight being waged is generally cast as one between "polluters" and taxpayers. Translated, "polluters" are bad companies which sue innocent cities in CERCLA cases. The word "polluter" really gets to me because I am a lawyer who has spent most of my working life representing a company whose scientists have discovered all kinds of wonderful products that make our life richer and better. It did its best to find the best places to send its wastes, but as it turns out, almost all waste disposal sites used in the past, even those specifically recommended and approved by the government, are either current or future Superfund sites. In the language of this debate, I represent a "polluter." Jack Lynch, of Carpenter, Bennerr and Morrisey, who represents industrial companies in the GEMS litigation, wrote an excellent brief on municipal liability in which he described how the word "polluter" was used as a mantra. He calls it the mantra of malice. And he shows how the term has been used to demonize companies who sue municipalities. After I read Jack's brief setting forth the position of industrial parties of the many municipalities who had contributed to the great garbage mountain of GEMS, one of my colleagues sent me an article which appeared in a New Jersey newspaper written by a New Jersey Congressman who is promoting a bill to exempt mu-

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municipalities completely from liability. The headline of the article says “Polluters Exploit Cleanup Loopholes.” Once again I see the word polluter. The “loophole” is the ability of industrial companies targeted by EPA to seek contribution from others, including municipalities, for their share of cleanup costs.

Last night, as I was preparing for today, I just had to spend some time with my Compact Edition of the English Dictionary that I can barely lift and comes with the neat magnifying glass. It was fascinating to learn that the term “polluter” has a tremendous religious connotation and many of the entries in the dictionary for “pollution,” “polluted,” and “polluter” relate to religious concepts. One of the sentences I loved was this one written in 1857: “The clergy urged him to exterminate the heretics whose presence they thought polluted France.”

One thing that those who represent companies are asked a lot is “why are you suing municipalities?” The question surprises me because the answer is so simple. There is absolutely one reason: we need their money. Although the perception may be that the pockets of industrial companies are indefinitely deep, the truth is that they do not have enough money to pay for the entire cost of cleaning up every garbage site in America. So there is no deeply cynical reason. The fact is that because of the way the Superfund statute has been implemented, there is a tendency across the board to pick out a couple of companies and hit them with the club of joint and several liability to clean up an entire site. Take the GEMS site in New Jersey. There is no way that one person or company could have created those mountains. They were created by many, many individuals, companies, and governments. It was not made by forces of nature and did not get there itself. Once the joint and several liability club fell on a few companies targeted by the EPA at GEMS, there was nothing they could do except to spread the pain. So the companies sued not only municipalities, but other companies, including their own customers, suppliers, and insurance companies. There are very wrenching relationship issues in these cases. One can see the difficulty when one starts analyzing what we’re doing in these cases. For instance, we sued municipalities who sued their insurance carriers who happen to be some of the same insurance carriers we sued. All this litigation is not for recreational purposes, and it is not the fault of the lawyers. It is the product of the Superfund liability system and everyone is doing exactly what you would expect them to do.
There is no secret that the industrial companies would appreciate any help that we could get from municipalities in fixing Superfund because the system is broken for everyone. The unfairness of joint and several liability guarantees endless and wasteful litigation. But the core problem is that as a society we are wasting billions of dollars on fantastic "remedies" which are not scientifically sound, and which are not based on any reasonable sense of risk or reasonable sense of benefit. The Superfund program has been implemented without regard to the economic laws of scarcity. While the government reports quote $30 million dollars as the "average cost" of a Superfund site, they all seem to be "above average" and over $100 million is not at all rare. We are burning an awful lot of dirt and chasing molecules at parts per billion levels.

EPA's approach to the municipal liability issue was to propose what's called the "four percent solution" which would cap the municipal share of cleanup costs to four percent of the total cost regardless of the amount of municipal waste at a site. This proposal is not based on science. We can reasonably debate what is a fair share of liability for a municipality at a particular site. It is not easy to allocate liability, especially at old sites where records are not available but the allocation process is difficult for everyone, not just municipalities. Given the large number of contributors to municipal sites, it makes a lot more sense to replace the Superfund liability system with a tax mechanism to pay for municipal site cleanups. In the meantime, it is clear that the municipal share of waste at many sites is very large, no matter how you measure it, in terms of hazardous substances, total volume, or whatever. And it should surprise no one that given the huge amounts of money involved, industrial companies will continue to seek a share of cleanup costs from municipalities.