A Proposed Scheme of Municipal Waste-Generator Liability

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The Environmental Protection Agency ("EPA") traditionally has exercised its administrative discretion to allocate liability for the cleanup costs of the nation's privately owned hazardous waste sites by shifting most of the liability to such private-sector entities as generators and transporters of toxic wastes. Studies increasingly reveal, however, that the municipal solid waste ("MSW") present at many of these waste sites has considerable hazardous potential, thereby making municipalities and their citizens liable for cleanup costs as waste generators. The EPA typically makes generators of hazardous waste liable for cleanup costs through enforcement actions pursuant to its statutory mandate: the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund").

Superfund liability is but one problem potentially associated with municipal waste generation. Superfund liability stems from harms associated with previous generation and disposal of waste. There are many indications that trends in current municipal waste generation will pose greater problems in the near future. Most citizens probably are not aware that MSW is toxic. The American population is producing an unprecedented volume of waste, and most states lack comprehensive plans for its safe disposal.

2. Id. at 212-13.
3. Id. at 202, 210. See infra text accompanying notes 11-13 & 22-25.
4. A municipality will be a potentially responsible party for cleanup costs when it is either "the current owner or operator of a dumpsite containing hazardous substances, or the previous owner or operator at the time of hazardous waste disposal." Ferrey, supra note 1, at 251. See infra text accompanying note 77. However, the EPA normally will not identify a generator of MSW as a responsible party if the dumpsite was privately owned at the time of disposal and if it collected both MSW and industrial hazardous waste. Ferrey, supra note 1, at 251. See infra text accompanying notes 66-70 & 73-75.
7. Municipalities currently generate waste at alarming rates. The average American disposes of 3.5 pounds of garbage per day. Beck, Buried Alive, NEWSWEEK, Nov. 27, 1989, at 67. The volume of garbage produced has increased 80% since 1960. Id. An additional 20% increase is expected by 2000. Id.
8. See infra text accompanying notes 29-32.
This Note argues in favor of routinely imposing CERCLA generator liability on municipalities that have contributed waste to harm-producing sites. Municipal liability is a powerful tool to achieve the combined ends of satisfying the tort aims of CERCLA and creating local incentives to adopt improved waste-management practices. These goals will be accomplished only if liability is allocated and managed through a scheme tailored to the characteristics of municipal waste generation that distinguish municipal generation from the private industrial waste generation currently penalized under CERCLA. This Note proposes such an administrative and funding scheme.

Part I of this Note examines municipal waste generation and identifies the role of municipalities in the larger problem of hazardous waste disposal. It then explains the ramifications of the failure to assess liability against municipalities that have contributed waste to harm-producing sites. Part II explores a foundation for municipal waste-generator liability. It examines the tort goals that liability should further, and analyzes ways to achieve those goals through municipal liability in a manner different from private-sector methods. Part III then proposes a concrete scheme for municipal generator liability, including recommendations for an administrative structure, and a system of funding through a household-variable waste tax.

I. MUNICIPAL WASTE AND THE PROBLEM OF WASTE DISPOSAL

The problems associated with municipal waste are threefold: municipalities generate an excessive volume of waste, they dispose of it improperly, and its components are hazardous. The presence of these three factors in the context of waste creation by scores of public and private-sector generators has yielded a serious environmental crisis.

A. Dimensions of Municipal Waste Generation

1. Composition of Municipal Waste

MSW has several components. Household waste comprises a portion of MSW; the remainder, up to two-thirds on average, comes from commercial and other sources. Recent scientific data indicates that the various chemical agents contained in household and other municipal wastes create environmentally hazardous situations. Such chemicals may be found in “pesticides, paints,
degreasers, preservatives, detergents, oven cleaners, insecticides, and even shampoos sold ubiquitously over the counter to consumers. One commentator concluded that "[t]he home garbage pail is a leaking sieve of toxic and potentially toxic chemical agents."

2. Disposal Methods and Their Consequences

Municipalities ordinarily choose one of the following approaches to waste collection: 1) collect MSW and transport it to disposal sites or landfills; 2) collect MSW from residences, unload it at a transfer station, and contract with a third party to transport it to a disposal site or landfill; 3) contract with third parties for both curbside collection and transportation to a disposal site; or 4) provide no collection services, thereby requiring residents to haul MSW themselves. Once municipal waste has been collected, it is usually incinerated, recycled, or disposed of in landfills. Landfilling accounts for approximately ninety percent of MSW disposal.

Because knowledge of the hazardous nature of MSW has emerged only recently, the EPA historically has presumed that MSW is sanitary "non-hazardous rubbish." It has permitted MSW disposal in sanitary landfills governed by safety standards less stringent than those associated with disposal sites of traditionally recognized sources of hazardous waste. However, MSW is found both at mixed-use waste disposal facilities and at municipal-only landfills.

One of the many problems posed by landfills is "leaching," the migration of contaminated liquid or water-soluble substances away from their point of origin. Leaching may contaminate groundwater that provides drinking supplies, kill plant and animal life, and render certain areas unsuitable for full

13. Id.
14. Id. at 233.
15. Comment, supra note 11, at 213-14, 231; see also Beck, supra note 7, passim.
16. Comment, supra note 11, at 213.
17. Sanitary waste is contrasted to hazardous waste. All sanitary waste is characterized as "solid" waste whether it is actually liquid, gaseous, or solid. Ferrey, supra note 1, at 200.
18. Id. at 202.
19. Id. at 200.
20. See id. at 213-15. Among the principal sources of hazardous waste are: 1) the federal government, primarily through the Atomic Energy Commission and the Department of Defense; 2) private industry; 3) agriculture; and 4) institutions such as laboratories, hospitals and research centers. N. CHEREMISHNOFF, F. ELLERBUSCH & A. PERNQ, INDUSTRIAL AND HAZARDOUS WASTE IMPOUNDMENT I (1979).
21. See Ferrey, supra note 1, at 212, 251. Mixed-use facilities receive both MSW and hazardous industrial or commercial waste.
22. Id. at 207 & n.34; Comment, supra note 11, at 219 & n.57. See, e.g., Beck, supra note 7, at 67 (discussing dump in Fresh Kills, N.Y., claimed to be leaching two million gallons of "contaminated gunk" into groundwater each day).
23. See Ferrey, supra note 1, at 210 (constituents in ordinary household wastes are toxic and capable of contaminating groundwater).
residential use because of health threats.\textsuperscript{24} In addition to dangerous leaches, MSW decomposition at landfills generates methane gas, which can cause explosions and underground fires.\textsuperscript{25} In short, waste disposal threatens the environment and human health.

For all its shortcomings, landfilling remains the most commonly used disposal method.\textsuperscript{26} Yet in many areas this option will soon cease: more than two-thirds of the nation's landfills have closed since the 1970's, and one-third of the remainder will be full in the next five years.\textsuperscript{27} In light of estimates that more than half of the cities in the United States would exhaust current landfills by 1990, a crisis is imminent.\textsuperscript{28} Although some states and municipalities have introduced waste-reduction programs,\textsuperscript{29} such measures are not centrally mandated,\textsuperscript{30} and the reduction of new waste is a lesser priority than the disposal of existing waste.\textsuperscript{31} "Local government subdivisions have a tendency to take a casual and indifferent approach to waste management."\textsuperscript{32}

The problem of hazardous waste sites looms large: as of March 1989 the EPA had designated 848 priority sites.\textsuperscript{33} By December 1989 the number of proposed and final priority sites stood at 1219, twenty-five percent, or 320, of which were thought to involve municipalities or MSW.\textsuperscript{34} Twenty percent, or 236 sites, were classified as municipal landfills.\textsuperscript{35} It is estimated that in the future half of the priority sites will be municipal landfills.\textsuperscript{36}

\begin{thebibliography}{99}
\bibitem{24} See, e.g., \textit{Polluted Lake Below Ground Worries E.P.A.}, N.Y. Times, Oct. 10, 1989, at B1, col. 2 (Toms River, N.J., is focus of underground lake of contamination that has forced prohibitions on swimming and fishing and has closed private wells).
\bibitem{25} \textit{Comment, supra note 11, at 219; Pollock, Mining Urban Wastes: The Potential for Recycling, 76 Worldwatch Paper 14 (1987).}
\bibitem{26} \textit{See supra text accompanying note 16.}
\bibitem{27} \textit{Beck, supra note 7, at 67.}
\bibitem{29} \textit{Beck, supra note 7, at 69.}
\bibitem{30} \textit{See Comment, supra note 11, at 214, 231.}
\bibitem{31} \textit{There are numerous examples of cities struggling to find places to send waste and waste by-products for which they do not have landfill capacity. See id. at 228-30 (describing sagas of barges lacking sites to unload their cargoes of ash residues of incinerated municipal waste from Philadelphia and West Islip).}
\bibitem{32} \textit{Id. at 214-15.}
\bibitem{33} \textit{Id. at 214-15.}
\bibitem{34} \textit{40 C.F.R. § 300, app. B (1989). See infra text accompanying note 40.}
\bibitem{35} \textit{Superfund Program; Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071, 51,071 (1989) [hereinafter Interim Policy].}
\bibitem{36} \textit{Id. The EPA defines a municipal landfill as "any landfill, either publicly or privately owned, which has received municipal solid waste." Id. The remainder of landfills that involve municipalities includes sites owned or operated by municipalities that have not been used for MSW disposal. Municipal landfills historically have represented 20% of the national priorities list. Id. Remaining sites are generally of five types: industrial/commercial landfills, mining waste sites, leaking underground storage tanks, radioactive waste sites, and RCRA Subtitle C hazardous waste facilities (sites for disposal of other hazardous, rather than sanitary, waste). OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, EPA, EXTENT OF THE HAZARDOUS RELEASE PROBLEM AND FUTURE FUNDING NEEDS: CERCLA SECTION 301(A)(1)(C) STUDY 5-2 to 5-11 (1984).}
\bibitem{37} \textit{OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 4-5 (1985) [hereinafter SUPERFUND STRATEGY].}
\end{thebibliography}
B. CERCLA: Legislative Response to the Problem of Hazardous Waste Disposal

Congress enacted the Superfund statute amid rising concern about hazardous waste disposal. The statute had a two-fold purpose: to provide for a national inventory of hazardous waste sites ("Superfund sites") and to establish a program of responsive action to protect public health and the environment from dangers posed by such sites.

1. Definitions, Terms, and Structure

Priority waste sites—those most urgently in need of cleanup—are listed on the National Priorities List ("NPL"), which is compiled from priority lists submitted by the states to the EPA. The statute defines four classes of persons liable for Superfund site cleanup costs. Such entities are "potentially responsible parties" ("PRPs"). Identified PRPs can be formally sued and ordered to perform cleanups, can be sued for response costs after the federal or state government has performed cleanup, or can enter into voluntary settlements with the government concerning their liability for response costs.

As a result of legislative compromise, CERCLA originally omitted specific terms of liability. Instead it provided that the standard (negligence or strict) and extent (joint and several or individual) of liability should be determined by the common law developed under other environmental statutes. However, the legislative history of CERCLA, and its interpretation by federal courts,
suggests that Congress intended to impose strict, joint and several liability on any qualifying defendant failing to establish the portion of the total liability attributable to its wastes.

The statute established a revolving fund available to the EPA and state and local governments to clean up hazardous waste sites listed by the EPA on the NPL. The fund enables the government to proceed with cleanup where PRPs are unavailable, insolvent, or unwilling to undertake cleanup themselves.

CERCLA is designed to be administered primarily by the EPA. However, the current statute also contains a "citizen suit" provision, which provides for private rights of action to enforce the terms of the statute.

2. Common Law Tort Foundations

Although environmental and toxic torts differ fundamentally from the individual wrongs of common law torts, CERCLA liability nevertheless may be imposed on qualifying PRPs to achieve the purposes of tort law.

The goals of modern tort law are compensation, deterrence, and loss

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46. Casenote, supra note 43, at 1065; see also Ferrey, supra note 1, at 235 ("courts have determined that PRP liability is joint and several if there is no basis for dividing the responsibility for the injury"); Note, The Comprehensive Environmental Response, Compensation and Liability Act of 1980: Is Joint and Several Liability the Answer to Superfund?, 18 NEW ENG. L. REV. 109, 113 (1982) (CERCLA silent on issue of joint and several liability, but legislative history suggests traditional common law principles applicable).

47. Although Congress intended that joint and several liability be applied, the common law does not impose mandatory liability. The rigid imposition of joint and several liability would require the defendant to bear the loss of insolvent or unidentifiable hazardous waste contributors, while the modern common law approach places the loss under those circumstances on the plaintiff. Casenote, supra note 43, at 1068 n.58. Judicial interpretation has obviated the need for government proof of proximate causation in certain cases, see, e.g., Wade, 577 F. Supp. at 1333-34, despite some evidence suggesting that Congress intended otherwise. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. I, 33, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136 ("The Committee intends that the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant 'caused or contributed' to a release or threatened release.").


49. 42 U.S.C. § 9659 (1988); see also infra text accompanying notes 118-20. This right of action also runs against the EPA and other public officials where failure "to perform any act or duty ... which is not discretionary" is alleged under the statute. 42 U.S.C. § 9659 (1988).


spreading. Compensation restores a victim to his or her condition prior to the occurrence of the tort. The "victims" of improper disposal of hazardous waste are the environment and populations that suffer property and health losses from environmental contamination. Superfund serves the compensatory aim of tort law by cleaning up waste sites and other contaminated areas in order to reduce the risk of future harm to an acceptable level. The statute excludes reimbursement of certain claims, such as individual medical claims, and thus does not achieve full compensation for the spectrum of losses that may result from hazardous waste disposal. Yet individuals benefit prospectively from present environmental amelioration.

Deterrence is accomplished by internalizing the costs of harm-producing activities, which discourages tortfeasors from engaging in them. CERCLA deters waste generators from improper waste-handling practices that cause environmental and personal injuries. Economic disincentives (liability assessments) motivate polluters to discontinue their past waste-handling practices.

Loss spreading is premised on the notion that individuals should share the costs of accidents because society is better off if several members suffer small losses than if one member suffers a large loss. If the PRPs do not pay for cleanup, those that suffer damage to environmental resources, property, and health bear the whole cost. Placing liability on PRPs shifts a portion of that burden, thereby diffusing the cost of harms.

3. Enforcement of CERCLA Against Municipalities

The language of CERCLA clearly states that all persons and instrumentalties falling within any PRP category are liable, including the United States or any other governmental instrumentality: "The statute does not provide an

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52. See G. CALABRESI, supra note 51, at 26-31, 68-69; see also PROSSER & KEETON ON TORTS, supra note 51, § 4, at 25-26 (providing strong incentive to prevent harm is one reason for imposing liability).
56. See S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980) (strict liability, as under CERCLA, "assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business"). Deterrence is accomplished either through "direct deterrence" rules (regulation) designed to prevent accidents or through "market deterrence," the forced internalization of costs. Owen, Deterrence and Desert in Tort: A Comment, 73 CALIF. L. REV. 667, 669 (1985).
57. Cf. Grigalunas & Opaluch, supra note 55, at 509, 528 (economic incentives efficient way to manage pollution; firms respond to potential liability for pollution damages).
59. See Note, supra note 46, at 144 (defendants in hazardous waste cases in better position to spread losses); see also infra text accompanying notes 102-06.
60. CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political
exemption from liability for municipalities.” Scientific evidence that MSW generally contains hazardous substances defined by CERCLA suggests that municipal generators should be liable as PRPs.

The December 1989 publication of the “Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes” followed ten years of inconsistent enforcement against municipal generators. Although the EPA claimed “to [have] develop[ed] an approach that is both fair and manageable,” the guidelines are seriously flawed: they ignore scientific evidence, discriminate unfairly against similarly situated parties, and fail to consider the full range of problems associated with municipal waste generation. Under EPA enforcement of the policy, municipalities will escape generator liability in many cases.

Municipal waste generators are excluded from the Superfund settlement process, and are thus exempted from liability by the EPA, “when the source of the municipal waste is believed to come from households, regardless of whether household hazardous waste may be present.” The Interim Policy delineates two exceptions to the general rule: municipal generators may be named PRPs in a settlement if (1) there is site-specific evidence that the MSW from a municipal contributor contains hazardous substances from a commercial, institutional, or industrial process or activity; or (2) there is an insignificant total volume of commercial, institutional, and industrial waste from private contributors relative to the volume of household-derived waste contributed by a municipality.

The “EPA expects [the latter] exception to be sparingly applied.” Thus, no generator liability ordinarily attaches to municipalities whose wastes are at privately owned, mixed-use sites, which constitute a significant percentage of the NPL.


61. Interim Policy, supra note 34, at 51,074.

62. Cf. id. at 51,074 (“Municipalities may . . . be PRPs as part of CERCLA's broad definition of who is potentially liable.”).

63. See Ferrey, supra note 1, at 269-71.

64. Interim Policy, supra note 34, at 51,072.


66. Interim Policy, supra note 34, at 51,072 (emphasis added).

67. Id.

68. Id. The EPA looks for specific evidence of municipal contributions of hazardous substances to a site, for example, where a municipality operated a wastewater treatment plant and deposited the resultant sludge at the landfill, or where it was a hauler for commercial and industrial generators. Telephone interview with John Fogarty, Superfund Enforcement Office Staff Attorney, Washington, D.C. (Aug. 7, 1990).

69. This exemption continues the EPA's enforcement practice antedating the creation of the Interim guidelines. See Ferrey, supra note 1, at 251, 256.

70. Id. at 251-52. Political pressure by the states may have influenced EPA policymaking. See id. at 212-13. The states urge the EPA to exclude MSW disposal facilities from the NPL because designation of a government-owned and -operated MSW disposal site on the NPL requires a state to pay at least 50% of
The EPA's criteria of site-specific evidence of commercial, institutional, or industrial waste in MSW as a prerequisite to municipal generator liability ignore current scientific understanding of MSW toxicity. Under the terms of the policy, "site-specific information does not generally include... 'general studies' conducted by EPA or other parties which draw general conclusions about whether MSW or sewage sludge typically contain [sic] a certain percentage of hazardous substances, unless the 'general study' includes 'site-specific' information obtained from the PRP or superfund site in question." The policy focuses on commercial refuse, not household waste. Even at those sites where MSW predominates, the hazards usually will be attributed solely to the presence of privately generated waste, since the policy fails to clarify what constitutes an "insignificant" presence of privately generated waste.

The policy also discriminates unfairly against similarly situated parties. CERCLA defines four coequal classes of PRPs, and does not provide a foundation for the EPA to distinguish between industrial or commercial generators and municipal generators, or between municipal generators and municipal owner/operators. Nevertheless, in addition to the disparate treatment of private and municipal generators, the policy differentiates generator liability from owner/operator liability. It states that municipal owner/operators, in contrast to generators, "may be potentially liable just like private parties, and that such parties will generally be notified and handled in the same manner" as private parties. Yet both classes of municipalities may have contributed to the waste-site problem. Neither the policy nor its supplemental explanation provides an adequate rationale for this disparate treatment.

The policy also places a heavier burden on private generators whose waste may be virtually identical to MSW. Private parties will be named as PRPs unless their waste did not originate from commercial, institutional, or industrial activity, and the amount and toxicity of the hazardous substance does not exceed that found in common household trash. Thus, for example, at a

the remediation costs and 100% of the operation and management expenses incurred by the cleanup. This cost depletes local tax resources. Id. See 42 U.S.C § 9604(c)(3) (1988). Consequently, the EPA does not pursue its full range of enforcement powers against municipalities for cleanup contribution even at all sanitary municipal landfills. Ferrey, supra note 1, at 212-13.

71. See supra notes 11-13 and accompanying text.
72. Interim Policy, supra note 34, at 51,075 n.8. General studies may be used, however, to supplement site-specific information. Id.
73. Id. at 51,075.
74. Id.
75. The policy's sole guidance on this question directs the Regional Offices to consider "the total volume of [privately-generated] waste contributed by all parties," and "whether such waste is significantly more toxic than the MSW and whether such waste requires a disproportionately high treatment and disposal cost or requires a different or more costly remedial technique than that which otherwise would be technically adequate for the site." Id. at 51,075 n.10.
76. See supra note 41.
77. Interim Policy, supra note 34, at 51,072.
78. See id. passim.
79. Id. at 51,075.
mixed-use site containing both MSW and commercial trash, neither of which resulted from industrial processes, the municipality's waste may exceed common household trash toxicity without triggering liability, whereas the identical commercial trash will trigger liability. The municipality is presumptively exempt, while the private party is presumptively liable.

The EPA does not fully recognize the threat associated with large-volume waste production. The sheer volume of hazardous waste spread out among numerous Superfund sites is as important as the toxicity level at any one site. Only an eventual decrease in hazardous sites will fulfill CERCLA's objectives, and this decrease depends on volume reduction. Because cost internalization is not accomplished with respect to a whole category of municipal generators, the volume element of the waste disposal crisis remains untreated—to society's long-term detriment since postcontamination cleanups are more costly than waste reduction.

Because CERCLA grants the EPA discretion in naming PRPs and in approving cleanup plans for Superfund sites, the Agency has considerable latitude in shaping the contours of Superfund enforcement. Though practical considerations may prompt enforcement issues, the EPA decision to exempt a class of PRPs from liability contravenes both the language of the statute and congressional intent, and may have undesirable results. Because courts generally grant administrative decisions deference, the EPA should consider the full ramifications of such decisions.

80. See, e.g., Ferrey, supra note 1, at 211, 216 (50,000 hazardous waste sites may exist; Office of Technology Assessment conservatively estimates 17,400 to 34,800 MSW sites may eventually require Superfund cleanup).
81. See supra notes 56-57 and accompanying text.
82. See Ferrey, supra note 1, at 211 n.65 (less economical, post-waste-generation pollution controls consume 99% of federal and state environmental spending).
84. Depending on the circumstances, selective enforcement may be justified. For example the EPA may choose to issue an administrative order or enter a consent decree with one or more PRPs but not others. See Garrett, Citizen Suits: A Defense Perspective, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,162, 10,162 (1986) ("[t]here are sound reasons why enforcement often is not pursued or is handled informally by the government"). Such decisions may rest on considerations of whether agency resources are well spent on a particular violation, whether enforcement fits the agency's overall policies, and whether the agency has resources for enforcement. Scalia, Responsibilities of Regulatory Agencies Under Environmental Laws, 24 HOUS. L. REV. 99, 105 (1987).
85. See supra notes 41-42 & 61-62 and accompanying text. Administrative agencies, although generally vested with considerable discretion, may not completely disregard congressional intent as embodied in statutory language. See Heckler v. Chaney, 470 U.S. 821, 833 (1985) (agency's exercise of discretion not absolute where Congress has limited enforcement power by circumscribing "an agency's power to discriminate among issues or cases it will pursue").
86. See supra text accompanying notes 37-39 & 43-47.
87. See infra text accompanying notes 89-95.
88. See Heckler v. Chaney, 470 U.S. 821, 831-34 (1985). "[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." Id. at 831. Thus, as a practical matter, overcoming judicial deference may be very difficult. Congress itself has recognized this problem. Impatient and dissatisfied with enforcement, Congress amended CERCLA in 1986 to include the "citizen suit" provision, see supra note 49 and accompanying text, intended to provide effective, fast, and
C. Ramifications of Failure to Sue Municipal Generators of Improperly Disposed Wastes

Although improperly disposed MSW has a significant impact on human lives and the environment, the EPA does not routinely impose generator liability on municipalities. That policy decision has several negative consequences.

The failure to include in enforcement actions those parties that otherwise meet the standard of liability under CERCLA diminishes the effectiveness of the statute, because some responsible parties have no incentive to employ alternative waste disposal methods. In addition, defendants that have sought to name municipal waste generators as codefendants have been less willing to afford remedies to citizens who wish to enforce the statutes. Babich & Hanson, Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen Organizations, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,165, 10,165 (1988).

The EPA attempts to justify its selective treatment of municipal generators under the Interim Policy on several grounds. The Agency claims that its resources are inefficiently used in pursuing contribution costs from generators of refuse, such as MSW, that is contaminated with only small quantities of household hazardous waste ("HHW"). Interim Policy, supra note 34, at 51,073. The EPA also cites the resource-intensive nature of obtaining evidence of the presence of HHW and the "potentially" increased transaction costs of settlement and litigation. Id. These are weak justifications in the face of the compelling reasons to pursue municipal generator liability. See supra text accompanying notes 51-59 and infra text accompanying notes 89-95.

Given the general studies of MSW toxicity, the conclusions of which are confirmed by the presence of sanitary-only landfills on the NPL, there is no reason to presume that MSW is any less toxic when dumped at mixed-use sites. Moreover, private generators have been held liable under the statute for the mere presence of their wastes at a site, whether or not the wastes could be proven to have caused a dangerous environmental release. See Ferrey, supra note 1, at nn. 237-43 and accompanying text. Municipalities should be subject to the same statutory application. A minimal step toward this end would be to place the burden of proof on municipalities to prove the absence of HHW. See supra text accompanying note 74. In addition, because sites "typically involve multiple responsible parties (sometimes hundreds of different parties)," Interim Policy, supra note 34, at 51,071-72, the relative increase in transaction costs associated with dealings with municipal generators would be minimal.

Other arguments may be raised for exempting municipalities from generator liability. One might conclude from the policy that the EPA considered the fact that, unlike private-sector generators, municipal generators lacked a profit motive in the production and disposal of waste. The EPA may have been more sympathetic to the plight of municipalities that sought to benefit their constituents through waste collection services rather than to generate large profits. Yet groups of consumers may benefit as much from privately-provided services as government-provided ones. The determination of whether to pass disposal costs to the public should depend on public benefit rather than provider identity.

CERCLA liability also might discourage cities from collecting garbage, a socially useful activity over which municipal governments should retain control. Cf. New Jersey Dept. of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 493, 468 A.2d 150, 164 (1983) (concluding that mercury and other toxic wastes are "abnormally dangerous" substances, disposal of which is dangerous, though socially useful, activity). Nevertheless, because citizens would be disinclined to arrange disposal of their own waste, local governments would probably continue collection.

Current liability for past waste disposal also raises issues of intergenerational equity between current municipal populations and those whose wastes were landfilled in the past. See Ferrey, supra note 1, at 274. However, this concern is intrinsic to the Superfund site problem, because decades may elapse between disposal and the manifestation of environmental damage. Intergenerational equity also confronts private-sector decisionmakers who now pay for their predecessors' choices. Neither Congress nor the EPA has accepted this consideration as a bar to liability.

cooperate and settle with the EPA. The credibility of the EPA as an enforcement agent is subsequently compromised.

The failure to hold municipalities liable as generator PRPs undercuts the goals of tort law at tremendous cost to public health and the environment. Fewer funds may be available to carry out remedial cleanups at sites containing MSW, because municipalities do not contribute to cleanup costs. To the extent that those funds and municipal administrative efforts are not available, remediation is delayed and compensation is not fully achieved. The hazards of open or untreated waste sites pose unreasonable health risks to nearby populations for longer periods of time.

Deterrence also fails. Municipal waste generators have little incentive to understand the toxicity of MSW or the environmental consequences of past landfilling practices, much less to seek safer disposal alternatives. The absence of municipal liability creates a free-rider problem by allowing municipalities to externalize the costs of their disposal sites and methods. Furthermore, inadvertent household use of hazardous substances may continue indiscriminately, without consideration of the environmental consequences of those products.

Similarly, loss spreading is less efficient when municipal liability does not attach. Municipalities have considerable loss-spreading ability that goes unused when a portion of the overall costs is not shifted to them.

The current enforcement scheme under which municipalities escape CERCLA liability implies that municipalities owe a lesser degree of environmental responsibility to citizens than do private entities. The exemption undercuts the values and policy objectives served by public tort law, which are as important when practices of a governmental entity, rather than misconduct by individual officials, are at issue.

II. IMPLEMENTING GOALS OF MUNICIPAL GENERATOR LIABILITY

Imposing liability on municipalities will be effective if it addresses the harms originating at Superfund sites. Such liability should promote municipal waste-management plans that increase awareness of MSW toxicity, decrease the volume of MSW produced, and force investment in improved waste disposal

90. Ferrey, supra note 1, at 220-21 (citing the example of the Charles George Landfill, an EPA Superfund site in Tyngsboro, Massachusetts). Although “[m]unicipalities and some states do not believe it is appropriate to include the generators/transporters of municipal wastes as [PRPs],” Interim Policy, supra note 34, at 51,072, understandably, “[i]ndustry representatives have generally taken the opposite view.” Id.

91. See supra notes 51-59 and accompanying text.

92. See infra text accompanying notes 96-98.

93. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.17, at 503 (1958) (government should be held liable more often than private actors because of government’s superior ability to spread losses).

94. “Public tort law is the system of substantive norms, procedural rules, and remedial opportunities that citizens invoke to redress harms” caused by public officials. P. SCHUCK, SUING GOVERNMENT xiv (1983).

95. See id. at 111 (“[G]overnment ought to occupy no better position vis-a-vis its citizens than its citizens do vis-a-vis one another.”).
alternatives. Two of the tort goals CERCLA serves further these objectives. CERCLA compensation achieves the first objective, site cleanup. CERCLA deterrence fulfills the second objective, improved waste management. Assigning the costs of compensation to municipal PRPs which may then redistribute them to the population will accomplish the goal of loss spreading.

To some extent a liability framework that implements these objectives will overlap with the typical model of private waste-generator liability. However, differences between municipalities and private-sector entities, and between municipal waste generation and industrial or commercial waste generation, suggest that approaches taken to enforce private-party liability will not achieve the full ends of municipal liability.

A. Adapting CERCLA Goals to Municipal Generators

1. Compensation: Remedial Action at Superfund Sites

Municipal liability should facilitate response actions at Superfund sites containing MSW. PRPs frequently have a dual role in effectuating cleanup. First, the liability burden of PRPs funds the cost of cleanup. This element of compensation may be achieved through municipal generator liability as well as through private generator liability. As long as payment is made, cleanup can proceed.

Second, since privately arranged cleanups are often less costly than EPA-conducted response actions,96 PRPs are often encouraged to organize and undertake the cleanup themselves,97 provided their intended remedial action conforms to regulatory standards. To this end, municipalities may be better suited to administer compensatory cleanup. For example, a municipal agency could organize voluntary discussion among PRPs.98 Municipalities are far more apt than private-sector generators to have administrative personnel available to manage cleanup participation. A strong municipal role would alleviate current perceptions of inequity in CERCLA enforcement and would increase cooperation among private-sector PRPs.

96. See Anderson, Negotiation and Informal Agency Action: The Case of Superfund, 1985 DUKE L.J. 261, 301-02 (cleanup costs by EPA might average 30% to 40% more than those incurred by PRPs).

97. See Futrell, Hazardous Wastes and Toxic Substances: Lessons from Superfund, RCRA, and Other Environmental Laws, 24 HOUS. L. REV. 125, 140-141 (1987). In an attempt to reduce the legal and administrative costs of hazardous waste cleanup, lawyers have developed “generators’ committees” to convene multiple interests involved at a single waste site. Other measures of alternative dispute resolution that promote party collaboration and cleanup without EPA intervention have also met with EPA approval. Id.

98. Resolution of claims at the Miami County, Ohio, incinerator site provides a strong example of municipal organizing ability. At that site, the town headed the site’s cleanup steering committee and devised an apportionment scheme among approximately 200 private and industrial/commercial PRPs participating in settlement. The town has also provided extensive in-kind services at the site. Although the site was owned by the town, no municipal waste was disposed there. Telephone interview with John Fogarty, Superfund Enforcement Office Staff Attorney, Washington, D.C. (Aug. 7, 1990).
2. Deterrence: Improved Waste Management

Deterring municipal generators differs significantly from deterring private generators. Private-entity deterrence implicates one set of actors. Knowledge and control of the waste generation process rests within one body. Once a damage assessment is made against that PRP, the same decisionmakers that make liability payments will set business goals. The liability costs are factored into the choice of enterprise activity level, thus influencing the volume of waste that will be produced. In addition, the decisionmakers can easily monitor compliance with waste disposal regulations.

Municipal deterrence necessarily involves two sets of actors. Municipal officials are responsible for collecting MSW and arranging for its disposal. In the face of a liability assessment, these officials will choose how to fund the liability burden and which disposal alternatives to employ. Liability should prompt local governments to prescribe regulations consistent with federal regulatory waste production regulations.99

However, neither municipal officials nor cities produce MSW. Entities within the city (individual households and businesses) generate waste. The costs of waste generation are internalized only if the actual producers are forced to pay. Because municipal deterrence requires an assessment against individual polluters, the exclusive use of certain funding alternatives, such as municipal insurance or state funding, is unsuitable.100 Polluters must directly pay the costs of damages from MSW and must also be aware that they are doing so. Only then will the individual polluter make waste-related choices that reflect their costs.101

3. Loss Spreading: Distribution of Costs Throughout Municipal Populations

Liability rules can spread losses if the liable party is in a position to disperse costs. The method of funding liability judgments influences the extent of loss spreading. Both municipal and private-sector generators could employ methods of budgetary redistribution or initiate cost-recovery actions against other PRPs.102 However, the means available to the two types of generators to raise additional funds differ in several respects. Insurance may be available to private generators to cover part or all of the liability judgment. In addition,

100. But see Note, supra note 54, at 390, 397 (state-funded municipal tort insurance would deter undesirable behavior).
101. See infra text accompanying notes 131-36 (proposing system of municipal funding).
Municipal Waste

industries may spread costs to consumers of their goods and services by increasing prices.\(^{103}\)

It is unlikely that many municipalities would be able to obtain insurance to cover liability judgments.\(^{104}\) Instead, the prime source of municipal funding would be taxation,\(^{105}\) an option unavailable to private entities. Taxation affects municipal populations as a whole. Thus, when municipalities fund the costs of accidents through taxation, these costs are widely diffused. Industries that increase prices spread the cost of accidents only to the discrete group within the population that consumes their products. Because the populations of municipalities often exceed the size of such consumer groups, municipal loss spreading may be superior to loss spreading by private entities.\(^{106}\)

B. Obtaining Liability Against Municipalities: EPA Enforcement Actions

As with private-sector PRPs, a limited array of plaintiffs can sue responsible municipalities. PRPs most commonly are joined in EPA enforcement actions, either by the EPA or by other PRPs in cost-recovery suits.\(^{107}\) In addition, private plaintiffs sometimes bring suits. Private plaintiffs have the option of common law rights of action or citizen suits under CERCLA.\(^{108}\) As a practical matter, however, several shortcomings of private suits favor routine inclusion of municipal generators in EPA enforcement actions. At best, reliance on private action will address the problem of municipal waste generation on a slow and piecemeal basis.

Private plaintiffs face several impediments in suing municipalities and will be less effective in accomplishing Superfund’s ends. CERCLA attempts to alleviate environmental contamination before it damages health and individual property. This goal is inconsistent with the limitations of the litigation of common law claims. Plaintiffs may be unable to prove individualized harm.\(^{109}\)

103. Cf. Blum & Kalven, The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence, in PERSPECTIVES ON TORT LAW 192, 194 (R. Rabin ed. 1990) (accepted economic theory is that cost of liability placed on producers ultimately passes to consumers).

104. Recently some municipalities have been forced to forego liability insurance and face the risk of bankruptcy because of increases in municipal insurance premiums. Note, supra note 54, at 389.

105. Id. at 393.

106. See K. Davis, supra note 93, at 503; see also P. Schuck, supra note 94, at 101 (one justification for expanding government liability is increased loss spreading). The potential for municipalities to spread losses better through taxation is an issue distinct from the proper allocation of a tax. Many forms of municipal taxation are regressive, see Note, supra note 54, at 394, and would not provide behavioral incentives based on waste-generation practices. Another form of taxation is appropriate in this context. See infra text accompanying notes 131-36.

107. See supra note 102 and accompanying text.

108. See supra note 49 and accompanying text (discussing citizen suit provision).

and thus fail to meet standing requirements typically imposed by courts.\textsuperscript{110} In addition, whether plaintiffs asserted a cause of action in strict liability,\textsuperscript{111} negligence,\textsuperscript{112} nuisance,\textsuperscript{113} public nuisance,\textsuperscript{114} or breach of statutory duty as negligence per se,\textsuperscript{115} the most difficult problem in obtaining judicial relief would be proving causation.\textsuperscript{116} Finally, sovereign immunity also poses problems.\textsuperscript{117}

Suing under CERCLA eliminates several of the problems associated with common law tort actions. Plaintiffs bringing citizen suits under CERCLA can use the same legal tools the EPA uses when it pursues formal litigation.\textsuperscript{118} However, Congress vested primary jurisdiction under the statute in the EPA to implement nationwide environmental policy rather than rely upon local initiative. Even using the citizen suit provision, citizen groups cannot systematically target municipalities as can the EPA. As with common law tort actions, the effectiveness of citizen suits is limited to obtaining damage awards or injunctive relief at individual waste sites. Unlike the EPA, citizen plaintiffs cannot prescribe nationally enforceable waste-related regulations to implement

\textsuperscript{110} See, e.g., Valley Forge Christian College v. Americans for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (standing in Article III court requires plaintiff to assert injury-in-fact); Warth v. Seldin, 422 U.S. 490, 490, 501 (1975) (plaintiff must show "distinct and palpable injury"; injury must be fairly redressable by remedy sought). Absent the implication of a federal question, a plaintiff’s claims would have to be litigated not in federal, but in state courts where standing requirements vary in each jurisdiction.

111. Plaintiffs might assert a claim that disposal of hazardous municipal waste is an abnormally dangerous activity to which strict liability should attach. Cf. New York v. Shore Realty Corp., 759 F.2d 1032, 1051-52 (2d Cir. 1985) (suggesting that defendant’s maintenance of hazardous waste site constitutes abnormally dangerous activity); State Dept. of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 493, 468 A.2d 150, 164 (1983) (concluding that mercury and other toxic wastes are abnormally dangerous and that their disposal, past or present, is abnormally dangerous activity).

112. Cf. The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932) (tug boat operator could be held to statutory duty to use radios even though not commonly used by other operators), cert denied, 287 U.S. 662 (1932).


114. See, e.g., Village of Wilsonville v. SCA Services, Inc., 86 Ill. 2d 7, 426 N.E.2d 824 (1981) (upholding injunction against operation of hazardous waste site on public nuisance grounds); Shore Realty, 759 F.2d at 1050-52 (New York public nuisance law supports injunctive relief against hazardous waste site). Generally, only a state or local public agency can enforce a claim of public nuisance. See Carlson, Making CERCLA Natural Resource Damage Regulations Work: The Use of the Public Trust Doctrine and Other State Remedies, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10299, 10,305 (1988). However, if a private party can demonstrate that it has sustained special damage over and above that suffered by the general public, the party may be granted standing to enforce a public nuisance claim.

115. Cf. Shore Realty, 759 F.2d at 1051-52 (suggesting that defendant’s continuing violation of state environmental laws constitutes nuisance per se).

116. See Note, supra note 50, at 584 ("Causal indeterminacy ... creates great difficulties for a toxic waste victim attempting to prove causation under common law rules.").


a scheme of mixed deterrence. Furthermore, incentives, as well as funding and education, are lacking for many individuals or groups to use the right of action provided by the statute.

The EPA already expends its resources to sue municipal owner/operators of hazardous waste sites and scores of private-sector waste generators. Implementing municipal generator liability requires only minor EPA policy changes. The inefficiencies of citizen enforcement suggest that EPA enforcement against municipalities is optimal.

Potential negative implications of liability for municipalities are readily dismissed. One complaint is that generator liability will impose a substantial added financial burden on municipalities. Yet, municipalities must bear the costs that they have imposed on society, regardless of the amount. Other low-toxicity generators of hazardous wastes have faced financial difficulty many times before, yet have not been granted categorical immunity from liability.

A proposal such as the one made in this Note that the burden be met through additional taxation might encounter political resistance centered on the argument that the ordinary citizen is better-off with private CERCLA liability. This argument fails to consider, however, the individual responsibility of each municipal resident in the two-tiered structure of municipal waste generation, and the high dollar and human health costs of the uncontained dangers of hazardous waste sites. Medical treatment of contamination-related disease, the burden of relocating or rebuilding entire communities, and the costs of identifying substitute groundwater supplies are among the many expenses that quickly and greatly will exceed short-run tax savings to individuals if municipal liability were absent.

Responding to generator liability and focusing greater attention on the problems of waste management will divert monetary and administrative resourc-

119. See supra note 56.

120. Despite evidence that citizen enforcement authority can raise the level of compliance with environmental standards, and despite the filing of hundreds of suits, this option remains underused. See Babich & Hanson, supra note 88, at 10,165; Roisman, The Role of the Citizen in Enforcing Environmental Laws, 16 Envtl. L. Rep (Envtl. L. Inst.) 10,163, 10,164 (1986).

121. See supra note 77 and accompanying text.

122. See Ferrey, supra note 1, at 274 (municipal liability implicates "hundreds of millions of dollars").

123. Small-volume generators comprise the majority of hazardous waste generators in the country. See generally Casenote, supra note 43. Municipal generators with inadequate funding resources may qualify for forms of special assistance that the EPA currently extends to municipal owner/operators, such as delayed lump-sum payments or payment according to a predetermined schedule arranged with the EPA. See, e.g., Interim Policy, supra note 34, at 51,075-76 (describing alternative financing methods currently negotiated with some municipal PRPs).

124. See infra text accompanying notes 131-36.

125. It might be argued that in a competitive market system in which the costs of private liability are passed on to consumers through price increases, consumers may choose to purchase the goods of a non-polluter. Thus, even though some portion of the public eventually bears the cost, the remainder of the public reaps a greater benefit from the tax saving than it would from the less immediate benefits of Superfund site remediation.

es from other issues. Nevertheless, prioritizing municipal obligations is a subjective process. In recent years Congress has placed great emphasis both on CERCLA and future hazardous-waste disposal issues. Municipalities must adapt to the national scheme of values embodied in these congressional measures.

III. A SCHEME OF MUNICIPAL WASTE-GENERATOR LIABILITY

Recalling the three important goals a scheme of municipal generator liability should pursue—satisfying the cleanup function of Superfund, alleviating the municipal waste problem and loss spreading—this Note makes specific recommendations for implementing them within the CERCLA framework. This proposal pays close attention to the need for two-step deterrence in the municipal context.

Liability should be imposed on all qualifying municipal generators in the course of EPA enforcement actions, including both formal litigation and informal settlement proceedings. Municipalities should be included from the outset of Superfund site negotiation so that, where appropriate, they may quickly assume an active role in organizing negotiations among PRPs. The EPA may negotiate a reduction in liability with those municipalities that provide “in-kind” services similar to those that the EPA currently accepts from municipalities. Where necessary, the general Superfund trust could fund any shortfall in dollar contribution.

At some Superfund sites, mainly those that have a history of heavy industrial use and relatively minimal municipal use, the EPA should, at its discretion, designate the implicated municipalities as “de minimis” generators with which the EPA quickly settles prior to the resolution of all cleanup issues.

The liability judgment apportioned to municipalities during settlement should be passed to individual households and commercial enterprises ("in-

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127. Within the range of environmental concerns is criticism that there has been undue focus on the issue of Superfund cleanups. See Polluted Lake Below Ground Worries EPA, N.Y. Times, Oct. 10, 1989 at B1, col.2. (“The valid question is, are we spending too much on Superfund . . . . We ought to do a better job of identifying real risks and putting money where they are.”) (statement of Christopher J. Duggett, New Jersey Environmental Protection Commissioner).

128. For example, municipalities that have contributed a substantial volume of waste to a site and that have large administrative staffs might spearhead efforts to organize generators’ committees. See supra notes 97-98 and accompanying text.

129. The EPA provides alternatives to monetary payment of cleanup costs to municipalities that demonstrate their propriety, for example, where a municipality demonstrates a valid inability to pay. See Interim Policy, supra note 34, at 51,075. In some cases the Agency negotiates in-kind agreements with municipalities under which the municipality may furnish operation and maintenance services at the facility, the use of municipal equipment during site remediation, use of sewage treatment plants, or may install fences and other security measures to control public access to the site. Id. at 51,076.

A waste tax should be charged to individual waste generators whose wastes are collected and disposed of by the municipal government. The individual waste generators should be taxed on the basis of both the volume and the hazardous content contributed to the municipal waste stream. A flat household or business tax, unresponsive to variations in waste production patterns, would not maximize the effectiveness of individual deterrence.

Neighborhood waste sampling programs could determine measures of volume and toxicity in order to develop working figures to be imputed to households and businesses. Volume easily would be measured by the number of cans or bins designated for collection. Can inspections for the number and type of hazardous substances present could yield a rough measure of toxicity. The system would not yield precise data, but should stress instead the development of workable averages for individual waste generators. To maximize incentives, local governments should inform each generator of its waste tax and the potential variation of the tax with volume and toxicity of trash collected. Subsequent to the implementation of the tax, the tax could be modified according to individual generators' waste disposal practices based on data gathered weekly or biweekly by trash collectors. The waste tax could include any administrative costs of inspection.

131. A liability judgment that requires funding beyond a level that officials are willing to raise through a waste tax may necessitate the use of regressive forms of municipal taxation, see supra note 106, or insurance, which may be unavailable. See supra note 104 and accompanying text. In those cases where cleanup requires funding beyond what a municipality can pay, it may be preferable for the EPA to extend special assistance to that municipality. See supra notes 123 & 129 and accompanying text.

132. Cf. Beck, supra note 7, at 75 (Seattle charges residents “variable can” rates based on number of cans collected, resulting in increased use of recycling).

133. Similar types of inspections have been introduced in some municipalities for other purposes, such as to achieve compliance with recycling laws. In preparation for the possibility of more aggressive standards set by New Jersey for municipal recycling programs, the town of Caldwell, New Jersey, recently piloted a program to enforce its longstanding recycling ordinance. A small number of inspectors were hired to inspect trash cans on streets scheduled for same-day trash collection. Inspectors lifted the tops off cans and briefly examined the cans' contents for the presence of recyclables. Cans in a given neighborhood were checked up to eight times per month. Telephone interview with Richard Rzeszutek, Caldwell, New Jersey Department of Public Works (Aug. 3, 1990).


134. See supra note 133.

135. See supra note 132 (discussing Seattle's variable can rates).

136. To decrease further the volume of waste produced, municipalities might impose volume-collection quotas as a function of household or business size. Fines could be issued for failure to comply with quotas or individual waste generators could be required to contract independently for collection of their surplus trash.
IV. CONCLUSION

A 1980 statement by Senator Gore summarizes the common attitude toward the role of municipalities and their citizens in creating the environmental harms that CERCLA was designed to address:

The public’s only contribution to the problem was to trust too blindly that the chemical companies were taking care of their own messes. The public is already bearing more than its fair share of the cost of recklessness in the form of threats to the public health and damage to the public’s environment.\textsuperscript{137}

Recent scientific evidence\textsuperscript{138} refutes Senator Gore’s position. The time has come for the EPA to make enforcement policies consistent with informational advances concerning the danger presented by MSW. The EPA can use municipal liability better to fulfill Superfund’s purposes and to foster a system of incentives for municipalities to respond to the problem of their hazardous wastes.


\textsuperscript{138} \textit{See supra} notes 11-13 & 22-25 and accompanying text.