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MUNICIPAL SOLID WASTE: THE ENDLESS DISPOSAL OF AMERICAN MUNICIPALITIES MEETS THE CERCLA STRICT LIABILITY DRAGON

*Norman A. Dupont**

*"They were careless people, Tom and Daisy—they smashed up things and creatures and then retreated back into their money or their vast carelessness . . . and let other people clean up the mess they had made"*¹

I. INTRODUCTION

Like the wealthy elite of F. Scott Fitzgerald's Long Island world of leisure, Americans have been among the world's most careless people. Americans produce an enormous amount of "solid" or "household" waste, also known as municipal solid waste (MSW).² Indeed, some sources suggest that Americans are much more extravagant in their disposal of MSW than citizens in comparably affluent foreign countries.³ Regardless of America's comparative extravagance, the simple fact is that even on an absolute basis, Americans consume and then throw away an enormous amount of materials. One estimate is that every American

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1. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 158 (1925) (emphasis added).

2. As in any field, one finds a variety of terms for the same basic concept. This Article will use Municipal Solid Waste (MSW) to include municipal garbage collected from households. MSW may also include various sludges or materials from light industrial or commercial sources. For example, the United States Environmental Protection Agency (EPA) has defined MSW as "solid waste generated primarily by households, but may include some contribution of wastes from commercial, institutional and industrial sources as well." EPA Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071, 51,074 (1989) [hereinafter EPA Interim Policy]; see also *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 968-71 (D. Conn. 1991) (describing various municipal waste streams, including "bulky waste" from Town of Woodbury as including "tires and wastes from the maintenance, construction or demolition of residential, industrial or commercial structures," or sludge from the Town of Beacon Falls' wastewater treatment plant).

3. See, e.g., Kovacs, *The Coming Era of Conservation and Industrial Utilization of Recyclable Materials*, 15 *ECOLOGY* L.Q. 537, 538-39 n.7 (1988) (citing evidence of massive volume of solid wastes generated by U.S.; noting that U.S. generates two and one-half times more municipal waste per capita than either Japan or West Germany).

is responsible for creating between 2.5 and 4.0 pounds of MSW per day.⁴ Californians alone throw away 202 million pounds of waste every day.⁵

Until recently, the enormous output of MSW by Americans was not perceived as a potential limitation upon the growth of American urban or even rural areas. Landfills, mistakenly known as "sanitary landfills," were perceived as a cheap and available dumping ground for such wastes. One author boldly stated that such landfills: "minimize environmental hazards by depositing refuse in a natural or man-made depression, compacting it, and covering it"⁶

Two problems pertaining to the availability of environmentally safe waste disposal methods, however, have arisen, suggesting that there are substantial costs associated with the explosive growth of American urban society. One problem is the discovery that the "sanitary landfill" is simply not sanitary.⁷ In all too many cases, the old "sanitary landfill" has proven to be a leaking pit—a source of potentially explosive methane gas and hazardous leachates.⁸ A second, and more recent problem, is that the unchecked accumulation of MSW in landfills can expose municipalities to potentially disastrous liability under the ultimate environmental liability statute—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁹

4. Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 200-01 (1988). Professor Ferrey's article is a comprehensive and thoughtful introduction to the entire subject of MSW and its legal treatment by the EPA.

5. Cone, *Cities' Tactics Vary in the War Against Waste*, L.A. Times, Mar. 22, 1991, at B1, col. 5.

6. Comment, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem*, 10 FORDHAM URB. L.J. 215, 217 (1982). Landfilling waste is such a common means of disposal that, in Los Angeles County for example, "many [landfills] reach their daily tonnage limits so early in the day that they have to shut down by noon." Cone, *supra* note 5, at B1, col. 5.

7. Kovacs, *supra* note 3, at 541 (operating landfills, particularly those built before 1980, "pose significant health and environmental risks").

8. Note, *Municipal Solid Waste Management: The State Must Pick Up Where Congress Left Off*, 23 AKRON L. REV. 587, 589 (1990) ("Methane gas, generated by decomposition of garbage, can collect in nearby buildings and eventually cause explosions. Leachate, a liquid containing waste bacteria and other contaminants, can drain out of landfills and contaminate the surface and ground water.").

9. 42 U.S.C. §§ 9601-9675 (1988). CERCLA is also known as the "Superfund." Moskowitz & Hoyt, *Enforcement of CERCLA Against Innocent Owners of Property*, 19 LOY. L.A.L. REV. 1171, 1171 (1986). A description of the vast liability imposed by CERCLA can be found in a recent First Circuit opinion, *United States v. Kayser-Roth Corp.*:

The Act empowers the government to use money from the "superfund" to clean up hazardous waste sites. Any "person" who is the "owner" or "operator" of a facility at the time of the disposal of a hazardous substance shall be liable for, among other things, all of the costs of removal or other remedial action incurred by the United States. Liability for the cost incurred is strict and joint and several.

This Article focuses on the second area—the potential liability of cities under CERCLA. In two recent cases involving critical urban areas—the Northeast and California—United States district courts have reached a common conclusion.¹⁰ That conclusion, simply stated, is that despite the exemption of MSW¹¹ from the strict regulatory provisions of the federal Resource Conservation and Recovery Act (RCRA),¹² municipalities can still be held liable under CERCLA for the MSW which they generate and send to landfills.¹³ The district courts' conclusions, while long expected by some,¹⁴ spell out in elaborate detail that cities are faced with a new and potentially severe economic limit on their production of "plain old trash."

This Article first sets forth the legal framework for treatment of MSW. Next, it examines the decisions of the two recent federal cases rejecting the municipal argument that MSW is exempt as a matter of law from CERCLA liability. Finally, this Article analyzes certain proposals municipalities may consider when planning for their growth and the inevitable production of garbage that ensues from that growth.

910 F.2d 24, 26 (1st Cir. 1990) (citations omitted), *cert. denied*, 111 S. Ct. 957 (1991); *accord* 1 C. SCHRAFF & R. STEINBERG, RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS § 2.01, at 2-2 (1988) ("Virtually every court that has considered the issue has concluded that CERCLA imposes a standard of strict liability, and provides joint and several liability among responsible parties when two or more persons have contributed to a single indivisible harm. Moreover, courts have imposed a minimal causation standard."). The liability provision discussed in *Kayser-Roth Corp.* is codified at 42 U.S.C. § 9607(a)(2).

This imposition of "strict" and "joint and several" liability under CERCLA constitutes an awesome threat, particularly given that environmental clean-up costs often average in the tens of millions of dollars. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-ITA-362, ARE WE CLEANING UP? 10 SUPERFUND CASE STUDIES—SPECIAL REPORT 1, 5-7 (1988) (noting estimated cleanup costs of city landfills: Smithfield, R.I., \$28 million; Niagara Falls, N.Y., \$30 million; Monterey Park, Cal., \$4.8 million; N. Dartmouth, Mass., \$19.9 million; Seymour, Ind., \$18 million); Wright, *Advantages and Disadvantages of Landfilling*, MUN. ATT'Y, Nov.-Dec. 1987, at 7, 9 (noting cost of clean-up of Seattle landfill is in \$40 million range with long-term costs undetermined).

10. See *B.F. Goodrich Co.*, 754 F. Supp. at 960; *Transportation Leasing Co. v. California*, No. 89-7368, slip op. (C.D. Cal. Dec. 5, 1990).

11. 40 C.F.R. § 261.4 (1990).

12. 42 U.S.C. §§ 6901-6907, 6911-6916, 6921-6931, 6941-6949, 6951-6954, 6961-6964, 6971-6979, 6981-6986 (1988).

13. *B.F. Goodrich Co.*, 754 F. Supp. at 974; *Transportation Leasing Co.*, No. 89-7368, slip op. at 5.

14. See EPA Interim Policy, *supra* note 2, at 51,074 (CERCLA "does not provide an exemption from liability for municipalities."); Ferrey, *supra* note 4, at 263-65 (arguing that MSW is considered hazardous substance under CERCLA, regardless of any exemption for that material under RCRA); Wright, *supra* note 9, at 8 ("Several years ago after amendments to Superfund, it became apparent that sanitary landfilling represented a liability, not only to the environment but to the economic stability of some communities because the potential liabilities for the operation of a landfill under Superfund are unprecedented in this country.").

II. WHY HAZARDOUS? WHEREFORE REGULATED? THE ENVIRONMENTAL PROTECTION AGENCY'S TRADITIONAL NON-REGULATION OF MUNICIPAL SOLID WASTE

Like scheming Edmund's protest over society labelling him "base" due to the illegitimate nature of his conception,¹⁵ many municipalities have wondered why society labels their MSW with the opprobrious term "hazardous."¹⁶ To answer this query, it is important to briefly review the current status of MSW under RCRA—the most pervasive federal statute regulating ground disposal of wastes. RCRA constituted a set of amendments¹⁷ to the Solid Waste Disposal Act (SWDA),¹⁸ but its impact on and changes to that act have been so pervasive that the amendments swallowed the SWDA, and most commentators and practitioners simply refer to the current statute as RCRA.¹⁹

RCRA divided the world of waste into two basic classes: the non-hazardous and the hazardous.²⁰ As the court in *B.F. Goodrich Co. v. Murtha*²¹ observed, "Only hazardous wastes are subject to the strict standards of the 'cradle-to-grave' regulatory regime [of subpart C of RCRA]."²² The "cradle-to-grave" regime is a very extensive set of regu-

15. W. SHAKESPEARE, *KING LEAR*, act I, scene i.

16. While no exact count of the number of municipalities so protesting can be determined, it is noteworthy that the moving municipalities in the *B.F. Goodrich Co.* action numbered twenty-four Connecticut towns, cities, boroughs, or other municipal entities, see *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 962 n.3 (D. Conn. 1991), and that the moving parties in the *Transportation Leasing Co.* action numbered twenty-eight cities, see *Transportation Leasing Co. v. California*, No. 89-7368, slip op. at 1-2 & n.1 (C.D. Cal. Dec. 5, 1990). These numbers alone suggest some considerable protest by a number of municipalities over the labelling of their MSW as "hazardous." See EPA Interim Policy, *supra* note 2, at 51,072 (prefatory section discussing various comments to EPA proposal and noting: "Municipalities and some States do not believe it is appropriate to include the generators/transporters of municipal wastes as potentially responsible parties [in CERCLA sites]."). In just one example of the EPA's prosecutorial discretion, it is reported that in the Charles George dump site in Tyngsborough, Massachusetts, the EPA sought to impose the entire amount of some \$30 million in cleanup costs upon only the industrial users of the site, ignoring municipal contributors who had contributed by volume some 99% of the waste at the site. Ferrey, *A Liability Crisis Cities Can't Throw Away*, L.A. Times, Oct. 20, 1986, at B5, col. 2.

17. See Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6907, 6911-6916, 6921-6931, 6941-6949, 6951-6954, 6961-6964, 6971-6979, 6981-6986 (1988)).

18. 42 U.S.C. §§ 6901-6992k (1988).

19. 1 C. SCHRAFF & R. STEINBERG, *supra* note 9, at 4-3; Ferrey, *supra* note 4, at 200.

20. Those wastes defined as hazardous under RCRA are listed in 40 C.F.R. § 261.30-261.33 (1990).

21. 754 F. Supp. 960 (D. Conn. 1991).

22. *Id.* at 964 (quoting H.R. REP. No. 1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120). See 42 U.S.C. §§ 6921-6925 (1988) for subpart C of RCRA.

lations which are intended to monitor hazardous wastes from their inception by a "generator,"²³ through their transportation to their ultimate disposal at treatment, storage and disposal facilities.²⁴

It is in the language of RCRA and its implementing regulations that municipalities find the greatest solace and support for the argument that their ever-increasing volume of MSW should not be considered hazardous. Indeed, the regulations explicitly exempt household waste from RCRA's definition of hazardous wastes.²⁵ In 1984, Congress enacted a self-proclaimed "clarification" of the scope of this household waste exclusion under RCRA to exempt a resource recovery facility from the onerous cradle-to-grave regulations of subpart C if that facility: "receives and burns only—(i) household waste (from single and multiple dwellings, hotels, motels and other residential sources), and (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section."²⁶

This household waste exemption under RCRA has prompted some municipalities to argue that a similar exemption exists under CERCLA. The municipalities point to the language of section 9601(14)²⁷ of CERCLA as support for their contention that the MSW exemption in RCRA has been incorporated by reference into CERCLA.²⁸ They argue that,

23. See 1 C. SCHRAFF & R. STEINBERG, *supra* note 9, at 2-18 ("persons who arrange for disposal or treatment, or arrange with a transporter for transport for disposal or treatment" of a hazardous substance are liable as a generator under CERCLA). Typically, those arranging for the disposal or the transportation for disposal of hazardous substances are those companies or individuals who "generate" the hazardous substances. *Id.* at 2-18 to 2-20. See EPA Interim Policy, *supra* note 2, at 51,074 n.5 (clarifying scope of 42 U.S.C. § 9607(a)(3) to include, among those "beyond true generators," anyone who arranges for disposal).

24. The detailed regulations of subpart C of RCRA are contained in an excruciatingly complex portion of the Code of Federal Regulations, see 40 C.F.R. §§ 260-265 (1990). The fine print consumes over 400 pages of the 1990 version of the Code of Federal Regulations.

25. 40 C.F.R. § 261.4(b) (1990). This section provides in pertinent part:

(b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes: (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels . . .).

Id.

26. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 223, 98 Stat. 3221, 3252 (codified at 42 U.S.C. § 6921i (1988)).

27. 42 U.S.C. § 9601(14) (1988).

28. 42 U.S.C. § 9601(14) defines the term "hazardous substance" as meaning any substance listed in a number of separate environmental statutes, including: "any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . . (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress)." *Id.* (citations omitted).

because CERCLA expressly incorporates the hazardous waste provisions of RCRA, it must also impliedly incorporate the exemptions provided by RCRA.²⁹

In addition to the regulatory exclusion, municipalities also focus on two policy proclamations of the United States Environmental Protection Agency (EPA) which suggest that MSW should not be deemed "hazardous." First, municipalities point to the EPA Interim Municipal Settlement Policy (EPA Interim Policy).³⁰ The political nature of the EPA Interim Policy was made apparent early in the preamble: "The primary purpose of this interim policy is to provide interim guidance to EPA Regional offices on how they should *exercise their enforcement discretion* in dealing with municipalities and municipal wastes in the [CERCLA] settlement process."³¹ Despite acknowledging expressly that MSW "may fall within the CERCLA liability framework,"³² the EPA concluded that its approach would be "to exclude such municipal wastes from the [CERCLA] settlement process."³³ The reason for this exclusion is not clear from the text of the EPA Interim Policy, especially in light of the EPA's express acknowledgment that MSW may "contain small quantities of household hazardous wastes."³⁴ Thus, the EPA's decision not to include municipalities in the CERCLA liability process can only be explained on some other non-legal basis—in this author's view, political considerations. The EPA's stance on this issue has led municipalities to

29. See, e.g., Memorandum in Support of Motion for Summary Judgment Filed on Behalf of the Defendant Municipal/Government Agency Collectors Group at 14 n.13, *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960 (D. Conn. 1991) [hereinafter *Municipal Group Mem.*] ("since CERCLA . . . incorporates into its definition of hazardous substances as those substances designated as hazardous wastes under RCRA, *CERCLA incorporates the entire household waste exemption.*"); Memorandum of Points and Authorities in Support of Motion for an Order Specifying Issues Without Substantial Controversy at 39-41, *Transportation Leasing Co. v. California*, slip op. (C.D. Cal. Dec. 5, 1990) (No. 89-7368) ("the express exclusion of household waste from the definition of hazardous waste under RCRA compels the conclusion that household waste should *not* be considered a 'hazardous substance' under CERCLA.").

30. 54 Fed. Reg. 51,071 (1989).

31. *Id.* (emphasis added). Because of the case law finding that liability under CERCLA is both "strict" and "joint and several," many defendants tend to settle rather than litigate their cases in court. This means that EPA's "settlement" policy is, in fact, a determination of who pays what share for the clean-up costs in a CERCLA action.

32. *Id.* at 51,074 ("To the extent municipal wastes contain a hazardous substance that is covered under section [9601(14)] of CERCLA and there is a release or threatened release, such municipal wastes may fall within the CERCLA liability framework.").

33. *Id.* at 51,072. Although the EPA Interim Policy includes municipalities in the initial information gathering process, it excludes them from "notification of potential liability" for the mere transportation of MSW. *Id.* at 51,073. This exclusion would not apply, however, if the EPA obtained "site-specific information that the [MSW] or sewage sludge contain[ed] a hazardous substance from a commercial, institutional, or industrial process or activity." *Id.*

34. *Id.* at 51,074.

maintain that, given CERCLA's silence about its coverage of MSW, courts should adopt the EPA Interim Policy by exempting cities from CERCLA liability.³⁵

Second, the EPA, as a matter of prosecutorial discretion, has traditionally avoided naming municipalities as potentially responsible parties (PRPs)³⁶ in its CERCLA actions.³⁷ The EPA has never specified its rationale for this practice. One reason may be an apparent conviction on the part of the EPA that MSW is not *generally* hazardous.³⁸ Another reason may stem from the misconception that industrial entities are more financially equipped to cope with CERCLA liability than municipalities, for the EPA will only name those parties "who have the ability to undertake or pay for response action."³⁹

With this background of: (1) an express statutory and regulatory exclusion of household wastes from the RCRA regulation of hazardous wastes; and, (2) an EPA policy of generally excluding municipalities from the Superfund settlement process, the reactions of two district court judges to the municipal argument that MSW should be excluded from CERCLA liability are examined.

III. "COME NOT BETWEEN THE DRAGON AND HIS WRATH:" THE IMPOSITION OF CERCLA'S STRICT LIABILITY UPON MUNICIPALITIES

Just as King Lear warned his noble Kent against intercession on behalf of fair Cordelia,⁴⁰ so have two recent United States District Court cases admonished the EPA to stay out of battles between private party plaintiffs and municipal defendants in CERCLA actions. Notwithstanding the EPA's reluctance to name municipalities as PRPs in CERCLA

35. See, e.g., Municipal Group Mem., *supra* note 29, at 32 (arguing that court should defer to EPA's Interim Policy "[i]n light of the silence in the statutory coverage of MSW and the sparse legislative history on the issue").

36. Potentially Responsible Parties (PRPs) are those persons or entities covered by the language of the liability provisions of CERCLA. See 42 U.S.C. § 9607(a)(1)-(4) (1988) (four basic categories of covered persons or entities: owners and operators; owners and operators at time of disposal; those who have arranged for disposal; and transporters).

37. Ferrey, *supra* note 4, at 220-21 (indicating that in case of Charles George landfill site EPA failed to name municipalities which contributed 99% of waste by volume to landfill); *id.* at 252-53 (noting "EPA's prosecutorial habit of naming private, but not municipal, solid waste generators as PRPs for the cleanup of Superfund sites").

38. See, e.g., *id.* at 256 ("Is MSW a legally hazardous substance? As a matter of prosecutorial discretion, the EPA uniformly answers this question in the negative in scores of prosecutions nationwide.").

39. Hickok & Padleschat, *Strategic Consideration in Defending and Settling a Superfund Case*, 19 LOY. L.A.L. REV. 1213, 1216 n.16 (1986).

40. W. SHAKESPEARE, *supra* note 15, act I, scene i.

actions, both *B.F. Goodrich Co. v. Murtha*⁴¹ and *Transportation Leasing Co. v. California*⁴² require municipalities to take responsibility for generating MSW or face liability under CERCLA.

A. *B.F. Goodrich Co. v. Murtha: A Firm Decision Against Municipalities*

B.F. Goodrich Co. v. Murtha involved two Superfund sites located in Connecticut: the Beacon Heights and Laurel Park landfills.⁴³ After the EPA rounded up the "usual suspects"—large industrial concerns such as B.F. Goodrich Co. (B.F. Goodrich) and Uniroyal Chemical Co. (Uniroyal)—it negotiated a settlement with them and thirty other companies to pay an estimated \$20 million in cleanup costs.⁴⁴ Before filing a consent decree to memorialize the corporate parties' cleanup agreement, lawsuits were filed by B.F. Goodrich and Uniroyal against the alleged owners or operators of the sites, Harold Murtha and various related persons and entities.⁴⁵ Thereafter, the EPA and the State of Connecticut Department of Environmental Protection filed related lawsuits.⁴⁶

From this small litigation acorn grew a mighty judicial oak. Murtha impleaded⁴⁷ some two hundred third-party defendants, including twenty-four municipal entities.⁴⁸ B.F. Goodrich and Uniroyal filed amended complaints to implead various municipal entities as defendants.⁴⁹ Shortly after being served with the complaints in both the B.F. Goodrich

41. 754 F. Supp. 960 (D. Conn. 1991).

42. No. 89-7368, slip op. (C.D. Cal. Dec. 5, 1990).

43. Laurel Park was listed by the State of Connecticut as the state's highest priority site for cleanup, and was listed as the 85th site in EPA's March 1990 National Priorities List (NPL). 40 C.F.R. pt. 300 app. B at 122 (1990). Beacon Heights was listed as the 254th site in EPA's March 1990 NPL. *Id.* at 126. To place these rankings in perspective, the March 1990 NPL listed a total of 988 sites, exclusive of federal facilities, which were separately listed. *Id.*

44. *Proposed Consent Decree Will Require \$20 Million Cleanup of CT Landfill*, Hazardous Waste Litig. Rep. (Andrews) 11,271 (Aug. 3, 1987) (requiring thirty-two companies to clean up contaminated site, including costs for surface clean up and groundwater monitoring, as well as repayment to EPA of certain of its costs in investigating the site).

45. *B.F. Goodrich Co.*, 754 F. Supp. at 961.

46. *Id.* at 961 & n.2; *U.S., CT. Simultaneously File Cost Recovery Suits Against Owner/Operators*, Hazardous Waste Litig. Rep. (Andrews) 10,613 (Mar. 16, 1987).

47. See FED. R. CIV. P. 14. "Impleader under Rule 14 of the Federal Rules of Civil Procedure provides a procedural basis for defendants in Superfund cases to seek contribution from third parties." Hickok & Padleschat, *supra* note 38, at 1216.

48. *B.F. Goodrich Co.*, 754 F. Supp. at 961-62 & n.3.

49. For example, the group of plaintiffs with the B.F. Goodrich group alone filed an amended complaint against an additional 388 parties. *Id.* at 962 & n.5. The United States District Court for the District of Connecticut organized the parties into various groups, including a group labelled the "Municipal Government Agency Collectors Group" (municipalities). *Id.* at 961.

and Uniroyal cases, the municipalities moved for summary judgment.⁵⁰

1. The municipal group's summary judgment motion

The twenty-four municipalities in *B.F. Goodrich Co.* argued principally that the generation or collection of MSW does not incur liability under CERCLA because any such wastes derive from household sources and, therefore, should be excluded from CERCLA's coverage.⁵¹ To support this contention, the municipalities noted that CERCLA is silent with respect to coverage of MSW.⁵² Given this alleged statutory silence, the municipalities argued that the court should adopt the EPA Interim Policy so as to exclude MSW from the ambit of hazardous substances under CERCLA.⁵³ The municipalities delicately described the nature of the EPA Interim Policy, suggesting that the policy created a rebuttable presumption that MSW is "free of [hazardous substances] to any significant extent."⁵⁴ Therefore, the municipal group argued, the court should defer to the EPA interpretation of CERCLA as pronounced in the EPA Interim Policy and exclude municipalities from CERCLA liability.⁵⁵

2. The district court's ruling

The United States District Court Judge, Peter C. Dorsey, denied the municipal group's summary judgment motion.⁵⁶ Judge Dorsey wrote a lengthy slip opinion which will probably serve as the landmark decision on municipal liability under CERCLA. Judge Dorsey's opinion contained three major points. First, if the municipalities' MSW does contain certain hazardous substances identified in CERCLA,⁵⁷ the municipalities are subject to CERCLA liability.⁵⁸ While the court did not elaborate

50. *Id.* at 962. The B.F. Goodrich plaintiffs served their amended complaint on or about April 26, 1990, and Uniroyal served its complaint on or about April 27, 1990. Municipal Group Mem., *supra* note 29, at 4-5. The motion for summary judgment by the municipalities is dated May 31, 1990. *Id.* at 1.

51. Municipal Group Mem., *supra* note 29, at 8-9. To be sure, the motion contained certain alternate grounds for requesting summary judgment, including the claim that plaintiffs failed to show that any of the MSW wastes collected contributed to the chemical contamination at the two sites. *Id.* at 11. This secondary argument, however, focused on the specific factual allegations, and not a general legal proposition.

52. *Id.* at 12-21.

53. *Id.* at 21-22.

54. *Id.* at 24.

55. *Id.* at 32-37.

56. *B.F. Goodrich Co.*, 754 F. Supp. at 974.

57. For definitions of hazardous substances, see 42 U.S.C. § 9601(14) (1988); 40 C.F.R. § 302.4(a) (1990).

58. *B.F. Goodrich Co.*, 754 F. Supp. at 964. Municipalities may be liable pursuant to section 9607(a)(3) of CERCLA if their MSW contains hazardous substances. See 42 U.S.C.

upon this point, it is important for one critical reason—it signifies a direct rejection of the municipalities' argument that MSW, by definition, contains only a de minimis amount of hazardous substances.⁵⁹ Indeed, in a subsequent portion of the opinion, Judge Dorsey expressly rejected the contention that because MSW contains only minimal toxic waste it should be exempt.⁶⁰

The municipalities' contention was correctly rejected by the district court, for various courts had repudiated the de minimis argument long ago in connection with private party generators.⁶¹ The fact that a city, rather than a private entity, is responsible for sending MSW to a CERCLA site should make no difference in terms of assessing the hazardous composition of MSW. Even if a municipality could convince a court that its MSW contains only a minimal amount of hazardous substances, it is still liable under CERCLA because "liability under CERCLA attaches regardless of the concentration of the hazardous substances present in a defendant's waste."⁶² Moreover, Judge Dorsey noted that the courts can apportion damages between the various municipal and industrial defendants to avoid "absurd results."⁶³ Presumably, what Judge Dorsey meant to suggest by this statement was that the court

§ 9607(a)(3) (1988). This section provides for what is commonly referred to as "generator liability" for the selection or contractual arrangement for the disposal of hazardous substances. 1 C. SCHRAFF & R. STEINBERG, *supra* note 9, at 1-25 ("The intent of Section 9607(a)(3) is to impose liability upon 'generators' of hazardous substances.").

Section 9607 of CERCLA provides in pertinent part:

[A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and . . .

[A]ny person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence or response costs, of a hazardous substance, shall be liable for . . . all costs of removal.

42 U.S.C. § 9607(a)(3), (4).

59. The municipalities had argued that the plaintiffs had failed to rebut the presumption that their MSW contained at most de minimis amounts of hazardous substances. Municipal Group Mem., *supra* note 29, at 37.

60. *B.F. Goodrich Co.*, 754 F. Supp. at 966 (citing *United States v. Wade*, 577 F. Supp. 1327, 1340 (E.D. Pa. 1983)).

61. *See, e.g.*, *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 992 (D.S.C. 1984) (rejecting argument by generator defendants that would require plaintiff to prove that hazardous substances traceable to each generator were more than de minimis factors in release of such substances); *United States v. Wade*, 577 F. Supp. 1326, 1332-33 (E.D. Pa. 1983) (rejecting generator argument that CERCLA plaintiff must show that generator defendant's particular wastes caused government to incur response costs).

62. *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 483-84 (S.D.N.Y. 1990).

63. *B.F. Goodrich Co.*, 754 F. Supp. at 966.

could consider that a municipality might be allocated a much smaller dollar share of the ultimate clean-up costs than an industrial generator which sent a much higher percentage of hazardous substances to the site.⁶⁴

The *B.F. Goodrich Co.* court then reviewed in some detail the municipalities' claim that RCRA's exemption for household waste should be incorporated by reference when assessing CERCLA liability.⁶⁵ Initially, the court noted that other courts have refused to extend the RCRA household waste exclusion to materials regulated as "hazardous" under other statutes.⁶⁶ Using similar logic, the *B.F. Goodrich* court rejected the municipalities' argument that the RCRA exemption for household waste implies a similar exemption under CERCLA.⁶⁷ In fact, Judge Dorsey found persuasive that Congress, when enacting CERCLA, decided *not* to expressly exclude household waste from CERCLA's scope.⁶⁸ As the court observed, Congress was well aware of the RCRA exclusion for household waste when it enacted CERCLA, yet deliberately chose not to make a similar exclusion under CERCLA.⁶⁹ Thus, rather than bolstering the municipalities' argument, Judge Dorsey decided that Congress' silence on the exemption issue weighed against finding an exclusion for MSW under CERCLA.

Furthermore, the *B.F. Goodrich Co.* court determined that household waste under RCRA is not necessarily synonymous with MSW.⁷⁰ To support this finding, the court credited the affidavit by the plaintiff's expert, Kirk W. Brown, Ph.D.⁷¹ Dr. Brown indicated that, based upon various EPA surveys and his own knowledge, MSW usually contains hazardous substances in the range of 0.3 to 0.4 percent by volume.⁷² The court further undercut the municipalities' argument by noting that the EPA Interim Policy states that "the actual composition of such wastes varies considerably at individual sites . . ."⁷³ Thus, the district court

64. See 42 U.S.C. § 9622(g)(1) (1988) (providing for de minimis settlements with parties that send minimal amounts of hazardous substances to sites when effect of those hazardous substances is minimal in comparison to other hazardous substances at site).

65. *B.F. Goodrich Co.*, 754 F. Supp. at 964-65.

66. *Id.* at 965; see, e.g., *Eagle-Picher Indus. v. EPA*, 759 F.2d 922, 927 (D.C. Cir. 1985); *Idaho v. Hanna Mine Co.*, 699 F. Supp. 827, 833 (D. Idaho 1987), *aff'd*, 882 F.2d 392 (9th Cir. 1989).

67. *B.F. Goodrich Co.*, 754 F. Supp. at 965-66.

68. *Id.* at 965.

69. *Id.*

70. *Id.* at 966.

71. *Id.* at 972.

72. *Id.*

73. *Id.* at 966 (quoting EPA Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071, 51,074 (1989)).

firmly rejected the municipalities' argument that the RCRA exemption for "household waste" implied an exemption for MSW under CERCLA.

Third, the *B.F. Goodrich* court considered the EPA Interim Policy and its impact on CERCLA liability for municipalities.⁷⁴ In evaluating the EPA Interim Policy, the court had an additional advantage—a brief filed in connection with the motion by the United States Department of Justice, Environmental Enforcement Division (DOJ).⁷⁵ The DOJ brief contained a slightly more expansive statement of its position on MSW. First, the DOJ argued explicitly that the definition of a hazardous substance under CERCLA bears no relation to the type of source which creates the waste.⁷⁶ As the DOJ noted:

[CERCLA] Section 101(14) makes no distinction regarding the source of the substance. If the material at issue is listed as hazardous in a statute referred to in Section 101(14), it is a "hazardous substance" under CERCLA regardless of whether it came from an industrial, commercial, institutional, municipal or household source⁷⁷

Moreover, the DOJ virtually repudiated the value of the EPA Interim Policy by informing the district court that "[t]he [EPA Interim Policy] has no binding impact on EPA, PRPs or the Court. The policy is not a rule or regulation, and cannot be relied on as the basis for a claim or a defense."⁷⁸ With this position taken by the DOJ, the district court had no difficulty in ignoring the Interim Policy. The court characterized the

74. *Id.* at 965-66.

75. Opposition of the United States Department of Justice to the Motion for Summary Judgment Filed on Behalf of the Municipal Defendants, *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960 (D. Conn. 1991) [hereinafter U.S. Opp. Mem.]. The EPA, represented by the Department of Justice (DOJ), was a party to the initial lawsuit against *B.F. Goodrich Co.* and other industrial generators, which resulted in a consent decree for the clean-up work to be performed. See *supra* note 44 and accompanying text. After *B.F. Goodrich Co.* pleaded the municipalities, the DOJ filed a brief entitled Opposition of the United States to the Motion for Summary Judgment Filed on Behalf of the Municipal Defendants, which is actually more in the nature of an amicus brief than that of a party affected by the municipalities' summary judgment motion. See U.S. Opp. Mem., *supra*.

76. U.S. Opp. Mem., *supra* note 75, at 11.

77. *Id.*

78. *Id.* at 22. One may wonder why the EPA Interim Policy was published in the *Federal Register* if it was truly not binding upon any of the relevant parties. Whatever inconsistency exists between the EPA Interim Policy as announced in the *Federal Register* and the DOJ's apparent lack of willingness to support that policy in formal briefs filed with district courts, it seems clear that, in the future, municipalities cannot rely upon the federal government for any real support in their efforts to escape CERCLA liability. Indeed, in another recent opinion a district court cited a DOJ brief as stating that: "EPA expressly denies that it follows a policy of refusing to enforce CERCLA against municipal generators or transporters of waste." *United States v. Kramer*, 757 F. Supp. 397, 433 (D.N.J. 1991).

Interim Policy as merely "a guide to EPA employees in administering the Superfund and reflects EPA priorities. . . . It does not limit a private party's claims."⁷⁹

In sum, the district court in *B.F. Goodrich Co.* held that municipalities can, in fact, be held liable under CERCLA for their disposal or arranged disposal of hazardous substances at landfill sites.⁸⁰ Consequently, based upon its earlier finding that MSW can be a hazardous substance, the court held that there was a genuine dispute of material fact sufficient to deny the municipalities' motion for summary judgment on the factual defenses to the amended complaints.⁸¹

B. Transportation Leasing Co. v. California: Confirming that Municipalities Can Face CERCLA Liability for Their MSW

In *Transportation Leasing Co. v. California*,⁸² the United States District Court for the Central District of California faced claims involving the Operating Industries, Inc. (Operating Industries) landfill site.⁸³ Operating Industries is a site of approximately 190 acres located in Monterey Park, California and is listed on the EPA's National Priorities List as the seventy-sixth site out of over nine hundred.⁸⁴ According to the EPA, the site operated from 1948 through 1984, during which period it accepted "industrial solid, liquid and hazardous wastes and municipal trash."⁸⁵ The EPA has named as PRPs at the site some 181 private corporations, and in the first partial settlement decree entered in 1988 obtained millions of dollars from these parties for certain remedial work.⁸⁶ In late 1989, sixty-four private PRPs, who were part of the group of corporations that had previously settled with the EPA, filed a lawsuit against a number of municipalities in Southern California who allegedly contributed hazardous substances in the form of MSW to the Operating

79. *B.F. Goodrich Co.*, 754 F. Supp. at 967.

80. *Id.* at 973-74.

81. *Id.*

82. No. 89-7386, slip op. (C.D. Cal. Dec. 5, 1990).

83. *Id.* at 3.

84. 40 C.F.R. pt. 300 app. B. at 122 (1990).

85. Partial Consent Decree, United States v. Chevron Chem. Co., No. 88-7186, slip op. at para. IV(A) (C.D. Cal. May 11, 1989).

86. *Id.* at attachment C. The remedial work done under the first Consent Decree included providing a treatment process for leachate—liquid or water soluble substances that migrate from the original point source—at the site and also providing for certain measures to stabilize the ground around the site. *Id.* at para. IX(B). The private parties included in the Consent Decree agreed to perform the work, or alternatively, to pay cash to help pay for the remedial work up to a maximum of \$34 million. *Id.* at para. IX(C).

Industries site.⁸⁷

In September 1990, the municipalities filed a motion for partial summary judgment based on two arguments. First, the municipalities asserted that: (1) they could not be liable as persons who arranged for the disposal of hazardous wastes because they "merely licensed" independent waste haulers to conduct business; and, (2) even if they were deemed to have arranged for the disposal, the "rubbish" generated by the residences and businesses within the municipalities could not be a "hazardous substance" within the meaning of CERCLA, at least "absent specific evidence that the particular rubbish generated contained CERCLA defined hazardous substances."⁸⁸ The municipalities' second argument, as in *B.F. Goodrich Co. v. Murtha*,⁸⁹ was that because Congress expressly exempted household waste from its definition of hazardous waste in RCRA, this exemption should impliedly be incorporated in CERCLA.⁹⁰

In opposition, the sixty-four industrial parties maintained that the exemption under RCRA for household waste did not indicate that Congress intended to exclude household waste from CERCLA, a completely different statutory scheme.⁹¹ Certain plaintiffs also cited a 1988 EPA directive issued by the Office of Solid Waste and Emergency Response⁹² which stated, "CERCLA does not contain an exclusion from liability for household waste or an exclusion based on the amount of waste generated. . . . If a household waste contains a substance that is covered under these CERCLA sections (whether or not it is a RCRA hazardous waste),

87. See Court Docket, *Transportation Leasing Co. v. California*, slip op. (C.D. Cal. Dec. 5, 1990) (No. 89-7368) (indicating complaint filed on December 21, 1989). The municipalities sued included Alhambra, Artesia, Baldwin Park, Bell, Bell Gardens, Beverly Hills, Commerce, Compton, Cudahy, El Monte, Huntington Park, Industry, La Puente, Lynwood, Maywood, Montebello, Monterey Park, Norwalk, Paramount, Rosemead, San Gabriel, San Marino, Santa Fe Springs, Sierra Madre, South El Monte, South Gate, South Pasadena, Temple City and Walnut. *Id.* The County of Los Angeles and the State of California were also named as parties. *Id.*

88. Notice of Motion and Motion for an Order Specifying Issues Without Substantial Controversy; Memorandum of Points and Authorities and Declarations of Frank Ruiz and Frank M. Usher in Support Thereof at 2-3, *Transportation Leasing Co. v. California*, slip op. (C.D. Cal. Dec. 5, 1990) (No. 89-7368) [hereinafter *Municipalities Mem.*] (filed Sept. 11, 1990). While the moving papers requested a motion in the style of a state court specification of issues without substantial controversy, it clearly was a motion for partial summary judgment pursuant to the Federal Rules of Civil Procedure. See FED. R. CIV. P. 56.

89. 754 F. Supp. 960 (D. Conn. 1991).

90. For a discussion of the *B.F. Goodrich Co.* court's treatment of this argument, see *supra* notes 65-69 and accompanying text.

91. *Transportation Leasing Co.*, No. 89-7368, slip op. at 4.

92. See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE (OSWER), U.S. EPA DIRECTIVE NO. 9574.00-1, CLARIFICATION OF ISSUES PERTAINING TO HOUSEHOLD HAZARDOUS WASTE COLLECTION PROGRAMS (1988) [hereinafter *OSWER DIRECTIVE*].

potential CERCLA liability exists."⁹³

Judge William Matthew Byrne, Jr. denied the municipalities' motion in short order. Judge Byrne characterized as "without merit" the municipalities' argument that the definition of hazardous substances under CERCLA excludes household waste.⁹⁴ The court reasoned that merely because RCRA contains an exemption for household wastes, "it does not necessarily follow that the RCRA exclusion for household waste compels the conclusion that household waste cannot be a 'hazardous substance' under Section 101(14) of CERCLA."⁹⁵ Consequently, the court denied the municipalities' motion for summary judgment.⁹⁶

IV. MUNICIPALITIES AND CERCLA LIABILITY: ALTERNATIVE APPROACHES TO THE STRICT LIABILITY DRAGON

Though the district court order in *Transportation Leasing Co. v. California*⁹⁷ is less detailed than the opinion in *B.F. Goodrich Co. v. Murtha*,⁹⁸ the bottom line in both cases is remarkably similar. Municipalities now face the ominous possibility of joint and several liability under CERCLA for their disposal of MSW. Both decisions rest on well-founded interpretations of CERCLA. Indeed, the EPA's Office of Solid Waste and Emergency Response directive reached the same conclusion:

CERCLA does not contain an exclusion from liability for household waste or an exclusion based on the amount of waste generated. . . . Communities should recognize that potential liability under CERCLA applies *regardless* of whether the HHW [Household Hazardous Waste] was picked up as part of a community's routine waste collection service and disposed of in a municipal waste landfill⁹⁹

Thus, given the statutory language of CERCLA, the federal courts' broad interpretation of CERCLA as a "remedial statute,"¹⁰⁰ and the EPA's administrative interpretations supporting application of

93. *Id.* at 4.

94. *Transportation Leasing Co.*, No. 89-7368, slip op. at 3.

95. *Id.* at 3-4.

96. *Id.* at 5.

97. No. 89-7368, slip op. (C.D. Cal. Dec. 5, 1990).

98. 754 F. Supp. 960 (D. Conn. 1991).

99. OSWER DIRECTIVE, *supra* note 92, at 4.

100. *See, e.g., United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). The *Kayser-Roth Corp.* court explained, "Because CERCLA is a remedial statute, we . . . construe its provisions liberally to avoid frustration of the beneficial legislative purpose. With this in mind, we join the Second Circuit in proclaiming that 'we will not interpret section 9607(a) in any way that apparently frustrates the statute's goals.'" *Id.* (quoting *New York v. Shore Realty*, 759 F.2d 1032, 1045 (2d Cir. 1985)).

CERCLA liability to MSW, municipalities now face several critical choices.

Despite the pained protests of wherefore and why by various municipalities, the recent decisions in *B.F. Goodrich Co.* and *Transportation Leasing* confirm what many others have long argued: municipalities should face the dragon of federal environmental liability laws, CERCLA, for the mere shipment of MSW to Superfund sites.¹⁰¹ Of course, such increased recognition of potentially very burdensome liability puts cities in an awkward dilemma. Certain cities experiencing continuous and largely uncontrolled growth also experience the ever-increasing generation and shipment of MSW to landfills. As a result, such cities may face the potentially crushing liability imposed by CERCLA.¹⁰² In turn, the prospect of ceaseless generation of MSW and the resulting potential liability creates a strong impetus to limit growth. Thus, municipal decision-makers may attempt to avoid CERCLA liability for dumping MSW by limiting development approvals until the development projects can handle not just additional parking, lighting, and landscaping, but also waste generation problems. The following sections describe and critique various proposals put forth for handling this new-found municipal liability.

A. *Surrendering to the Dragon: Continuing Along the Same Old Path of "Sanitary" Landfill Disposal*

First, municipalities could continue in the tradition of simply collecting increasing amounts of MSW and disposing of it in "sanitary" landfills, thereby ignoring the possibly devastating effects of dumping the

101. See, e.g., Ferrey, *supra* note 4, at 271 ("In view of the EPA's position in other cases, and in view of the contrary judicial determinations of this issue, the EPA's exemption for MSW [from CERCLA liability] is legally inconsistent. . . . MSW should be routinely included in Superfund prosecutions, under any one of several legal authorities."); Wright, *supra* note 9, at 8 ("The liability to the City of Springfield [Missouri] or any other city as the owner/operator of a landfill for the release or potential release of a hazardous substance into the environment is absolute and without regard to fault.").

102. One alternative to landfilling might be greater reliance on recycling and "waste-to-energy" facilities. But as William L. Kovacs has noted, economic considerations and neighborhood fears tilt the scales strongly against "waste-to-energy" facilities in favor of landfills. Kovacs, *supra* note 3, at 540-41. Moreover, although Kovacs urges more recycling, he admits that states face what he terms a "Herculean task" in developing increased recycling. *Id.* at 545; cf. *Texas Calls Halt to Waste-Disposal Sites*, N.Y. Times, Feb. 19, 1991, at A12, col. 1 (describing Texas state-wide moratorium on permits for waste sites). Even the recycling of MSW poses some potential health concerns. See Notice of Meeting on Potential Hazards of Municipal Solid Waste Recycling, 56 Fed. Reg. 6849, 6849 (1991) ("Recycling of emissions from municipal solid waste (MSW) has become a matter of great public interest. However, the potential emissions and risk to health and the environment of many recycling processes are as yet unexplored."). Thus, the panacea of recycling poses additional problems in connection with MSW.

potentially hazardous ingredients. This choice would seem to be ultimate folly because it ignores both the ever-growing volume of MSW and, more importantly, the increasing cost of disposing of such waste. Even the costs of litigation in facilitating the clean up of CERCLA sites can impose substantial additional costs upon the smaller municipal budget.¹⁰³

B. Taming the Dragon: Imposing a Negligence Standard for Municipal Liability

A second alternative is essentially a variation on the first option. Municipalities could continue to dispose of their MSW while seeking legislative relief from the strict liability provisions of CERCLA and its sister state statutes.¹⁰⁴ One such legislative proposal was recently offered by New Jersey Governor James Florio.¹⁰⁵ He argued that imposition of strict liability upon municipalities under either CERCLA or the analogous New Jersey Spill Compensation and Control Act¹⁰⁶ was too severe.¹⁰⁷ He proposed legislative reform to impose only a negligence standard on municipalities involved in Superfund sites.¹⁰⁸

The alternative of modifying the liability standard for municipalities lacks viability for several reasons. First, it would allow municipalities to continue on in the traditional pattern of unchecked growth of municipal waste without any real liability limitations. Second, even if a negligence standard were adopted, such a standard, in practice, would not serve to limit the potential liability of many municipalities. In the real world municipalities, just like their industrial counterparts of twenty years ago,

103. See Wright, *supra* note 9, at 9 (noting litigation costs in the millions of dollars). While the actual litigation bills incurred by municipalities in CERCLA actions are unavailable, the author is personally aware that bills for private industrial parties in major CERCLA actions can run over \$1 million per year.

104. Many states have adopted state statutes that parallel the federal CERCLA statute. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25300-25395 (West 1983 & Supp. 1990); CONN. GEN. STAT. ANN. §§ 22a-133a to -133f (West Supp. 1990); MASS. GEN. LAWS ANN. ch. 21E, §§ 1-18 (West Supp. 1989); N.J. STAT. ANN. §§ 58:10-23.11 to -23.11z (West 1982 & Supp. 1990); see also 1 C. SCHRAFF & R. STEINBERG, *supra* note 9, at 12-16 to 12-18 (description of state superfund laws).

105. Florio, *Too-Strict Liability: Making Local Government Entities Pay for Waste Disposal Site Cleanup*, 1 VILL. ENVTL. L.J. 105, 119-21 (1990).

106. N.J. STAT. ANN. §§ 58:10-23.11 to 23.11z.

107. Florio, *supra* note 105, at 117-19.

108. *Id.* at 120-21. Governor Florio argues that the New Jersey statute should be modified to provide that "[t]hose who have merely handled or disposed of this [municipal] hazardous waste out of public necessity, such as municipalities and counties, are to be held liable only if plaintiffs can demonstrate that the handling or disposal activities were carried out negligently." *Id.* at 120.

have done little or nothing to ensure the adequacy and environmental security of local landfills.¹⁰⁹ Such indifference would surely fall below the standard of reasonable care in the eyes of judges evaluating actions with 1991 hindsight.

Third, Governor Florio's proposal would create an untenable distinction between municipalities and their industrial counterparts, thereby leading to an inequitable legal burden. Industrial users would be subject to CERCLA's strict liability standard, while municipalities would be subject to the less stringent standard of negligence. Governor Florio's proposal is premised upon an artificial distinction between parties he describes as "in a position to profit from the generation or transport of hazardous waste" and those whom the governor posits as merely handling or disposing of such materials.¹¹⁰ Governor Florio ignores the reality that major corporations simply do not profit from generation of hazardous waste materials but, rather, are subject to strict regulatory costs in the generation and disposal of such materials.¹¹¹

Furthermore, Governor Florio blithely attempts to justify a differential standard based upon the undocumented assertion that "a large multinational industrial enterprise would be able to incorporate the remediation costs into the price of its products on an international basis."¹¹² This assertion, however, is not at all certain to be correct. Even large multinational corporations face foreign competition which may limit their ability to raise prices on their products.¹¹³ Additionally, many industrial contributors to CERCLA sites across the country are local companies with low profit margins, not the large multinational which Governor Florio conveniently posits.¹¹⁴

Finally, Governor Florio's proposed differential standard is pre-

109. See Ferrey, *supra* note 4, at 212-13 (noting that 20% of NPL sites are or were MSW disposal facilities and that the Office of Technology Assessment "expects that half the future Superfund priority sites will be municipal landfills"); Florio, *supra* note 105, at 109-10 (describing site used by Gloucester Township, New Jersey as located adjacent to residential developments and motorbike recreation area, and above aquifer providing municipal water supply).

110. Florio, *supra* note 105, at 120.

111. See *supra* notes 20-23 and accompanying text.

112. Florio, *supra* note 105, at 119.

113. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 522-23 (1961) (describing difficulty of enterprise to shift costs when exit costs were difficult and economy was in general state of decline, and noting that ability to spread costs depends on degree of competition between selected industry and other industrial concerns).

114. For example, Edgington Oil Co., ranked 59th on the listing of private party generators for the very expensive Operating Industries Superfund site, is in financial straits. See L.A. Times, Feb. 8, 1991, at D2, col. 1 ("Most of [Edgington Oil's] estimated 75 employees were sent home from work Wednesday, after the company said it could not meet its payroll. Edg-

mised upon the misconception that, while private industry can withdraw from waste-generating businesses, municipalities cannot make such a choice.¹¹⁵ On the contrary, a majority of companies face an inevitable fact of life: certain industrial processes inevitably will create some amount of hazardous waste materials. Governor Florio cannot be serious in suggesting that chemical, oil and steel manufacturers have an option to cease operations. Finally, Governor Florio's proposal ignores the incentive feature of a strict liability regime upon recalcitrant municipalities.¹¹⁶

C. *Facing the Dragon: A Proposal for Recycling*

The best alternative to the difficult dilemma that municipalities face by shipping MSW to CERCLA sites is not to modify the current liability standard. Rather, municipalities, just like their corporate brethren, should be compelled to face the dragon of strict liability under CERCLA. Only then will municipalities have the needed incentive to reexamine the convenient yet environmentally harmful practice of landfilling MSW.

To combat CERCLA's looming liability, municipalities across the nation should consider altering their residents' past pattern of simply creating ton upon ton of MSW, and their own pattern of dumping all this waste in local landfills. California's Integrated Waste Management Act of 1989 (IWMA)¹¹⁷ is an example of one such effort. This act expressly acknowledges that "[i]n 1988, Californians disposed of over 38 million tons of solid waste This amounts to more than 1,500 pounds of waste per person living in the state."¹¹⁸ The IWMA notes that over 90% of California's solid waste is deposited in landfills.¹¹⁹ It attempts to respond to diminishing landfill space by requiring that cities and counties begin a system to reduce the volume of solid waste sent to landfills through a combination of measures such as source reduction, recycling,

ington is looking to refinance its debts. The company's 50% owner, Clark Oil Trading Co., is no longer providing financing.").

115. Florio, *supra* note 105, at 121.

116. The author apologizes to the many municipalities which have directly, and with substantial effort, dealt with the problem of municipal landfills. The author is aware of substantial efforts by the City of Jacksonville, Florida, in attempting to examine and review the many landfill sites used by that municipality. Nonetheless, many other municipalities, such as those in *B.F. Goodrich Co.* and *Transportation Leasing*, simply seem unwilling to face potential liability under CERCLA.

117. CAL. PUB. RES. CODE §§ 40000-50002 (West Supp. 1991).

118. *Id.* § 40000(a) (legislative findings concerning need for integrated waste management plan).

119. *Id.* § 40000(b).

and composting activities.¹²⁰

There is some indication that California's IWMA is altering both municipal treatment of MSW and individual residents' waste disposal habits. For example, "some cities report that 5% to 20% of residential garbage that used to wind up in landfills is being recycled."¹²¹ Likewise, individuals are contributing to the effort to reduce landfill waste, such that "recycling rates for glass, cans, steel and plastic—the pace at which people convert trash to cash—[have] jumped from 56% in 1989 to 70% in 1990."¹²²

As with any major municipal undertaking there are, of course, certain initial challenges to grapple with. Primarily, launching a municipal recycling program is an expensive proposition.¹²³ Equipment, such as curbside bins and trucks, will have to be incorporated into municipal budgets. Moreover, city planners will be forced to assess, logistically and demographically, how best to implement recycling in their communities. This may not be an easy task, given that "'most cities . . . aren't in the business of designing innovative waste management programs.'"¹²⁴

While the ultimate goals of the IWMA may or may not be attained, recycling represents an option which is environmentally preferable to either of the other proposed alternatives. Certainly recycling must be better than the old approach of simply pouring ever greater volumes of waste into sanitary landfills, because that approach has been tried and failed. It is also better than Governor Florio's proposal to reduce the liability standard for municipalities, for his proposal would lessen any incentive municipalities might have to switch from the current landfill system. Recycling programs, such as those imposed by the IWMA, would reduce the future liability exposure of municipalities for the waste they generate today. Additionally, recycling represents a more creative alternative for dealing with the ever-increasing volume of MSW.

V. CONCLUSION

In describing a certain desolate stretch of ground between the fash-

120. *Id.* § 40051. The Act mandates an initial reduction in total volume of solid waste sent to landfills or transformation facilities of 25% by 1995, and a further reduction of 50% of all solid waste by 2000. *Id.* § 41780(a)(1)(2).

121. Cone, *supra* note 5, at B4, col. 1.

122. *Id.* at B1, col. 5.

123. One estimate is that municipal recycling programs will run in the multimillion dollar range for each city. *Id.* at B4, col. 1.

124. *Id.* (quoting Mary Nichols, senior attorney with the Los Angeles office of the Natural Resources Defense Council).

ionable Long Island estates and New York City, F. Scott Fitzgerald wrote of

[A] valley of ashes—a fantastic farm where ashes grow like wheat into ridges and hills and grotesque gardens; where ashes take the forms of houses and chimneys and rising smoke and, finally, with a transcendent effort, of ash-gray men who move dimly and already crumbling through the powdery air.¹²⁵

It is this potential of endless gray valleys of municipal waste which threatens the picture of limitless growth by wealthy and careless Americans. The old solution—simply throwing out everything and letting the city take it to a “sanitary” landfill—has resulted in innumerable municipal waste sites that have achieved the ultimate regulatory stamp of horror: the National Priorities List of CERCLA.

Americans, and the cities in which they dwell, must now face the CERCLA dragon and come up with alternatives. They must either limit their growth and their waste output, or face vast liability for the waste that they carelessly leave behind. American cities, unlike Tom and Daisy Buchanan, do not have the alternative of retreating to some wealthy island while leaving behind the valleys of waste landfills that they created.

125. F. SCOTT FITZGERALD, *supra* note 1, at 25.

