MUNICIPAL LIABILITY UNDER SUPERFUND — A LEGISLATIVE RESPONSE

*Honorable Robert G. Torricelli**

I. The Superfund Threat to Cities

For many years following the enactment of The Comprehensive Environmental Response, Cleanup and Liability Act of 1980(CERCLA),[1] otherwise known as Superfund,[2] municipalities have "stood on the sidelines" while industry, environmental groups and federal and state governments have debated over cleanup liability.[3] Although some twenty percent of the roughly

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[1] P.L. No. 96-510, 94 Stat. 2767, 42 U.S.C. §§ 9601-9675 (1988).

[2] The Superfund is a legislative mechanism for the creation of a public trust fund for the cleanup of toxic waste sites, 26 U.S.C. § 9507 and a scheme to apportion liability and encourage private parties to cleanup these sites. 42 U.S.C. §§ 9606, 9607. *See* Molly A. Meegan, Comment, *Municipal Liability for Household Hazardous Waste: An Analysis of the Superfund Statute and Its Policy Implications*, 79 GEO. L.J. 1783, 1785 n.15 (1991); Rena I. Steinzor, *Local Government and Superfund: Who Will Pay the Tab?*, 22 URB. LAW. 84-85 (1990) [hereinafter Steinzor, *Who Will Pay the Tab?*].

[3] *See* Steinzor, *Who Will Pay the Tab?*, *supra* note 2, at 79-80. CERCLA imposes liability on four categories of "potentially responsible parties" (PRPs):

> (1) the owner and operator of a vessel or a facility,
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> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or

1,200 sites on the Superfund's National Priorities List (NPL)[4] were labeled as "municipal landfills,"[5] municipal organizations have not, until recently, become deeply concerned about Superfund policy.[6]

The attitude of municipalities changed dramatically following the 1989 release of the Environmental Protection Agency's (EPA) Interim Municipal Settlement Policy[7] and the subsequent filing of a series of third-party "contribution" lawsuits seeking hundreds of millions of dollars in damages from small and medium-sized cities throughout the country.[8]

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incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which cause the incurrence of response costs, of a hazardous substance . . .

42 U.S.C. § 9607(a)(1)-(4).

CERCLA defines a person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, *municipality*, commission, *political subdivision of a State*, or any interstate body." *Id.* at § 9601(21) (emphasis added). Such persons can be held "strictly, jointly, and severally liable for the costs of cleanup whether such costs are incurred by the federal government, state governments, or private parties. They are also liable for damages to natural resources and the costs of any health assessment or health effects study carried out under [CERCLA]." Steinzor, *Who Will Pay the Tab?*, *supra* note 2, at 79-80 (footnote omitted). See *id.* at 88 nn.29-30 for citations to lower court opinions which construed CERCLA's liability provisions to corporate defendants.

4 *Id.* at 79-80 citing 54 Fed. Reg. 33,846 (1989). NPL sites are selected from approximately 33,000 sites which are on file with the EPA. These sites are usually furnished by past or present owners, or state environmental protection agencies. *Our Nation's Transportation and Care Infrastructure: Hearings Before the House Comm. on Public Works and Transportation*, 102d Cong., 1st Sess. 757 (1991) (prepared statement of William K. Reilly, Administrator, U.S. Environmental Protection Agency).

5 The EPA defines a municipal landfill as "any landfill, whether publicly or privately owned, that has received municipal solid waste (MSW) for disposal. SUPERFUND PROGRAM; INTERIM MUNICIPAL SETTLEMENT POLICY, 54 Fed. Reg. 51,071, 51,074 (1989).

6 Steinzor, *Who Will Pay the Tab?*, *supra* note 2, at 79-80.

7 54 Fed. Reg. 51,071 (1989). *See supra* note 12 and accompanying text for a discussion of the EPA's Interim Municipal Settlement Policy.

8 Private party PRPs have filed third-party suits against municipalities in at least eight states and threaten to file many more. *See* Rena I. Steinzor & Matthew F. Lintner, *Should Taxpayers Pay the Cost of Superfund?*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10089, 10090 n.8 (Feb. 1992) (citing United States v. Kramer, 770 F. Supp. 954 (D.N.J. 1991); 757 F. Supp. 397 (D.N.J. 1991); B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960 (D. Conn. 1991), *appeal docketed*, 91-7450 (2d Cir. May 8, 1991); Trans-

In 1986, Superfund was amended by the Superfund Amendment and Reauthorization Act (SARA).[9] One of the provisions the amendment added to the Superfund program explicitly allowed private parties sued by the state or federal government to sue other parties for contribution.[10] The impetus of the provision was to allow responsible parties to spread costs amongst themselves and thereby achieve a more rational distribution of costs. Now this provision is being turned on its head, and private party suits in some cases are leading to the possibility of an irrational cost distribution.[11] This problem began just a few years ago with the issuance by the EPA of a policy addressing Superfund sites involving municipalities.

II. EPA's Interim Municipal Settlement Policy

The Interim Municipal Settlement Policy[12] set the guidelines

portation Leasing Co. v. California, 21 Envtl. L. Rep. (Envtl. L. Inst.) 20777 (C.D. Cal. Dec. 5, 1990); Anderson v. Minnetonka, No. CV 3-90-312 (D. Minn., Apr. 24, 1991); New Jersey Dep't of Envtl. Protection v. Almo Anti-Pollution Servs. Corp., No. 89-4380 (JFG) (D.N.J. Nov. 20, 1990) (third-party complaint filed); United States v. Charles George Trucking, No. 85-2463-WD (D. Mass. Feb. 12, 1990) (third-party complaint filed); United States v. Superior Tube Co., No. 89-7421 (E.D. Pa. Dec. 22, 1989) (third-party complaint filed); New Jersey Dep't of Envtl. Protection v. Gloucester Evntl. Mgmt. Servs., No. 84-0152 (SSB) (D.N.J. Apr. 14, 1988) (third-party complaint filed).

9 Pub. L. No. 99-499, 100 Stat. 1615 (1986).

10 42 U.S.C. § 9613(f). Courts had implied a right of contribution before this amendment explicitly granted the right. *See* United States v. Conservation Chem. Co., 619 F. Supp. 162, 226 (D. Mo. 1985).

11 *See supra* note 8 for a list of third-party suits filed against municipalities.

12 54 Fed. Reg. 51,071 (1989). The EPA published this statement on December 12, 1989 and has received comments from interested parties. The EPA, however, has not responded to these comments publicly or issued a policy statement in final form.

The EPA's policy statement reduced the risk of federal prosecution for MSW but did nothing to deter or limit industry polluters from bringing suits against municipalities. Under CERCLA, if the government finds that a party is a PRP (including a municipality) at a Superfund site it has two options. The EPA can choose to use Superfund monies to cleanup the site, provided such monies are available. The EPA can then enforce CERCLA's liability provisions to recover the funds. 42 U.S.C. § 9607. The EPA can also choose to issue an order against a group of PRPs to conduct the cleanup. *Id.* at § 9606. *See* Rena I. Steinzor & Matthew F. Lintner, *Local Government and Superfund, 1992 Update: Who is Paying the Tab?*, URB. LAW. (forthcoming 1992)(manuscript at 4). The EPA stated in its Interim Municipal Settlement Policy that it would not routinely prosecute local governments for the generation or transportation of MSW. 54 Fed. Reg. 51,072.

for how the federal government would exercise prosecutorial discretion at sites involving MSW or sewage sludge.[13] The policy stated that EPA will generally not sue local governments or any other party, where the party's only connection to the site is the generation or transportation of MSW or sewage sludge.[14]

The interim policy, however, did nothing to bar private corporations identified by the EPA as responsible for the costs of cleaning up Superfund sites from filing suits against other parties.[15] In fact, the EPA underestimated the extent to which corporate PRPs would take advantage of their ability to initiate third-party lawsuits.

Critics of the interim policy cite the EPA's lack of protection for third parties, especially municipalities, and its failure to exempt MSW from Superfund liability as partially responsible for the escalation of third party suits aimed at private businesses and municipalities.

> By failing to totally exclude MSW from CERCLA liability, the interim policy has implicitly, if not explicitly, determined that MSW containing solely household hazardous wastes is a CERCLA hazardous substance. It is this aspect of the interim policy that . . . will have potentially disastrous implications for present solid waste disposal as well as for CERCLA and state settlements and cost recovery actions.[16]

III. Municipal Liability Under CERCLA

CERCLA provides a very broad definition of those responsi-

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[13] The EPA defines MSW as waste that is generated primarily by households. The composition of such waste varies considerably depending on the site, however, MSW is "*generally* composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents) as well as small quantity generator wastes." 54 Fed. Reg. at 51,074 (emphasis in original).

[14] *See* 54 Fed. Reg. 51,071, 51,074 (1989). Municipalities can be subject to liability under an EPA cost recovery action if it is found that a municipality collected and delivered waste that includes industrial or commercial hazardous materials to a site. *Id.* at 51,074.

[15] 54 Fed. Reg. 51,706. The EPA states that "[n]othing in this interim policy affects the rights of any party in seeking contribution from another party." *Id.*

[16] January 10, 1991 letter from Judith Yaskin, State of New Jersey, Department of Environmental Protection, to Don R. Clay, Assistant Administrator, Office of Solid Waste and Emergency Response, United States Environmental Protection Agency, page 1.

ble parties who may be defendants in a private party cost recovery action.[17] Clearly, municipalities could fall into any one or all of these categories. Yet, liability for the generation or transportation of municipal solid waste or sewage sludge is becoming the most threatening type of exposure for municipalities.[18] Corporations have taken to aggressively pursuing state and local governments and private parties under CERCLA to help recover the costs of cleanup for sites where municipalities have either transported or disposed MSW.[19]

The *Wall Street Journal* reported last year that a pizzeria in Utica, New York had a lawsuit filed against it by Special Metals Corporation and Chesebrough-Ponds's USA Co.[20] According to the *Journal* story, the two corporations were charged with violating federal anti-pollution statutes and had agreed to a $9 million cleanup effort of a New York landfill.[21] Municipalities have been targeted in many similar suits. In New Jersey alone, more than 95 local governments have been sued or threatened with a suit by private parties charged with cleaning up Superfund sites.[22] And, to add insult to injury, many of these towns find themselves the targets of multiple third-party suits.[23]

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17 42 U.S.C. § 9607(a)(1)-(4)(1988). *See* note 3 *supra* for the text of Section 9607(a)(1)-(4).

18 Rena I. Steinzor & Matthew F. Lintner, *Coming Soon to a Town near You — Municipal Liability Under CERCLA*, 6 TOXICS L. REP. 564, 565 (1991).

19 *See supra* note 8 for list of pending third party suits. Rena Steinzor, in a recent article, described the plight of the corporation stung by Superfund liability:

> Until recently, the brunt of Superfund's heavy liability has been born by the manufacturing sector, especially oil and chemical industries, which have contributed a large portion of the toxic wastes now causing problems at Superfund sites. As these corporations suffer growing economic stress, they have begun to search for fellow 'deep pockets' to help shoulder multi-billion dollar cleanup costs. The insurance industry was the first, logical target of such efforts. Local governments are clearly next in line.

Steinzor, *Who Will Pay the Tab?*, *supra* note 2, at 80, 82 (1990).

20 Robert Tomsho, *Pollution Ploy, Big Corporations Hit by Superfund Cases Find Way to Share Bill*, WALL STREET J., Apr. 2, 1991, at 1. The corporations also sued "hundreds of Utica-area towns, school districts and small business owners." *Id.*

21 *Id.*

22 *Superfund Issues Facing Municipalities: Hearing Before the Subcomm. on Superfund, Ocean and Water Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess. 74 (1991) (prepared statement of the Honorable Dale Taylor, Mayor of Wenonah, N.J.).

23 *Id.*

In one instance, 29 cities are being sued by 64 major corporations alleging that they are liable for the cleanup of the 200-acre Operating Industries Superfund site in Monterey Park, California.[24] According to the city manager of one of these cities, the total cleanup costs of this site could reach between $650 and $800 million.[25] The cities named, he was told, should be expected to foot up to 90 percent of this bill.[26]

It does not seem to matter that MSW is of very low toxicity,[27] municipalities are fair game under CERCLA, and corporations seeking help in paying for cleanup costs, or simply stalling for time, will continue to file suits.[28] Case law points to the undeniable fact that

> [m]unicipalities have become the latest victims of the inexorable extension of CERCLA liability to government entities. Three recent decisions addressed municipal liability, and refused to find that Congress had intended to treat local governments any differently from other persons merely because their nexus to a CERCLA cleanup site was through disposal of municipal solid waste.[29]

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24 Kevin Murphy, *A Funny Thing Happened on the Way to the Landfill or How 29 California Cities Discovered Superfund*, WESTERN CITY, Apr. 1991.

25 *Id.*

26 *Id.*

27 Studies indicate that hazardous substances constitute less than one half of one percent contained in household garbage. Kinman & Nutini, *Household Hazardous Waste in the Sanitary Landfill*, 11 CHEM. TIMES AND TRENDS 23, 24 (1988).

28 Rena I. Steinzor & Matthew F. Lintner, *Should Taxpayers Pay the Cost of Superfund*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10089 (Feb. 1992). *See also* Kyle E. McSlarrow, et al., *A Decade of Superfund Litigation: CERCLA Case Law From 1981-1991*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,037, 10,368 (July 1991). The authors provide an indepth survey of litigation which was spawned after the adoption of the Superfund legislation. They observed that:

> [I]n the imposition of liability, CERCLA shows mercy for no one, not even state, federal and municipal governments. The application of CERCLA liability to governments is logically inescapable, given the text of the statute and the judicial gloss that increasingly ensnares those with even the most attenuated connection to a contaminated site.

Id.

29 *Id.* at 10,370 (citing to United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991); B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960 (D. Conn. 1991); Transportation Leasing Co. v. California, 21 Envtl. L. Rep. (Envtl. L. Inst.) 20826 (C.D. Cal. Dec. 5, 1990)).

IV. The Cost to Cities

The tremendous cost of these suits can easily bring municipal governments to their knees. Many cities can neither afford to pay the cleanup costs for which they are being sued, or the costs of the endless litigation involved in many Superfund proceedings. In testimony before a Senate subcommittee, a member of the city council of Alhambra, California said that:

> Local governments, small businesses and others find themselves in a horrific 'Catch 22' when they receive notice of such lawsuits. If they cannot afford, or do not think it is right, to settle such claims, they must spend millions to defend themselves and pray that somewhere down the line a judge will put an end to this madness. The price paid in the interim is extreme . . . [O]ne of the cities in our group — Bell, California — had no alternative but to lay off two policemen in order to meet its share of our joint defense costs, and I am certain that these normally hidden, but devastating, social costs are being duplicated in targeted communities throughout the country.[30]

V. A Solution — The Toxic Cleanup Equity and Acceleration Act

The only clear way around these difficulties is to protect municipalities from the capricious filing of third-party suits. The EPA cannot deal with the problem through a simple rule making proceeding. The Superfund law has to be changed by Congress. I have introduced legislation, The Toxic Cleanup Equity and Acceleration Act of 1991[31] to protect citizens, municipalities and other generators and transporters of MSW and sewage sludge from lawsuits equating these substances with industrial hazardous wastes. While it protects these parties, the Act will still maintain the basic Superfund philosophy of requiring the polluter to pay for the cost of cleaning up the nation's old toxic waste sites.

A. *Section 4 — Preventing Third-Party Lawsuits*

Section 4 of the bill modifies CERCLA to prevent third-party

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30 *Superfund Issues Facing Municipalities: Hearing Before the Subcomm. on Superfund, Ocean and Water Protection of the Senate Comm. on Environment and Public works*, 102d cong., 1st Sess. 3 (July 29, 1991) (prepared statement of Boyd C. Condie, Council Member, Alhambra, Ca.)

31 H.R. 3026, 102d Cong., 1st Sess. (1991). (The full text of H.R. 3026 is set out in the appendix to this article).

contribution suits against municipalities or other persons if their only actions were related to the generation or transportation of MSW or sewage sludge.[32] As used in the bill, "generation" or "generators" is meant to refer to actions or persons described by section 107(a)(3) of CERCLA and may include arranging for the transportation, treatment, or disposal of hazardous substances.[33] "Transportation" or "transporters" is meant to refer to actions or persons described by section 107(a)(4).[34] If municipalities owned or operated a facility, or generated or transported waste materials that do not meet the definitions of MSW and sewage sludge, the block on third-party suites does not apply.[35]

Section 4 of the bill also codifies EPA's Interim Municipal Settlement Policy.[36] The bill states that the President must not sue municipalities or other persons who merely generated or transported MSW or sewage sludge, unless "truly exceptional circumstances" exist.[37] These circumstances exist when the President has reliable evidence from a particular site that hazardous substances have been released that are not ordinarily found in MSW or sewage sludge *and* that those substances have come from commercial, institutional, or industrial processes, not households.[38] Truly exceptional circumstances also exist when the toxicity and volume of waste from commercial, institutional and industrial sources is insignificant compared with the toxicity and volume of the MSW or sewage sludge, or when absent all the hazardous substances from commercial, institutional and industrial sources, the hazardous substances from municipal solid waste or sewage sludge would be a significant cause of the contamination requiring the cleanup. When non-household trash at a site is alleged to be similar to ordinary household garbage, the President may require that the generators or transporters of the trash bear the burden of proving that similarity.[39]

The section identifies two specific situations that can never

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[32] *Id.* at § 4. See *id* at § 3 for definition of MSW.
[33] *Id.* at § 4.
[34] 42 U.S.C. § 9607 (1988). *See supra* note 3 for text of section 9607.
[35] H.R. 3026 at § 4.
[36] SUPERFUND PROGRAM; INTERIM MUNICIPAL SETTLEMENT POLICY, 54 Fed. Reg. 51,071 (1989).
[37] H.R. 3026 at § 4.
[38] *Id.*
[39] *Id.*

amount to truly exceptional circumstances. First, when MSW or sewage sludge have been contaminated with hazardous substances at a waste transfer station, the generator or transporter of the original MSW or sewage sludge is not held responsible for the subsequent contamination (unless the generator or transporter also owned or operated the waste transfer station).[40] Second, when sewage sludge has been approved by the President for "beneficial reuse" such as fertilizer, or would have so qualified at the time of disposal, that sludge cannot be the basis for the President bringing a lawsuit under Superfund. Finally, Section 4 of the bill states that municipalities will not be liable under Superfund for exercising its regulatory power when it owns a public right-of-way, such as a road or sewage pipeline, over which hazardous substances are transported.[41]

B. *Section 5 — Settlement Opportunities*

Section 5 of the Bill creates a special settlement opportunity for municipal generators and transporters of MSW and sewage sludge.[42] When a municipality is noticed by any person that it may be sued for generating or transporting MSW or sewage sludge, the Bill permits the municipality to request the President to enter into a settlement for all or part of the municipality's potential liability. The section requires that the settlement must be reached within 120 days, unless specific conditions are met.[43]

Once the municipality requests a settlement, a moratorium on administrative or judicial action against the municipality begins, and it continues until a negotiated settlement is reached or until the President publishes an explanation of why a settlement cannot be reached. A municipality may ask a federal district court to review the President's decision denying the request for settlement.[44]

This section provides for three acceptable reasons for failing to settle: 1. the municipality refuses to pay according to specific

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40 *Id.*

41 *Id.* A public-right-of-way includes, "roads, streets, or other public transportation routes, and pipelines used as a conduit for sewage or other liquid or semiliquid discharges." *Id.*

42 H.R. 3026, 102d Cong., 1st Sess. § 5 (1991).

43 *Id.*

44 *Id.*

cost allocation criteria, 2. the municipality refuses to agree to settlement terms routinely required by the President in settlements with parties who bear insignificant responsibility for sites, or 3. there is insufficient information to allocate costs.[45] If the President believes there is insufficient information, the moratorium is extended until enough information is obtained, but a completed remedial investigation/feasibility study (RI/FS) is deemed to provide sufficient information, at least for the portion of the site studies in the RI/FS. Also, if the President has settled with another party (other than a *de minimis*[46] party), it is presumed that he has enough information to settle with the municipality regarding matters addressed in the prior settlement.[47]

Section 5 requires a municipality to pay for costs based on the portion of its MSW or sewage sludge that consists of hazardous substances, not on the total volume of the waste. MSW and sewage sludge are presumed to contain no more than one-half of one percent of hazardous substances unless the President obtains reliable site-specific evidence to the contrary.[48]

This section also requires the President to limit the amount a municipality must pay if payments would force a municipality to dissolve, to declare bankruptcy, or to default on its debt obligations. A municipality can settle under this section even if it may face other liability for acts unrelated to its role as generator or transporter of MSW or sewage sludge (although the settlement can ignore such other liability).[49]

The bill makes clear that the settlement, which can take the form of a consent decree or an administrative order, must include both a promise from the President (unless contrary to the public interest) not to sue the municipality again and protection from contribution suits or other claims under Superfund for matters addressed in the settlement. Under this section, the President cannot reserve any rights for further relief that he does not

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45 *Id.*

46 The EPA can enter settlements with so-called "de minimis" parties when that party has contributed a low volume of toxic waste. *See* 42 U.S.C. § 9622(g). The provision is not available to cities contributing MSW since in such cases the volume is relatively high.

47 H.R. 3026 at § 5.

48 *Id.*

49 *Id.*

ordinarily reserve in settlements with parties who bear insignificant responsibility for sites. The President also cannot ask a municipality to indemnify the United States or require a municipality to violate laws about meeting its fiscal obligations. Finally, the President must encourage municipalities to contribute services instead of money and to make delayed payments or payments over time.[50]

C. *Section 6 — Preliminary Allocation of Responsibility*

This section provides that, at the request of a municipality, the President must prepare a non-binding preliminary allocation of responsibility, unless doing so would be contrary to the public interest. In such allocations, the volume of MSW and sewage sludge must refer to the portion of its MSW or sludge that consists of hazardous substances not on the total volume of the waste.[51]

D. *Section 7 — Retroactive Nature of The Act*

Section 7 of the Bill provides that the Act applies to all administrative or judicial actions that began before the effective date of the Act, unless a final court judgment has been rendered or a court-approved settlement agreement has been reached.[52]

VI. Conclusion

At a time when the costs of government are increasingly felt at a local level, neither these governments, nor the taxpayers that support them, should feel threatened by Superfund. Congress never intended the law to financially cripple local government, nor was it constructed to provide convenient scapegoats for corporate polluters.

The H.R. 3026 addresses the concerns of municipalities while not absolving them of responsibility if they have, indeed, substantially contributed to the pollution of a Superfund site. This law does what no administrative measure can do. It corrects a serious oversight in the Superfund law while protecting the powerful principle that the "polluter pays."

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50 *Id.*

51 H.R. 3026, 102d Cong., 1st Sess. § 6 (1991).

52 *Id.* at § 7.

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102D CONGRESS
1ST SESSION

H. R. 3026

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to protect citizens, municipalities, and other generators and transporters of municipal solid waste and sewage sludge from lawsuits equating these substances with industrial hazardous wastes.

IN THE HOUSE OF REPRESENTATIVES

JULY 24, 1991

Mr. TORRICELLI (for himself, Mr. DREIER of California, Mr. ATKINS, Mr. GALLO, Mr. HUNTER, Mr. MARTINEZ, Mr. MOORHEAD, Mr. SHAYS, Mr. SKAGGS, Mr. TORRES, and Mr. WELDON) introduced the following bill; which was referred to the Committee on Energy and Commerce

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A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to protect citizens, municipalities, and other generators and transporters of municipal solid waste and sewage sludge from lawsuits equating these substances with industrial hazardous wastes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Toxic Cleanup Equity and Acceleration Act of 1991".

SEC. 2. FINDINGS.

Consistent with the policies under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) (42 U.S.C. 9601 et seq.), the Congress finds that—

(1) there is a need for a reaffirmation of the policies that are the basis for Superfund, the Nation's toxic waste cleanup program, including the principle that the polluter should pay for cleanup;

(2) the Congress did not intend to hold municipalities or individual citizens strictly, jointly and severally liable under Superfund for the generation or transportation of municipal solid waste and sewage sludge;

(3) studies demonstrate that the proportion of hazardous substances found in municipal solid waste from households generally averages less than 0.5 percent;

(4) cities that have received awards from the Environmental Protection Agency for the beneficial reuse of sewage sludge have been sued under Superfund because such sewage sludge was present at Superfund sites;

(5) third-party contribution suits based on the generation or transportation of municipal solid waste

and sewage sludge distort the intent of Superfund and delay cleanup; and

(6) it is imperative that spurious litigation be eliminated so that the cleanup program is not delayed and precious resources are not diverted from remedial actions.

SEC. 3. ADDITIONAL DEFINITIONS.

Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding the following new paragraphs at the end thereof:

"(39) The term 'municipal solid waste' means all waste materials generated by households, including single and multiple residences, hotels and motels, and office buildings. The term also includes trash generated by commercial, institutional, and industrial sources when the general composition and toxicity of such materials are similar to waste normally generated by households, or when such waste materials, regardless of when generated, would be considered conditionally exempt generator waste under section 3001(d) of the Solid Waste Disposal Act because it was generated in a total quantity of 100 kilograms or less during a calendar month. The term 'municipal solid waste' includes all constituent components

of municipal solid waste, including constituent components that may be deemed hazardous substances under this Act when they exist apart from municipal solid waste. Examples of municipal solid waste include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, and household hazardous waste (such as painting, cleaning, gardening, and automotive supplies). The term 'municipal solid waste' does not include combustion ash generated by resource recovery facilities or municipal incinerators.

"(40) The term 'sewage sludge' refers to any solid, semisolid, or liquid residue removed during the treatment of municipal waste water, domestic sewage, or other waste waters at or by a publicly owned treatment works subject to the limitations of section 113(m).

"(41) The term 'municipality' means any political subdivision of a State and may include cities, counties, towns, townships, boroughs, parishes, school districts, sanitation districts, water districts, and other local governmental entities. The term also includes any natural person acting in his official ca-

pacity as an official, employee, or agent of a municipality.".

SEC. 4. THIRD-PARTY SUITS FOR MUNICIPAL SOLID WASTE OR SEWAGE SLUDGE.

Section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding the following new subsections at the end thereof:

"(l) CONTRIBUTION ACTIONS FOR MUNICIPAL SOLID WASTE AND SEWAGE SLUDGE.—No municipality or other person shall be liable to any person other than the United States for claims of contribution under this section or for other response costs or damages under this Act for acts or omissions related to the generation, transportation, or arrangement for the transportation, treatment, or disposal of municipal solid waste or sewage sludge unless such acts or omissions provide a basis for liability under sections 107(a)(1) or 107(a)(2) of this Act.

"(m) ACTIONS BY THE PRESIDENT FOR MUNICIPAL SOLID WASTE AND SEWAGE SLUDGE.—In the absence of truly exceptional circumstances, the President shall not initiate or maintain an action against any municipality or other person under this Act for acts or omissions related to the generation, transportation, or arrangement for the transportation, treatment, or disposal of municipal solid

waste or sewage sludge unless such acts or omissions provide a basis for liability under sections 107(a)(1) or 107(a)(2) of this Act. For the purpose of this subsection, truly exceptional circumstances shall exist only—

"(1) where the President obtains reliable, site-specific evidence that—

"(A) the release or threatened release of hazardous substances on which liability is based are not those ordinarily found in municipal solid waste or sewage sludge; and

"(B) the hazardous substances were derived from a commercial, institutional, or industrial process or activity; or

"(2)(A) the total contribution to the site of commercial, institutional, and industrial hazardous substances is insignificant in terms of both volume and toxicity when compared to the volume and toxicity of the municipal solid waste and sewage sludge, or

"(B) absent the total contribution to the facility of commercial, institutional, and industrial hazardous substances, the contribution of hazardous substances from municipal solid waste and sewage sludge would be a significant cause of the release or

threatened release of hazardous substances that results or will result in the response action.

When the release or threatened release involves trash from commercial, institutional, or industrial sources, the President may require that persons who generated, transported, or arranged for the transportation, treatment, or disposal of such materials provide reliable, site-specific evidence that the general composition and toxicity of the trash are similar to those of waste normally generated by households. When municipal solid waste or sewage sludge has been combined or mixed with hazardous substances at a waste transfer station, such combination or mixing shall not constitute truly exceptional circumstances under this subsection warranting action against the municipality or other person that generated, transported, or arranged for the transportation, treatment, or disposal of such municipal solid waste or sewage sludge, unless the municipality or other person also owned or operated the waste transfer station. When sewage sludge has been approved by the President for beneficial reuse or other equivalent use, or would have qualified for beneficial reuse or other equivalent use at the time of disposal, the release or threatened release of such sewage sludge shall not constitute truly exceptional circumstances under this subsection.

"(n) PUBLIC RIGHT-OF-WAY.—In no event shall a municipality incur liability under this Act for the act of owning or maintaining a public right-of-way over which hazardous substances are transported.

For the purposes of this subsection, 'public right-of-way' shall include roads, streets, or other public transportation routes, and pipelines used as a conduit for sewage or other liquid or semiliquid discharges.".

SEC. 5. SETTLEMENTS.

Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding the following new subsection at the end thereof:

"(n) SETTLEMENTS FOR MUNICIPAL GENERATORS AND TRANSPORTERS OF MUNICIPAL SOLID WASTE OR SEWAGE SLUDGE.—

"(1) APPLICABLE ACTIONS.—This subsection applies whenever an administrative or judicial action is brought, or notice is given by any person that an action may be brought, against a municipality under this Act for acts or omissions related to the generation, transportation, or arrangement for the transportation, treatment, or disposal of municipal solid waste or sewage sludge unless such acts or omissions

provide a basis for liability under section 107(a)(1) or 107(a)(2) of this Act.

"(2) TIMING OF SETTLEMENTS.—For applicable actions under this subsection, a municipality may request that the President enter into a settlement under this section. The request may seek to settle a municipality's potential liability for all or part of the response costs or damages to natural resources. Notwithstanding any other deadlines under this Act, the President shall make every effort to reach a final settlement with the municipality within 120 days after receiving such request.

"(3) FAILURE TO REACH SETTLEMENT; MORATORIUM.—If the President does not reach a settlement with the municipality within the 120-day period defined in paragraph (2) of this subsection, the period shall be extended for negotiations to continue until a settlement is reached, or until the President has published in the Federal Register an explanation of why a settlement cannot be reached. During the moratorium which commences when a municipality requests a settlement under this subsection and terminates when a settlement has been reached or when the President has published notice explaining why a settlement cannot be reached, no administrative or

judicial action may be commenced or pursued against the municipality in any applicable action as defined by this subsection. Permissible reasons for failing to reach a settlement under this subsection shall be limited to one or more of the following:

"(A) The settlement offer from the municipality does not meet the cost allocation criteria specified in this subsection.

"(B) The municipality refuses to agree to settlement terms routinely required in consent decrees under subsection (g) of this section.

"(C) Insufficient information exists to permit a cost allocation.

If the President invokes subparagraph (C) as the reason why a settlement cannot be reached, the moratorium on initiating or pursuing action in applicable actions under this subsection shall be extended until sufficient information is acquired. The completion of a remedial investigation/feasibility study for the portion of the response action or the completion of an assessment of damages that is the subject of the municipality's request for settlement shall be deemed to provide sufficient information to reach a settlement for such portion or damages under this subsection. If the President has completed a settle-

ment with a party other than the municipality requesting a settlement, such settlement creates a rebuttable presumption that the President cannot invoke subparagraph (C) as a reason for failing to reach a settlement with the municipality concerning matters addressed in the other party's settlement, unless the other settlement was reached pursuant to subsection (g) of this section.

"(4) EXPEDITED FINAL SETTLEMENT.—Settlements under this subsection shall—

"(A) require the municipality to pay for costs based on the quantity of hazardous constituents within municipal solid waste and sewage sludge, not the overall quantity of municipal solid waste and sewage sludge, but municipal solid waste and sewage sludge shall not be deemed to contain more than one-half of one percent (0.5%) constituent hazardous substances unless the President obtains reliable site-specific evidence to the contrary during the moratorium period defined above in paragraph (3);

"(B) limit a municipality's payments if such payments would force a municipality to

dissolve, to declare bankruptcy, or to default on its debt obligations; and

"(C) be reached even in the event that a municipality may be liable for response costs or damages in actions other than applicable actions under this subsection, although the President may elect to exclude liability, costs, or damages not covered by this subsection from settlements under this subsection.

"(5) COVENANT NOT TO SUE.—The President shall provide a covenant not to sue with respect to the facility concerned to any municipality which has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f) of this section.

"(6) CONSENT DECREE OR ADMINISTRATIVE ORDER.—A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order as described in subsection (g)(4) of this section.

"(7) EFFECT OF AGREEMENT.—A municipality that has resolved its liability to the United States under this subsection shall not be liable for claims of contribution or for other response costs or dam-

ages under this Act regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

"(8) SETTLEMENT PROVISIONS.—When reaching settlements under this subsection, the President—

"(A) shall not reserve any rights to seek further relief from a settling municipality which the President does not routinely reserve in other settlements under subsection (g);

"(B) shall not seek to have a municipality provide indemnification to the United States;

"(C) shall not require a municipality to act or fail to act in contravention of legal requirements that are of general applicability and were adopted by formal means concerning the assumption and maintenance of municipal fiscal obligations; and

"(D) shall encourage municipalities to enter into settlements that allow them to contribute services in lieu of money, to make delayed payments, or to make payments over

time, through an annuity or other financing device.

"(9) JUDICIAL REVIEW.—Review of the President's action in denying a municipality's request for settlement under this subsection may be had by any interested municipality in the United States district courts in accordance with section 113(b) of this Act. Any such application for review shall be made within 90 days from the date the President publishes an explanation of why a settlement cannot be reached.".

SEC. 6. PRELIMINARY ALLOCATION OF RESPONSIBILITY.

(a) MUNICIPAL SOLID WASTE AND SEWAGE SLUDGE.—Section 122(e)(3)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting the following sentence between the second and third sentences: "Under these guidelines, the volume of municipal solid waste and sewage sludge shall refer to the quantity of hazardous constituents within municipal solid waste and sewage sludge, not the overall quantity of municipal solid waste and sewage sludge.".

(b) REQUEST BY MUNICIPALITIES.—Section 122(e)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding the following new subparagraph at the end thereof:

"(F) REQUEST BY MUNICIPALITIES.—If a municipality requests the President to prepare a nonbinding preliminary allocation of responsibility, the President shall provide such an allocation unless he provides a written explanation of why such an allocation would be contrary to the public interest.".

SEC. 7. RETROACTIVITY.

The amendments made by this Act shall apply to each municipality and other person against whom administrative or judicial action has been commenced before the effective date of this Act, unless a final court judgment has been rendered against such municipality or other person or final court approval of a settlement agreement including such municipality or other person as a party has been granted. If a final court judgment has been rendered or court-approved settlement agreement has been reached that does not resolve all contested issues, such amendments shall apply to all contested issues not expressly resolved by such court judgment or settlement agreement.

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