THE SUITABILITY OF CERCLA LIABILITY FOR MUNICIPAL POLLUTION OF RIVERS

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I. *Introduction*

Despite thirty years of federal regulation, our nation's rivers are polluted. Contaminated particles of sand, clay, silt, and other substances, commonly referred to as sediments, have settled at the bottom of many of our rivers.[1] As a result, many species in these polluted rivers cannot tolerate the toxic contaminants found in the sediments and die.[2] Those species that survive the exposure often develop serious health problems, such as fin rot, tumors, and reproductive deficiencies.[3] Moreover, the pollutants often bioaccumulate in the animals that survive, posing a risk to humans who consume them.[4] At present, approximately forty percent of our nation's rivers remain unfit for swimming or fishing.[5]

Contaminated sediments also affect the navigability of the waters. According to the EPA, approximately 300 million cubic yards of sediment are dredged each year in the United States in order to "deepen harbors and clear shipping lanes."[6] Yet, approximately

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[1] EPA, Contaminated Sediment in Water: Basic Information, http://www.epa.gov/waterscience/cs/aboutcs (last visited Feb. 28, 2006) [hereinafter Contaminated Sediment]. In December 2004, the EPA reported that 43% of sediment samplings nationwide are "probably associated with harmful effects on aquatic life or human health" and that 30% are "possibly associated with harmful effects on aquatic life or human health." EPA, 2004 Contaminated Sediment Report to Congress Fact Sheet, http://www.epa.gov/waterscience/cs/report/2004/fs.htm (last visited Feb. 28, 2006). In order to complete the report, the EPA examined sediment contaminant data from 19,398 sampling stations across the United States. *Id.*

[2] Contaminated Sediment, *supra* note 1.

[3] *Id.*

[4] Contaminated Sediment, *supra* note 1. For example, in 1998, the EPA issued fish consumption advisories for over 2500 U.S. water sources due to the bioaccumulation of pollutants in fish, in part due to the possible long-term effects on humans, such as cancer and neurological defects. *Id.* An example of bioaccumulation can be found in the Passaic River located in Northern New Jersey. According to Mary Mears, a spokeswoman for Region II of the EPA, "[t]he dioxins (pollutants found in the Passaic River) are persistent chemicals that get into tiny critters living in sediments, and then end up in the fatty tissue of fish that eat the critters." Tina Traster, *Passaic River Listed as "Endangered,"* THE RECORD (N.J.), Apr. 7, 1998, at L1. The Lower Passaic, a six-mile stretch from the Newark Bay to the Dundee Dam in Clifton, New Jersey has more dioxins than any other river in the United States. *Id.* The contamination not only affects bottom-dwelling organisms, but all organisms in the water, in part because contaminated sediments are often stirred up, for example, by storms. Contaminated Sediment, *supra* note 1.

[5] STEVEN FERREY, ENVIRONMENTAL LAW EXAMPLES & EXPLANATIONS 238 (3d ed. 2004).

[6] Contaminated Sediment, *supra* note 1.

three to twelve million cubic yards of those sediments are so contaminated that "they require special, and sometimes costly, handling."[7] This, in turn, means that such dredging is often not feasible.[8] As a consequence, the "volume of shipping on these waterways" drastically declines.[9] Some of these pollutants are the legacy of our nation's industrial past. For example, the pesticide dichloro-diphenyl-trichloroethane (DDT) and the industrial chemicals polychlorinated biphenyls (PCBs) plague our waters even though Congress banned the use of DDT and PCBs in the United States in the 1970s.[10] Many other contaminants, however, continue to enter our waterways daily.[11] Some such pollutants enter rivers through runoff from urban and agricultural areas.[12] Other airborne pollutants from factories are carried through the air until they eventually land in rivers and other bodies of water.[13] Still others come "directly from industrial and *municipal* waste dischargers."[14]

One way municipal sewer communities pollute rivers is through the use of combined sewer systems (CSSs), a wastewater collection system that transports "domestic, commercial, and industrial[15] wastewater and storm water runoff through a single pipe system to a publicly-owned treatment works (POTW)."[16] At POTWs, the wastewater is treated and later discharged into a receiving body of water.[17] CSSs serve approximately forty to forty-six

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* PCBs were legally manufactured, distributed, used, and then disposed of throughout the United States for almost fifty years. *Id.* In 1977, the Toxic Substances Control Act generally prohibited the manufacture and sale of PCBs within United States. 15 U.S.C. § 2605 (2000); *see also* Erik Claudio, Comment, *How the EPA May Be Selling General Electric down the River: A Law and Economics Analysis of the $460 Million Hudson River Clean Up Plan*, 13 FORDHAM ENVTL. L. REV. 409, 411 (2002).

[11] Contaminated Sediment, *supra* note 1.

[12] *Id.*

[13] *Id.*

[14] *Id.* (emphasis added).

[15] EPA, REPORT TO CONGRESS: IMPACTS AND CONTROL OF CSOS AND SSOS 1-2 (2004), *available at* http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm [hereinafter IMPACTS AND CONTROL]. It is important to emphasize that the CSS transports not only domestic wastewater, but also industrial wastewater. *Id.*

[16] *Id.*

[17] EPA, National Pollutant Discharge Elimination System (NPDES): Combined

million people and are located in 772 to 1100 communities, across thirty-two states, primarily in the Northeast and Midwest.[18]

CSSs are some of the oldest sewer systems constructed in the United States, built before the early part of the twentieth century.[19] When municipalities first installed these CSSs in the nineteenth century, few treated their wastewater before discharging it into local receiving waters.[20] In 1892, only twenty-seven municipalities in the country treated their wastewater.[21] Thus, for many decades most municipalities dumped their untreated sewage directly into bodies of water, including rivers.[22] Although the levels of untreated sewage entering our nation's waters decreased significantly since the creation of POTWs, some untreated sewage is still discharged directly into our rivers through combined sewer overflows (CSOs).[23]

A CSO is a discharge from a CSS at some point prior to the wastewater reaching the POTW where it will receive treatment.[24] "Seventy-five percent of CSOs discharge directly into rivers, streams, or creeks."[25] CSO discharges are made up of a toxic blend of domestic, commercial, and industrial wastewater, as well as storm water runoff, which includes pollutants washed from streets and parking lots.[26] The primary pollutants found in CSOs are "microbial pathogens, oxygen depleting substances, total suspended

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Sewer Overflows, http://cfpub.epa.gov/npdes/home.cfm?program_id=5 (last visited Jan. 29, 2006).

[18] EPA, National Pollution Discharge Elimination System (NPDES): Combined Sewer Overflows Frequently Asked Questions (2005), http://cfpub.epa.gov/npdes/faqs.cfm?program_id=5 [hereinafter NPDES FAQ]; EPA, COMPLIANCE AND ENFORCEMENT NATIONAL PRIORITY: CLEAN WATER ACT, WET WEATHER, COMBINED SEWER OVERFLOWS 2 (2004), *available at* http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2005prioritycwacso.pdf [hereinafter COMPLIANCE AND ENFORCEMENT]; EPA, COMBINED SEWER OVERFLOWS: GUIDANCE FOR NINE MINIMUM CONTROLS 1-1 (1995), *available at* http://www.in.gov/idem/water/npdes/permits/wetwthr/cso/guidance/csonmc1_2.pdf [hereinafter NINE CONTROLS].

[19] IMPACTS AND CONTROL, *supra* note 15, at ES-2.

[20] *See id.* at 2-3.

[21] *Id.* at 2-2 to -3.

[22] *Id.* at 2-3.

[23] *Id.* at 1-2, 2-3 to -4.

[24] *Id.* at 1-2.

[25] IMPACTS AND CONTROL, *supra* note 15, at 4-19.

[26] *Id.* at 1-2.

solids, toxics, nutrients, floatables and trash."[27] The average bacterial concentrations in a CSO can be "several thousand times greater than standard water quality criteria."[28]

CSOs inflict serious harm on rivers. For instance, a study of the Rouge River in Michigan, a river with a "long history of CSOs and pollution problems, revealed that 10 to 15 percent of the total bacterial load in the watershed is the result of CSOs."[29] According to the EPA, impaired waters often contain three types of pollutants: solids,[30] pathogens,[31] and nutrients.[32] All three are present in CSO discharges, leading the EPA to conclude that CSOs "contribute to the loading of these pollutants where they occur."[33] In fact, the EPA reports that "CSOs are among the major sources responsible for beach closings, shellfishing restrictions, and other water body impairments."[34]

As of December 2004, "828 [National Pollutant Discharge Elimination System] NPDES permits authorize[d] discharges from 9348 CSO outfalls."[35] The EPA estimates that 850 billion gallons are discharged through CSOs every year.[36] These CSOs generally occur during precipitation events, as the systems are intended to overflow when the collection system's capacity is exceeded.[37] In

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[27] *Id.* at ES-6. Floatables and trash are "visible buoyant or semi-buoyant solids including organic matter, personal hygiene items, plastics, styrofoam, paper, rubber, glass and wood." *Id.* at GL-3.

[28] *Id.* at ES-7.

[29] *Id.* at 4-30.

[30] *Id.* at 5-5. The term "solids" refers to "suspended solids, situation and total dissolved solids." *Id.*

[31] Pathogens are "microorganisms (e.g., bacteria, viruses, or parasites) that can cause disease in humans, animals and plants." EPA, Terms of Environment: P (2005), http://www.epa.gov/OCEPAterms/pterms.html (last visited Mar. 21, 2006).

[32] IMPACTS AND CONTROL, *supra* note 15, at 5-4. Nutrients are "any substance assimilated by living things that promotes growth. The term is generally applied to nitrogen and phosphorus in wastewater, but is also applied to other essential and trace elements." EPA, Terms of Environment: N (2005), http://www.epa.gov/OCEPA terms/nterms.html (last visited Mar. 21, 2006).

[33] IMPACTS AND CONTROL, *supra* note 15, at 5-4, 5-6.

[34] NPDES FAQ, *supra* note 18.

[35] IMPACTS AND CONTROL, *supra* note 15, at ES-4.

[36] *Id.* at ES-5.

[37] EPA, REPORT TO CONGRESS ON IMPACTS AND CONTROL OF COMBINED SEWER OVERFLOWS AND SANITARY SEWER OVERFLOWS: FACT SHEET (2004), *available at* http://www.epa.gov/npdes/pubs/csosso_rtc_factsheet.pdf [hereinafter CSO FACT SHEET].

fact, CSOs have been permitted during precipitation events since the 1970s.[38] However, CSOs also have occurred, and continue to occur, during dry weather events, in direct violation of CSO permits.[39] In fact, only seventy percent of those municipal sewer

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[38] 33 U.S.C. § 1342 (2000). On April, 19, 1994, the EPA issued its final CSO Control Policy. In the Consolidated Appropriations Act for Fiscal Year 2001, Congress stated that "each permit, order, or decree issued pursuant to this Act after the date of enactment of its subsection for a discharge from a municipal combined storm and sanitary sewer shall conform to the CSO Control Policy signed by the Administrator on April 11, 1994." *See* CSO FACT SHEET, *supra* note 37, at 1.

[39] IMPACTS AND CONTROL, *supra* note 15, at 2-4, 6-8 to -12. Dry weather overflows are illegal under the CWA. CSO permits generally contain a direct prohibition on dry weather overflows. *Id.* at 6-12. Moreover, CSO permits generally require the permittee to "document and report" dry weather overflows to the NPDES authority. *Id.* Unfortunately, there is little data on the occurrence of dry weather overflows. *Id.*

Despite that there is little statistical data on how often releases occur during dry weather, a review of consent decrees entered into by municipal sewer communities, as a settlement of Clean Water Act litigation, indicates that releases during dry weather are a widespread problem. Many of the consent decrees pertaining to combined sewer overflows reference a specific problem with dry weather overflows and other illegal overflows. For example, the consent decree entered into by the Washington D.C. Water and Sewer Authority (WASA) states that the WASA:

> [s]hall design, construct and implement measures to correct regulator and/or CSS deficiencies that cause or contribute to Dry Weather Overflows at the following CSO outfalls: 007, 027, 005, 020, 023, 015, 014, 024. WASA shall complete all of the foregoing within the following schedule, giving consideration to addressing, where practicable, outfalls having more frequent Dry Weather Overflows before outfalls having less frequent Dry Weather Overflows.

Anacostia Watershed Soc'y v. D.C. Water & Sewer Auth., No. 1:00CV00183tfh, at 16 (D.D.C. June 25, 2003) (consent decree), *available at* http://www.epa.gov/compliance/resources/decrees/civil/cwa/dcwasa-cd.pdf. Thus, the WASA consent decree indicates that dry weather releases were a frequent widespread problem for WASA.

For another example of consent decrees referencing a problem with dry weather releases see United States v. City of Toledo, No. 3:91:CV7646, at 7 (N.D. Ohio June 28, 2002) (consent decree), *available at* http://www.epa.gov/compliance/resources/decrees/civil/cwa/toledo-cd.pdf. Here, the court stated that:

> Toledo shall at all times comply with all effluent limitations applicable to Outfall 001 in Toledo's Current Permit and with the requirement set forth in Toledo's Current Permit that any discharges from Combined Sewer Overflows may occur only during wet weather periods when the flow in the sewer system exceeds the capacity of the sewer system.

Id.; *see also* United States v. Mayor & City Council of Baltimore, at 41-55 (D. Md. Apr. 26, 2002) (consent decree), *available at* http://www.epa.gov/compliance/resources/decrees/civil/cwa/baltimore-cd.pdf (discussing the measures the city must take to ensure that releases during dry weather do not occur). As such, one can infer that releases during dry weather, and other releases in violation of the permits,

communities holding permits for CSOs have implemented controls to eliminate dry-weather overflows.[40]

Thus far, the EPA has relied on the Clean Water Act (CWA) to remedy municipal pollution of our nation's rivers.[41] The CWA provides for the NPDES, which requires that every point source discharger, including CSOs, have a permit.[42] Each NPDES permit specifies the effluent limitations that a discharger must meet and sets a deadline for compliance.[43] If a discharger fails to comply with the requirements of its NPDES permit, the EPA[44] can issue a compliance order or bring a civil action for appropriate relief.[45] The CWA also allows for citizen suits, which can be brought against polluters, "or against the EPA Administrator or equivalent state administrator for" failure to complete non-discretionary duties.[46]

Despite these efforts, the CWA's scheme to curtail future pollution has not stopped municipal pollution of our nation's rivers through CSOs because EPA enforcement is low[47] and citizens' suits are often ineffective.[48] A 2003 EPA report found that a quarter of

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are not infrequent.

[40] *See* EPA, REPORT TO CONGRESS ON IMPLEMENTATION AND ENFORCEMENT OF CSO CONTROL POLICY 6-9 (2002), *available at* http://www.epa.gov/npdes/pubs/csortc6_7.pdf [hereinafter IMPLEMENTATION]. The EPA reviewed 811 permit files to evaluate implementation of the nine minimum controls for combined sewer overflows. *Id.*

[41] Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 7 (1997). When Congress enacted the Federal Water Pollution Control Act Amendments of 1972 it mandated the cessation of all discharges of pollutants into our nation's navigable waters by 1985. *Id.* In 1987, Congress extended its timetable for compliance, as all the deadlines set forth in the CWA had passed. *Id.* To date, toxic pollutants in toxic amounts are still discharged into our nation's navigable waters. *Id.*

[42] 33 U.S.C. § 1342 (2000).

[43] Permit Application and Special NPDES Program Requirements, 40 C.F.R. § 122.21(f)-(g) (2005).

[44] 33 U.S.C. § 1342. It is important to note that the EPA has delegated much of the CWA program to the states. *Id.* As such, states can set up their own compliance schedules. *Id.*

[45] *Id.* § 1319(a)(1). Civil penalties can be as high as $25,000 per day. *Id.* § 1319(c)(1)(B). Criminal penalties can be as high as $50,000 per day for knowing violations and $25,000 per day for negligent violations. *Id.*

[46] *Id.* § 1365(a); Flatt, *supra* note 41, at 13.

[47] Flatt, *supra* note 41, at 15-16 (citing Robert F. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2388 (1996)).

[48] *Id.* at 20. Citizens' suits against the EPA administrator are especially ineffective

major dischargers discharged in "significant violation of their NPDES permits, seldom with any EPA penalties."[49] And, municipalities are the worst offenders, as they are "far more likely to be out of compliance with NPDES permits for longer periods of time than are industrial sources."[50]

As a result, pursuant to the CWA, the EPA issued a CSO policy, which lays out nine minimum controls that municipalities should implement in order to prevent untreated wastewater from entering waterways.[51] However, no more than seventy percent of municipal sewer communities have implemented any one of the nine minimum controls.[52] One of the nine minimum controls requires that combined-sewer communities implement long-term control plans.[53] Yet, little more than half of all combined-sewer communities have implemented such a plan. This demonstrates that combined-sewer communities are not viewing the pollution of our rivers as a high priority matter, and therefore, the CWA is proving to be an inadequate tool for cleaning our nation's rivers.[54] Because EPA action under the CWA alone has proven inadequate to encourage municipalities to stop polluting rivers through CSOs, an additional mechanism must be sought.[55]

One possible mechanism for encouraging municipalities to decrease pollution is holding municipalities liable for their pollution of rivers under the Comprehensive Environmental Response,

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given that in 1987 Congress protected state enforcement of NPDES violations from citizens' suits so long as the alleged permit breaches were being "diligently prosecuted." 33 U.S.C. § 1319(g)(6)(A). This is especially true given that most courts have given the term "diligent prosecution" a broad interpretation, barring a citizen's suit that is premised upon the same CWA violation alleged in any administrative action. Flatt, *supra* note 41, at 20.

[49] FERREY, *supra* note 5, at 249.

[50] Flatt, *supra* note 41, at 25.

[51] NINE CONTROLS, *supra* note 18, at 1-7.

[52] IMPLEMENTATION, *supra* note 40, at 6-9.

[53] NINE CONTROLS, *supra* note 18, at 1-7; Susan Bruninga, *Water Pollution, Billions of Gallons Overflow from Sewers Annually, EPA Says in Report*, DAILY ENV'T REP., Aug. 27, 2004, at A-10.

[54] Envtl. Integrity Project, Clean Water Act, http://www.environmentalintegrity.org/page27.cfm (last visited Jan. 20, 2006) [hereinafter Integrity Project]. Moreover, "[m]ost communities have not established their minimum controls" at all. *Id.*

[55] *See* IMPLEMENTATION, *supra* note 40, at 6-9. It is important to note that although the CWA *alone* has proven inadequate, it has not been entirely ineffective. *Id.* (documenting implementation of the nine minimum controls).

Compensation, and Liability Act (CERCLA).[56] CERCLA provides for the liability of persons responsible for releases of hazardous substances into the environment.[57] Both the EPA and parties already held liable under CERCLA can initiate CERCLA liability actions.[58] Although the EPA appears reluctant to pursue municipalities under CERCLA, as the present EPA policy is not to pursue municipalities under CERCLA,[59] contribution actions, initiated by other parties held liable under CERCLA, may be available. Notwithstanding the possible availability of such contribution actions under CERCLA, to date, no party already held liable under CERCLA has initiated a contribution action against a municipality for its pollution of a river through its CSOs. However, such contribution actions are likely to arise in the near future because the EPA is currently seeking CERCLA liability from industrial entities for their pollution of rivers,[60] and, as stated above, municipalities

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[56] 42 U.S.C. § 9607 (2000). CERCLA is commonly referred to as Superfund.

[57] *Id.*; EPA, CERCLA Overview, http://www.epa.gov/superfund/action/law/cercla.htm (last visited Mar. 3, 2006).

[58] 42 U.S.C. §§ 9613(f)(1), 9607.

[59] Charrise Marie Fraccascia, *Taking Responsibility, Passing The Buck, and Cleaning Up the Mess: Making Municipal Liability Under CERCLA Work*, 44 CASE W. RES. L. REV. 1093, 1115 (1995). The present EPA policy, at least in the context of the disposal of municipal solid waste, is to refrain from initiating CERCLA enforcement actions against municipalities, even if they are responsible parties. *Id.* Moreover, to date, the EPA has not sought CERCLA liability for municipal pollution of rivers through CSOs. Despite this, the EPA has pursued CERCLA liability for industrial polluters of rivers.

[60] EPA, National Priorities List Sites in the United States, *available at* http://www.epa.gov/superfund/sites/npl/npl.htm. The EPA, under CERCLA, is pursuing industrial polluters of rivers. *Id.* (listing all Superfund sites that require immediate attention, many of which include rivers or portions of rivers). It is important to note that at present there is no published data regarding the actual number of sites affected by Superfund that are rivers or include portions of rivers. This is due in part to the fact that the National Priorities List (NPL) does not list all sites the EPA is pursuing under CERCLA. *Id.* However, hundreds of rivers could be affected. *See id.*

The rivers or portions of rivers that are known and listed on the NPL are some of the worst Superfund sites in the country. *See* Claudio, *supra* note 10, at 412 (discussing pollution of the Hudson River); TIMOTHY J. IANNUZZI ET AL., A COMMON TRAGEDY: HISTORY OF AN URBAN RIVER 75-96 (2002) (discussing pollution of the Passaic River). For example, the Hudson River is arguably the nation's single largest Superfund site, as PCBs pollute the river from Hudson Falls in Washington County to Battery Park in New York City, which is a 200-mile stretch. Claudio, *supra* note 10, at 411. PCBs are regulated as a probable carcinogen, and can influence the "delicate endocrine system, potentially affecting reproduction, development, resistance to disease, and brain function." Klara B. Sauer, *Where Are We in Cleaning Up Contaminated*

are responsible for a great deal of that pollution.[61] Therefore, examining whether CERCLA liability can attach to a municipality for its pollution of a river through CSOs is an important, yet essentially unexplored issue.

Moreover, legal scholarship has largely ignored the issue of whether such liability can or should attach.[62] Consequently, it is an

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Sites?, 4 ALB. L. ENVTL. OUTLOOK 35, 36 (1999); EPA, HUDSON RIVER PCBS SUPERFUND SITE 5 (2002), *available at* http://www.epa.gov/hudson/proposedplan.pdf. General Electric discharged over a million pounds of PCBs, over a thirty-year period, resulting in a continued dispersement of PCBs throughout the river. Sauer, *supra*, at 36. In fact, PCB contamination of fish in the Hudson River "is forty times the level set by the FDA." *Id.* As a result of this contamination, in 1983, the EPA designated the Hudson River a Superfund site. Claudio, *supra* note 10, at 412. In addition to the inability to eat any organism found in the Hudson River, both the Port of Albany and the New York Harbor "are choked with PCB-laden sediments that" are too "costly to dispose of once dredged." Sauer, *supra*, at 36. Furthermore, the canal system upstate is almost impassable as it is congested with PCB river mud. *Id.* As such, the Hudson River is a major Superfund site, and in 2002 the EPA ordered a $460 million cleanup of the Hudson River. Claudio, *supra* note 10, at 409 (providing further information on the Hudson River Superfund site).

It is important to note that General Electric is not the only source of pollution of the Hudson River. CSOs continue to discharge into the Hudson River. *See* HANDS ACROSS THE HUDSON, OPPORTUNITIES FOR COOPERATION IN CONTROLLING COMBINED SEWER OVERFLOWS 1-4, *available at* http://www.troyny.gov/public_utilities/Hudson CSO_all.pdf.

Another example of a major river Superfund site is a six-mile stretch of the Passaic River, known as the Lower Passaic, located in Northern New Jersey. EPA, DIAMOND ALKALI CO., *available at* http://www.epa.gov/region02/superfund/npl/0200613c.pdf. "From 1951 to 1969, the Diamond Alkali Company owned and operated a pesticides manufacturing plant" located on a property that numerous companies had used for various types of manufacturing for more than 100 years. *Id.* The property continued to be used until 1983, when a sampling of the Passaic River revealed high levels of dioxin, an "extremely toxic chemical and unwanted byproduct of the manufacture of certain chemicals which were produced at the [Diamond Alkali] site." *Id.* The EPA has required the Occidental Chemicals Company, the successor to the Diamond Alkali Company, to perform cleanup activities under CERCLA. *Id.*

However, the Diamond Alkali Company is not the only polluter of the Passaic River. *Id.* Hundreds of other companies throughout the Passaic River's industrial past contributed to the creation of the Lower Passaic Superfund site. IANNUZZI, *supra*, at 83-96; Symposium, *Environmental Symposium Cleaning Up Newark: Rebuilding for the New Twenty-First Century: An Environmental Study of the Passaic River Estuary*, 29 SETON HALL L. REV. 37 (1998) [hereinafter *Environmental Symposium*]. Water quality sampling of the River's outfalls indicate chemical concentrations that exceed promulgated water quality criteria "for arsenic, copper, lead, mercury, PCBs, and dioxin." *See id.* at 41 (discussing the condition of the Passaic River). In addition, CSOs are a major source of the pollution of the Passaic River. IANNUZZI, *supra*, at 75-96.

[61] *See supra* text accompanying notes 15-55.

[62] One scholar has addressed whether there should be CERCLA liability for

open question as to whether such liability can attach to municipalities for their pollution of rivers,[63] as well as whether such liability is desirable.

This Article examines the reasons CERCLA contribution actions, initiated by industrial entities already held liable under CERCLA, are both possible and appropriate for municipal pollution of rivers through CSOs. Part II provides the necessary background information on CERCLA liability, explaining why Congress enacted the statute, as well as identifying the elements needed to establish CERCLA liability when the EPA initiates the action, or when other entities initiate a contribution action.[64] Part II also explores the history of municipal liability under CERCLA, examining the debates that occurred throughout the 1990s about whether municipal liability exists, as well as whether it is appropriate to have such liability for the pollution that results from the disposal of municipal solid waste (MSW).[65]

Part III considers whether a typical municipal sewer community can incur CERCLA liability for its pollution of rivers through CSOs.[66] This section analyzes each element needed to establish a prima facie case of CERCLA liability. After careful analysis, including a review of the possible legal objections to each element needed for a prima facie case of CERCLA liability, Part III con-

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CSOs; however, he addressed only the particular situation presented by the case of *Westfarm Associates Ltd. Partnership v. International Fabricare Institute.* *See* Robert M. Frye, *Municipal Sewer Authority Liability Under CERCLA: Should Taxpayers Be Liable for Superfund Cleanup Costs?* Westfarm Associates Ltd. Partnership v. International Fabricare Institute, 14 STAN. ENVTL. L.J. 61 (1995) (explaining why there should not be CERCLA liability for municipal pollution of soil and groundwater through CSOs). Outside of the Frye note, legal scholarship has not addressed whether there should be CERCLA liability for municipal pollution through CSOs.

[63] Although some cases have addressed situations similar to the one presented in this article, no case has addressed the specific question of whether CERCLA liability should attach to municipalities for their pollution of rivers through combined sewer overflows. *See* Westfarm Assocs. Ltd. P'ship. v. Wash. Suburban Sanitary Comm'n, 66 F.3d 669 (4th Cir. 1995) (discussing whether the Washington Suburban Sanitary Commission is liable for its release of toxic substances through leaky joints and cracks in its sewer pipes), *cert. denied*, 517 U.S. 1103 (1996); City of Bangor v. Barrett Paving Materials, Inc., No. 02-183-B-S, 2004 U.S. Dist. LEXIS 3845 (D. Me. Mar. 11, 2004) (discussing whether the City of Bangor is a responsible party with respect to a tar slick facility).

[64] *See infra* Part II.

[65] *See infra* Part II.

[66] *See infra* Part III.

cludes that municipal sewer communities can incur CERCLA liability for their pollution of rivers through CSOs.

Part IV examines the availability of possible defenses or exceptions, as enumerated within CERCLA, to liability for municipal polluters.[67] This section explains why a typical municipal sewer community is not entitled to any defenses or exceptions to CERCLA liability for its pollution of rivers through CSOs, despite possible arguments to the contrary.[68]

Part V discusses the reasons why CERCLA liability is a good method to encourage municipalities to stop polluting.[69] This section also addresses the possible policy objections to CERCLA liability for municipal pollution of rivers through CSOs.[70] After careful examination of these possible policy objections, however, it appears that they lack the force needed to outweigh the benefits of having such liability. Thus, this article recommends that CERCLA liability can and should attach to municipalities for their pollution of rivers through CSOs.

II. The Cleanup of Contaminated Sites Through the Imposition of CERCLA Liability

A. *CERCLA Liability, Generally*

In 1980, on the eve of President Reagan assuming office, Congress enacted CERCLA to provide a mechanism for the identification and cleanup of the releases of hazardous substances into the environment.[71] Enactment of CERCLA was partly a response to the extensive media coverage of the degradation of the envi-

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[67] *See infra* Part IV.

[68] *See infra* Part IV.

[69] *See infra* Part V.

[70] *See infra* Part V.

[71] William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 194 (1996). CERCLA was enacted in response to the "serious environmental and health risks resulting from the existence of inactive hazardous waste sites." United States v. Union Corp., 277 F. Supp. 2d 478, 485 (E.D. Pa. 2003) (citing United States v. Bestfoods, 524 U.S. 51, 55 (1998)); H.R. REP. NO. 96-1016(I), pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119. Since its enactment in 1980, CERCLA has been substantially amended. Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9601-75 (2000)).

ronment, specifically resulting from industries' slapdash disposal of toxic waste.[72] The most well-known of the many discoveries was the contamination found at the Love Canal site where it was believed that the contamination caused illness in children and birth defects.[73] Heightening the outrage was the fact that the Hooker Chemical Company, whose facility had caused the contamination, had transferred the waste disposal site for use as a school and playground to the local government.[74] CERCLA was Congress's answer to the nation's outrage.[75]

Congress had two goals in enacting CERCLA.[76] The first goal was the cleanup of our nation's hazardous waste sites.[77] The second goal, known as the "polluter pays" principle, was to place the cost of cleanup on those parties Congress had deemed responsible for the creation of such hazardous waste sites.[78] Consequently, the statute allows the President to direct federal cleanups of hazardous waste sites, and requires the EPA to compile a "National Priorities List," listing all hazardous waste sites that require immediate attention due to their potential threat to the environment and public health.[79] These sites are often known as Superfund sites.[80] At present, approximately 40,000 sites, contaminated by a hazardous substance(s), are "directly affected" by CERCLA.[81]

In order to achieve its dual goals, CERCLA holds responsible parties liable for the costs of cleanup.[82] The elements needed to establish that a party is liable under CERCLA are as follows: (1)

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[72] Araiza, *supra* note 71, at 201; *see* H.R. REP. NO. 96-1016(I), at 18-20 (discussing toxic waste sites throughout the country); HAROLD C. BARNETT, TOXIC DEBTS AND THE SUPERFUND DILEMMA 25, 60 (1994) (discussing the finding of groundwater contamination in California and Massachusetts and the 1980 explosion of a chemical facility in New Jersey).

[73] Araiza, *supra* note 71, at 201-02; *see* BARNETT, *supra* note 72, at 57-58.

[74] Araiza, *supra* note 71, at 202.

[75] *Id.*

[76] Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995).

[77] *Id.*

[78] *See id.* ("CERCLA's dual goals are to encourage quick response and to place the cost of that response on those responsible for the hazardous condition.").

[79] 42 U.S.C. § 9604 (2000).

[80] EPA, Superfund: Sites, http://www.epa.gov/superfund/sites/index.htm (last visited Jan. 20, 2006).

[81] FERREY, *supra* note 5, at 334.

[82] 42 U.S.C. § 9607.

the defendant falls within one of the four classes of "covered persons" listed in section 107(a) of CERCLA; (2) "hazardous substances were disposed of at a 'facility'" by the defendant; 3) "there has been a 'release' or 'threatened' release of hazardous substances from the facility into the environment;" and 4) the release caused the incurrence of "response costs."[83]

Any party liable under CERCLA can be held responsible for all cleanup costs[84] because the general consensus is that CERCLA allows for joint and several liability.[85] Because CERCLA allows the EPA to burden one responsible party with the total cost of cleanup, even if there are thousands of other responsible parties, it eliminates the "pressure on the EPA to identify every responsible party."[86] As a practical matter, the EPA has tended to pursue large companies with "deep pockets" instead of small businesses and municipalities.[87] Therefore, in many instances the EPA does not seek cleanup costs for a site from all of the responsible parties who are still in existence and solvent.[88]

So what is a CERCLA liable party, pursued by the EPA, to do when the EPA fails to pursue all responsible parties? In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA), which explicitly provides for a right of contribution.[89] Accordingly, a party, who has in fact been held liable under CERCLA, may seek reimbursement from other parties that could be held liable under section 107 of CERCLA.[90] Consequently,

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[83] *See* N.J. Tpk. Auth. v. PPG Indus., Inc., 197 F.3d 96, 103-04 (3d Cir. 1999) (stating the elements needed under 42 U.S.C. § 9607).

[84] 42 U.S.C. § 9607.

[85] Araiza, *supra* note 71, at 194 n.5; *see also* United States v. Colo. & E.R.R., 50 F.3d 1530, 1535 (10th Cir. 1995) ("It is . . . well settled that 107 imposes joint and several liability on PRPs regardless of fault."); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983) (holding that CERCLA liability is joint and several except when defendants can prove actual divisibility of harm).

[86] *See* Araiza, *supra* note 71, at 204.

[87] Frye, *supra* note 62, at 64. The present EPA policy is to refrain from initiating CERCLA enforcement actions against municipalities for the disposal of MSW, even if they are responsible parties. Fraccascia, *supra* note 59, at 1115.

[88] Araiza, *supra* note 71, at 204.

[89] Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9613(f)(1) (2000)).

[90] *Id.* It is important to note that a responsible party not sued "under CERCLA sections 106 or 107(a) may not obtain contribution under section 113(f)(1) from

SARA provides the CERCLA-liable party with deep-pockets the opportunity to seek contribution from all the other responsible parties.[91] However, such a third-party contribution defendant, by judicial precedent, is only severally liable, not jointly liable.[92]

B. *A Municipality May Be Held Liable Under CERCLA*

Throughout the 1990's a debate raged as to whether municipalities could be held liable under CERCLA for contribution,[93] despite that by 1989, the EPA had already identified 320 National Priority List sites that involved municipalities or municipal waste.[94] This section will discuss the potential liability of municipalities under the framework established by CERCLA.

1. Congress Intended for Municipalities to Be Held Liable Under CERCLA

In the 1990s many argued that Congress did not intend for municipalities to be held liable under CERCLA.[95] In the end, however, scholars and the courts agreed[96] that Congress intended

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other liable parties," even if the party has engaged in voluntary cleanup. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 165-69 (2004).

[91] 42 U.S.C. § 9613(f)(1).

[92] *Id.*; *see* United States v. Union Corp., 277 F. Supp. 2d 478, 485-86 (E.D. Pa. 2003); Saco Steel Co. v. Saco Def., Inc., 910 F. Supp. 803, 809 (D. Me. 1995) ("Liability for contribution under 113(f) is not joint but several."); N.J. Dept. of Envtl. Prot. & Energy v. Gloucester Envtl. Mgmt. Servs., 821 F. Supp. 999, 1004 (D.N.J 1993); United States v. Kramer, 757 F. Supp. 397, 414 (D.N.J. 1991); Araiza, *supra* note 71, at 206.

[93] Lisa M. Schenck, *Liability of Municipalities Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Is This a Legal Hazard to the Environment?*, 23 SETON HALL LEGIS. J. 1, 4 (1998).

[94] Superfund Program, Interim Municipal Settlement Policy, 54 Fed. Reg. 51,071, 51,074 (Dec. 12, 1989).

[95] *See* Schenck, *supra* note 93, at 6-7 (discussing some of the debates); Fraccascia, *supra* note 59, at 1103-05 (discussing why municipal liability for the disposal of MSW is inappropriate); Joshua B. Epel, *Evolving Issues Affect Municipal Solid and Hazardous Waste*, 19 CURRENT MUN. PROBS. 211, 215 (1991-1992) (explaining that the American Communities for Clean Up Equity formed due to a concern regarding municipal liability for the disposal of MSW).

[96] The courts have found municipalities liable in a variety of ways, including as owners or operators of landfills, as generators of waste disposal (meaning that the municipality contracted (i.e. arranged) for the disposal of residential trash) and as transporters of the waste who also selected the site of disposal. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) (holding municipalities liable in a CERCLA

to have the polluter pay, even when the polluter is a governmental entity.[97]

Congress made its intent clear through the plain language of CERCLA. Section 101, the definitions section of CERCLA, explicitly includes municipalities as "persons" who may incur statutory liability.[98] CERCLA defines a "person" as any "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."[99]

Other statutory provisions of CERCLA also demonstrate congressional intent to include municipalities as parties that can be held liable under CERCLA.[100] Congress exempted municipalities from CERCLA liability in certain instances, such as where:

> a municipality acquires ownership or control of a facility involuntarily as a result of its sovereign function . . . or where a municipality acts in response to an emergency caused by the release of hazardous substances from a facility owned by another

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action, as generators, and finding municipal solid waste a hazardous substance under CERCLA); Transp. Leasing Co. v. California, 861 F. Supp. 931 (C.D. Cal. 1993) (finding arranger liability for five county entities, for their disposal of hazardous substances, in a contribution action brought by private responsible parties that had previously settled with the EPA); *Gloucester Envtl. Mgmt. Servs.*, 821 F. Supp. at 999 (finding that municipalities are explicitly within CERCLA's definition of "persons"); Anderson v. City of Minnetonka, No. CV 3-90-312, 1993 U.S. Dist. LEXIS 4846 (E.D. Minn. 1993) (finding no exemption for CERCLA liability simply because taxpayers may have to pay for cleanup costs); New York v. City of Johnstown, 701 F. Supp. 33 (N.D.N.Y. 1988) (holding a municipality liable under CERLA as an owner or operator of a landfill); United States v. Seymour Recycling Corp., 554 F. Supp. 1334 (S.D. Ind. 1982) (finding a municipality liable under CERCLA as the owner or operator of a landfill).

[97] For example, in *Artesian Water Co. v. New Castle County,* 605 F. Supp. 1348, 1355 (D. Del. 1985), the District Court of Delaware held that Congress did not intend to differentiate between governmental entities, such as municipalities, and private persons, and as such, CERCLA treats a municipality as if it were a private person under section 101(21). *Id.*; *see also* FERREY, *supra* note 5, at 358.

[98] 42 U.S.C. § 9601(21) (2000). The Supreme Court has struck down the portion of CERCLA regarding state liability, holding that an individual suing a state for contribution is a violation of the 11th Amendment. Seminole Tribe v. Florida, 517 U.S. 44 (1996). However, an individual seeking contribution from a municipality is not doing so in violation of the 11th Amendment. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[99] 42 U.S.C. § 9601(21) (emphasis added).

[100] *See infra* text accompanying notes 101-107.

> party and does not act with gross negligence or willful misconduct . . . .[101]

This indicates that Congress did not intend to exempt municipalities altogether.[102]

Moreover, the repeated, yet failed, attempts of Congress to limit or eliminate altogether municipal CERCLA liability further confirm the understanding that municipalities can be held liable under CERCLA.[103] For example, in 1991 Congress contemplated the passage of the Toxic Cleanup Equity and Acceleration Act (TCEAA), which proposed to prohibit third-party suits against Municipal Solid Waste (MSW) generators and transporters.[104] The TCEAA also offered beneficial settlement opportunities to municipalities.[105] However, the TCEAA failed.[106] Representative Manton also proposed a bill to limit municipal liability (the Manton Bill), which limited municipal owner and operator liability to no more than twenty percent of cleanup costs (or up to thirty-five percent with "exacerbating factors").[107] The Manton Bill failed as well.[108] Thus, Congress clearly intended to include municipalities as responsible parties who may incur CERCLA liability.

2. Municipal Solid Waste is a "Hazardous Substance"

Critics of municipal liability also argued that CERCLA liability does not exist "for the disposal of everyday household garbage."[109]

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[101] B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1199 (2d Cir. 1992).

[102] *Id.*

[103] *See infra* text accompanying notes 104-108.

[104] H.R. 3026, 102d Cong. (1991). Representatives Torricelli and Drier introduced H.R. 3026 on July 24, 1991. *Id.*

[105] *Id.* "The proposed legislation would have codified the EPA's 1989 Municipal Settlement Policy, and offered a special settlement opportunity for municipal MSW generators and transporters requiring settlement with the EPA within 120 days." Schneck, *supra* note 93, at 18.

[106] Schneck, *supra* note 93, at 18.

[107] H.R. 3595, 105th Cong. (1998). Representative Thomas Manton (D-NY) introduced the bill on March 30, 1998. *Id.*; *see also* Schenck, *supra* note 93, at 19.

[108] Schneck, *supra* note 93, at 18.

[109] Fraccascia, *supra* note 59, at 1094-95; Matthew W. Ward, Presentation to the International Municipal Lawyers Association 1998 Annual Meeting, Municipal Superfund Liability: How Industry Is Trying to Dump Co-Disposal Landfill Liability on Localities Through Litigation and Lobbying (Nov. 9, 1998), *available at* http://www.spiegelmcd.com/pubs/imlaward_pub.htm.

The American Communities for Clean Up Equity (ACCE), a national municipal coalition, formed in response to concerns about municipalities being held liable under CERCLA for the disposal of MSW.[110] The goal of the ACCE was to eliminate municipal CERCLA liability "for the generation and transportation of MSW," especially in the context of contribution actions.[111] The ACCE argued that municipal waste does not fall under CERCLA because it is not a "hazardous substance."[112]

Despite the fact that there is no statutory exemption for household waste,[113] at the core of this debate was the composition of MSW. Those who opposed MSW being classified as a hazardous substance under CERCLA argued that because hazardous substances comprise only one percent of the weight of household waste, there should not be CERCLA liability for MSW.[114] However, the amount of hazardous substances released is irrelevant because CERCLA does not have a threshold "hazardous substance" requirement.[115] Thus, so long as household waste contains any percentage of a "hazardous substance," CERCLA liability will arise.[116]

In the end, the courts and Congress rejected the proposition that municipalities are not liable under CERCLA for the disposal of MSW.[117] For example, in *B.F. Goodrich Co. v. Murtha*,[118] the United States Court of Appeals for the Second Circuit held that municipalities are subject to liability under CERCLA for the disposal of MSW, so long as the MSW contains substances considered

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[110] Fraccascia, *supra* note 59, at 1094 n.10; Epel, *supra* note 95, at 215.

[111] Fraccascia, *supra* note 59, at 1094 n.10; *see also* Rena I. Steinzor & Matthew F. Lintner, *Local Governments and Superfund, 1992 Update: Who Is Paying the Tab?*, 24 URB. LAW. 51, 151-55 (1992) (discussing the ACCE and its reform proposal).

[112] *See* Fraccascia, *supra* note 59, at 1094-95.

[113] Norman A. DuPont, *Municipal Solid Waste: The Endless Disposal of American Municipalities Meets the CERCLA Strict Liability Dragon*, 24 LOY. L.A. L. REV. 1183, 1196-97 (1991).

[114] Schenck, *supra* note 93, at 29. "The EPA claims that 'approximately only one percent by weight of household waste is hazardous.'" *Id.* (quoting ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 284, 333 (2d ed. 1996)). However, because municipal waste is generated in very large volumes, hazardous waste presents a formidable environmental hazard. *Id.*

[115] *Id.* at 29 (citing United States v. Alcan Aluminum Corp., 964 F.2d 252, 259-62 (3d Cir. 1992); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1200 (2d Cir. 1992)).

[116] Dupont, *supra* note 113, at 1196-97.

[117] *See infra* text accompanying notes 118-121.

[118] 958 F.2d 1192 (2d Cir. 1992).

hazardous.[119] Moreover, Congress has now indicated that MSW is a "hazardous substance" in that Congress has exempted individual residences and small businesses from CERCLA liability for their generation of MSW,[120] but has not exempted municipalities from liability for the transportation or generation of MSW.[121] Thus, both the courts and Congress have clearly indicated that MSW is a "hazardous substance."

The debate over municipal liability under CERCLA resulted in a general understanding that such liability can exist.[122] The question that remains, however, is whether municipal liability is appropriate for municipal pollution of rivers, which occurs through CSOs.

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[119] *Id.* at 1206.

[120] 42 U.S.C. § 9607(p) (2000). The relevant portion of section 9607(p), entitled the "Municipal solid waste exemption," reads:

> (1) In general. Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is –
>
> (A) an owner, operator, or lessee of a residential property from which all of the person's municipal solid waste was generated with respect to the facility;
>
> (B) a business entity (including a parent, subsidiary, or affiliate of the entity), that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 *et seq.*)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or
>
> (C) an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

Id. (citations omitted).

[121] *Id.*

[122] *See supra* text accompanying notes 95-121.

III. A CERCLA-Liable Party Can Establish CERCLA Liability for Municipal River Pollution from CSOs

CERCLA achieves its goals by designating the criteria for a party to be a responsible party, who must implement and finance cleanup, but who may also seek contribution from other responsible parties.[123] As discussed earlier, section 107 of CERCLA establishes the elements needed to establish a prima facie case of CERCLA liability.[124] SARA authorizes a party held liable under section 107 of CERCLA to "seek contribution from any other person who is liable . . . under [section 107]."[125] Hence, the question is whether a municipality can be held liable under section 107 of CERCLA when an industrial CERCLA-liable party seeks contribution from the municipality under SARA since the EPA is unlikely to initiate a CERCLA action against a municipality.[126]

Municipalities can be held liable under CERCLA, in contribution actions, for the pollution caused by CSOs.[127] As noted before, in order to establish a prima facie case of CERCLA liability against a municipality for its role in CSOs, a plaintiff (i.e. a CERCLA-liable party with deep pockets) must establish that: (1) the defendant falls within one of the four classes of "covered persons" listed in section 107(a) of CERCLA; (2) "hazardous substances were disposed of at a facility;" (3) "there has been a 'release' or threatened release of hazardous substances from the facility into the environment;" and (4) the release caused the incurrence of "response costs."[128]

Each of the above elements presents a challenge to the establishment of CERCLA liability.[129] However, each challenge can be

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[123] 42 U.S.C. §§ 9607, 9613.

[124] *Id.* § 9607(a).

[125] *Id.* § 9613(f)(1); Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 160 (2004).

[126] The EPA's current policy is not to pursue municipal MSW generators and transporters. *See* Policy for Municipality and Municipal Solid Waste CERCLA Settlements as NPL Co-Disposal Sites, 63 Fed. Reg. 8197, 8198 (Feb. 18, 1998). Moreover, to date the EPA has not pursued any municipality for its pollution of rivers through CSOs, but has pursued industrial polluters of rivers.

[127] *See infra* text accompanying notes 134-217.

[128] N.J. Tpk. Auth. v. PPG Indus., Inc., 197 F.3d 96, 103-04 (3d Cir. 1999).

[129] *See infra* text accompanying notes 134-217.

overcome. In order to examine whether such liability can attach, a hypothetical is appropriate.[130] Assume that prior to 1920, all industrial and domestic sewage from Polluterville went directly into the Pristine River without treatment. In 1920, Polluterville, along with other municipalities, built a CSS along the Pristine River, which leads to a POTW. Polluterville intercepted the CSS with outpoles, an outpole being a line that brings untreated sewage into the CSS and serves as the exit ramps for the untreated sewage during CSOs. At each outpole there is a regulator, which is supposed to prevent untreated sewage from entering the Pristine River, except during precipitation events. Polluterville owns the outpoles and regulators located in Polluterville.

CSOs occurred from 1920 to 1975 without a permit, as permits were not required until passage of the Clean Water Act.[131] Starting in 1975, Polluterville obtained a NPDES permit, which allows it to release untreated sewage directly into the Pristine River during wet weather events, but not during dry weather. Unfortunately, like many CSOs, the regulators often malfunction, due to the age of the sewer system, and as a result, releases occur during dry weather, as well as during wet weather, in direct violation of the NPDES permit.[132]

The liability of Polluterville for its pollution of the Pristine River arises from three different pollution phases. The first pollution phase occurred when Polluterville released untreated sewage directly into the Pristine River prior to 1920. The second pollution phase occurred when Polluterville released untreated sewage into the Pristine River through CSOs prior to obtaining a permit in 1975. The third pollution phase began in 1975 and continues to the present. It transpired when Polluterville released untreated sewage directly into the Pristine River through CSOs during dry weather in direct violation of its NPDES permit and the CWA. In the end, Polluterville can be held liable under CERCLA for all three pollution phases.[133]

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[130] The hypothetical is based on that of a typical municipal sewer community.

[131] 33 U.S.C. §§ 1251, 1342 (2000). Despite that permits were not required, there were a number of state statutes that prohibited stream pollution, but they were not vigorously enforced.

[132] IMPACTS AND CONTROL, *supra* note 15, at 2-4, 6-12; *see supra* notes 39-40 and accompanying text.

[133] *See infra* text accompanying notes 134-242.

A. *Polluterville Is a "Covered Person" Under CERCLA*

To be liable, Polluterville must fall into one of the four categories of "covered persons" listed in section 107(a) of CERCLA.[134] The categories of "covered persons" are: (1) owners, (2) operators, (3) arrangers, and (4) transporters.[135] Despite possible objections, once analyzed, it becomes apparent that Polluterville falls within all of these categories, and therefore is a "covered person" under CERCLA.[136]

1. "Owner" Liability Can Attach to Polluterville

CERCLA imposes liability on the past or present owner of a facility at which "hazardous substances" were "released" or "disposed of."[137] Mere ownership of property during the time of a release is enough to establish ownership liability.[138] Moreover, in the one case that has dealt with CERCLA liability for a CSO (albeit a CSO that did not discharge into a Superfund river, but rather into a mudflat that is part of a Superfund site), the court held that the owner and operator of the CSO "at the time of the alleged releases of hazardous substances from the CSO into the mudflat area," is an "owner" for purposes of CERCLA liability.[139] Accordingly, Polluterville's mere ownership of the CSO outfall during the time of release makes it an "owner" for purposes of CERCLA liability.

2. "Operator" Liability Can Attach to Polluterville

Under CERCLA, "operator" liability attaches to any "person who at the time of disposal of any hazardous substance . . . operated any facility at which such hazardous substances were disposed of."[140] In *United States v. Bestfoods*,[141] the United States Supreme

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[134] 42 U.S.C. § 9607(a) (2000).

[135] *Id.* § 9607(a)(1)-(4). Both "owner" and "operator" liability applies to the current owners and operators, as well as the owners and operators of the facilities at the time of the disposal of the hazardous substance. FERREY, *supra* note 5, at 358.

[136] *See infra* text accompanying notes 137-172.

[137] 42 U.S.C. § 9607(a)(1)-(2); Lincoln Props. v. Higgins, 823 F. Supp. 1528, 1533 (E.D. Cal. 1992).

[138] United States v. A & N Cleaners & Launderers, Inc., 788 F. Supp. 1317, 1332 (S.D.N.Y. 1992); *Lincoln Props.*, 823 F. Supp. at 1533.

[139] United States v. Union Corp., 277 F. Supp. 2d 478, 488 (E.D. Pa. 2003).

[140] 42 U.S.C. § 9607(a)(2).

Court explained that to "operate" means to "direct the workings of, manage, or conduct the affairs of the facility."[142] The *Bestfoods* Court went on to state:

> To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.[143]

The *Bestfoods* Court concluded that "when [Congress] used the verb 'to operate,' we recognized that the statute obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities."[144] Given the *Bestfoods* decision, Polluterville is an "operator" for purposes of CERCLA liability because it continues to manage, direct, and conduct operations, specifically related to pollution, by maintaining, or rather failing to maintain, the regulators and outfalls, from which hazardous substances are released into the Pristine River.[145]

Those who oppose "operator" liability for Polluterville may argue that because the CWA and the Resource Conservation and

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[141] 524 U.S. 51 (1998).

[142] *Id.* at 66.

[143] *Id.* at 66-67.

[144] *Id.* at 71.

[145] *Id.* at 66-67. In *United States v. Union Corp.*, 277 F. Supp. 2d 478 (E.D. Pa. 2003), the District Court for the Eastern District of Pennsylvania held that the operator of a CSO is a covered person under CERCLA. *Id.* at 488. Maintenance ensures that there are not releases during dry weather events. IMPLEMENTATION, *supra* note 40, at 6-13. There are in fact "several methods" to alleviate dry weather overflows. *Id.* They are as follows:

> Adjusting regulator settings to keep peak dry weather flows within the combined sewer system; [r]epairing and rehabilitating regulators to correct problems; [m]aintaining regulators to remove dry weather overflow-producing blockages caused by trash and refuse; [m]aintaining tide gates and removing debris to ensure that the gates close properly to prevent tidal intrusions from entering the combined sewer system; [c]leaning interceptors to remove sediment, roots, and other objects that restrict flow; [r]epairing sewers to reduce groundwater infiltration.

Id. Also, it is important to note that with many CSOs, employees of the municipality must manually throw open the regulators during wet weather events to allow direct discharge into the river. Newark Water and Sewer, City of Newak Sewer System, http://www.ci.newark.nj.us/water/sewer.htm (last visited Mar. 22, 2006).

Recovery Act (RCRA)[146] permit the release of untreated sewage into the CSS, Congress did not intend for the sewer "operator" to be held liable for the releases from the CSOs because the untreated sewage was permitted to be in the CSS in the first place.[147] The defendants in *Westfarm Associates v. International Fabricare Institute*[148] made a similar argument.[149] In *Westfarm*, the Fourth Circuit held the Washington Suburban Sanitary Commission liable under CERCLA, as "operators," for the release of toxic substances through leaky joints and cracks in sewer pipes,[150] even though the commission did not make the decision to release toxic substances into the municipal sewer system.[151] The Fourth Circuit reasoned that the CWA and RCRA serve different purposes than CERCLA: the CWA and RCRA are "preventative," whereas CERCLA is "curative."[152] The court went on to state:

> It does not follow that because the environmental risk posed by household waste is deemed insufficient to justify the most stringent regulations governing its day-to-day handling that the environmental harm caused when that risk is realized is insufficient to require holding liable those responsible for that harm . . . . Even total compliance with [RCRA] regulations will not prevent releases or avoid CERCLA liability.[153]

Therefore, although Polluterville did not decide to release untreated sewage into the CSS, the sound analysis set forth by the Fourth Circuit in *Westfarm* supports a finding that "operator" liability is appropriate for Polluterville.

3. "Arranger" Liability Can Attach to Polluterville

CERCLA imposes "arranger" liability on "any person who by

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[146] Resource Conservation and Recovery Act (RCRA) of 1976, Pub. Law. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992 (2000)). RCRA provides a mechanism which ensures that the method of disposal of hazardous waste prevents the escape of those wastes into the environment. *Id.*

[147] *See infra* text accompanying notes 148-153.

[148] Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst., 66 F.3d 669 (4th Cir. 1999), *cert. denied*, 517 U.S. 1103 (1996).

[149] *Id.* at 677.

[150] *Id.* at 674.

[151] *Id.*

[152] *Id.* at 679.

[153] *Id.* (citing B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1202-03 (2d Cir. 1992)).

contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances."[154] Arranger liability can attach even "if the 'arranger' does not own or physically possess the hazardous substances," so long as the "arranger" constructively possesses the materials.[155] For example, a municipality can be held liable for supervising the transportation or disposal of hazardous materials.

The courts have not adopted a uniform standard for determining whether a person is an "arranger" under CERCLA.[156] In *United States v. TIC Investment Corp.*,[157] the Eighth Circuit held that a person is an "arranger" "if he or she has the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances."[158] However, according to the Sec-

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[154] 42 U.S.C. § 9607(a)(3) (2000). A person can be still be liable as an arranger with or without knowledge that hazardous substances would be deposited at the particular site. United States v. Hardabe, 761 F. Supp. 1501, 1511 (W.D. Okla. 1990).

[155] Steven G. Davison, *Governmental Liability Under CERCLA*, 25 B.C. ENVTL. AFF. L. REV. 47, 78-79 (1997) (citing United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986)).

[156] United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 n.8 (8th Cir. 1989); *see also* Davison, *supra* note 155, at 79 ("The Supreme Court has not adopted standards of criteria for determining arranger liability under section 107(a)(3), but lower courts interpret section 107(a)(3) liberally to hold liable all persons who profit from the generation and disposal of hazardous substances.").

[157] 68 F.3d 1082 (8th Cir. 1995).

[158] *Id.* at 1089. In other words, "if [a] person had the authority to control, and did in fact exercise actual or substantial control over, the arrangement for disposal, or the off-site disposal, of hazardous substances, without proof that the person had the specific intent to arrange for the disposal of hazardous substances," that person is an "arranger." Davison, *supra* note 155, at 79. Under this test, liability can attach without even having proof that the person "personally participated in, or had any knowledge or awareness of, arrangements for disposal of hazardous substances at the facility." *Id.* The Eighth Circuit provided an additional test for arranger liability. *Aceto Agric.*, 872 F.2d at 1373. According to Davison, under the *Aceto* test, a person is an arranger if:

> (1) that person supplied raw materials to another manufacturer's facility which the person had hired to produce a final product; (2) that person retained ownership of those raw materials, the work in progress, and the final product; and (3) that person knew that the generation of hazardous substances was inherent in that other manufacturer's production process.

Davison, *supra* note 155, at 79 (citing *Aceto Agric.*, 872 F.2d at 1373).

ond Circuit, "arrangers" are those persons who had the obligation and the authority to arrange for disposal of a hazardous substance, even if they did not exercise that authority and/or were not involved in arranging for the actual disposal and treatment.[159]

The Third Circuit, however, provides the most comprehensive test for determining arranger liability.[160] In *Morton International, Inc. v. A.E. Staley Manufacturing Co.*,[161] the Third Circuit set forth a three-part test for determining arranger liability: (1) ownership or possession of a material by the defendant; *and* (2) the defendant's knowledge that hazardous waste can or will be released in the course of the process it has arranged for; *or* (3) the defendant's control over the process.[162] Because the Third Circuit appears to have provided the most comprehensive and clear test for determining arranger liability, in order to determine arranger liability for Polluterville, one should apply the *Morton* test.

When applying the *Morton* test to Polluterville, the first issue is what "ownership" or "possession" means, as found in step one of the test. "Ownership . . . can be either actual or constructive."[163] Polluterville does not have "actual ownership" of the untreated sewage, but perhaps it has "constructive ownership" of the untreated sewage.

Courts have applied two different tests to determine constructive ownership: (1) whether the defendant had sufficient control over the waste; or (2) whether the defendant had a sufficient nexus with the actual waste owner.[164] "Evidence that a defendant selected a site for disposal can demonstrate constructive owner-

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[159] *See* Gen. Elec. Co. v. AAMCO Transmission, Inc., 962 F.2d 281, 286 (2d Cir. 1992).

[160] Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 677 (3d Cir. 2003).

[161] *Id.* at 669.

[162] *Id.* at 677.

[163] Transp. Leasing Co. v. California, 861 F. Supp. 931, 949 (C.D. Cal. 1993) (holding that ownership can be either actual or constructive).

[164] *Id.* at 949; Hassayampa Steering Comm. v. Arizona, 768 F. Supp. 697, 702 (D. Ariz. 1991).

> [T]he standard established by prior case law for determining when a non-generator will be constructively held to have owned or possessed the waste requires that the alleged arranger have some nexus with the actual owner, usually evidenced by having the authority to decide on behalf of the owner where the waste would be deposited.

Id. at 702.

ship or possession."[165] Because Polluterville selected the sites for the disposal of the waste, it has constructive ownership of the waste, satisfying the first factor of the *Morton* test.

The second issue for Polluterville is whether the term "process," as used in the second part of the *Morton* test, is limited to those processes that lead to the *generation* of hazardous waste. Although the "arranger" argument is most often utilized to impose liability on the generators of hazardous waste, arranger liability is not so limited.[166] The courts have concluded that a liberal interpretation of section 107(a)(3)'s "arranged for" language agrees with CERCLA's remedial intentions.[167] For example, in *City of Bangor v. Citizens Communications Co.*,[168] the Federal District Court of Maine held the City of Bangor liable under CERCLA as an "arranger" because it had exercised its powers of eminent domain, in the mid-nineteenth century, to facilitate the construction of a sewer drain that carried away tar-laden wastewater and emptied into the Penobscot River.[169] Accordingly, the term "process" need not be limited to situations where the "process" leads to the *generation* of hazardous waste. Thus, because Polluterville had knowledge that the hazardous waste could and would be released into the Pristine River through the process it had arranged for, the second part of the *Morton* test is satisfied.

The third issue for Polluterville is whether the defendant has control over the process, as required by the third step of the *Morton* test. Because Polluterville controls the process of bringing the hazardous waste to the treatment facility, as well as the CSOs, the

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[165] *Transp. Leasing*, 861 F. Supp. at 952; *Hassayampa*, 768 F. Supp. at 702.

[166] City of Bangor v. Citizens Commc'ns Co., No. 02-183-B-S, 2004 U.S. Dist. LEXIS 3845 (D. Me. 2004); United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987); William B. Johnson, Annotation, *Arranger Liability of Nongenerators Pursuant to §107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9607(a)(3))*, 132 A.L.R. FED. 77, 103-04 (1996).

[167] United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 n.8 (8th Cir. 1989); *Citizens Commc'n*, 2004 U.S. Dist. LEXIS 3845, at *51 (holding the City of Bangor liable under CERCLA as an "arranger").

[168] *Citizens Commc'ns*, 2004 U.S. Dist. LEXIS 3845, at *1.

[169] *Id.* at *48-49. It is important to note that the *Citizens Communications* case does not decide fully the issue of whether CERCLA liability should attach to a municipality for its pollution of a river through CSOs because the case addresses only whether the City of Bangor is a "covered person," and the facts differ from the facts presented by the story of Polluterville.

third step is satisfied. Therefore, "arranger" liability can attach to Polluterville for its pollution of the Pristine River through CSOs.

4. "Transporter" Liability Can Attach to Polluterville

Polluterville can also be held liable under CERCLA as a "transporter." CERCLA imposes "transporter" liability on those who accept hazardous substances for transport to a site selected by that person.[170] For "transporter" liability to attach, the party must have selected the disposal facility.[171] However, "a person is liable as a transporter not only if it ultimately selects the disposal facility, but also when it actively participates in the disposal decision to the extent of having had substantial input into which facility was ultimately chosen."[172] Polluterville has accepted, and continues to accept, hazardous substances for transport to the CSS, as well as on to the POTW. In addition, Polluterville selected the disposal sites, as evidenced by the fact that it constructed the CSS. As such, "transporter" liability can attach to Polluterville.

B. *Polluterville Disposed of "Hazardous Substances" at a "Facility"*

1. The Untreated Sewage from a CSO Is a "Hazardous Substance" or Contains "Hazardous Substances"

For liability to attach under CERCLA a "covered person" must have disposed of "hazardous substances" at a "facility."[173] Hence, one must determine whether untreated sewage from a CSO is a "hazardous substance," or if it contains "hazardous substances." CERCLA defines a "hazardous substance" as a substance that is so designated by the EPA pursuant to section 9602 of CERCLA or by one of four other environmental statutes.[174] As a result, there are

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[170] 42 U.S.C. § 9607(a)(4) (2000).

[171] Tippins Inc. v. USX Corp., 37 F.3d 87, 94 (3d Cir. 1994).

[172] *Id.*

[173] 42 U.S.C. § 9607.

[174] 42 U.S.C. § 9601(14). The term "hazardous substance" means:
(A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act, (C) 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 Dis-

over 700 "hazardous substances" for purposes of CERCLA liability.[175] Congress explicitly excluded *only* two substances from the definition of hazardous substances: natural gas and oil.[176] "[T]he definition makes no distinction dependent upon whether the substance's source was industrial, commercial, municipal or household."[177] Likewise, quantity or concentration of the hazardous substance is irrelevant, as mere presence is enough to trigger liability.[178] Therefore, given that untreated sewage released from a CSO contains waste from industrial, commercial, and domestic sources, it seems likely that at least one of the 700 hazardous substances is present. Thus, the untreated sewage released into the Pristine River through the CSOs is a "hazardous substance" or contains "hazardous substances" for purposes of CERCLA liability.[179] Moreover, although no court has been faced with the question of whether untreated sewage is a "hazardous substance" under CERCLA, Congress's failure to explicitly exempt it, as it did with natural gas and oil, demonstrates that Congress wanted to include untreated sewage as a "hazardous substance" under CERCLA.[180]

It is important to note that because RCRA[181] provides a domes-

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posal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id. (citations omitted).

[175] B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1200 (2d Cir. 1992).

[176] 42 U.S.C. § 9601(14); *Murtha*, 958 F.2d at 1200.

[177] *Murtha*, 958 F.2d at 1200.

[178] *Id.*

[179] *See* Designation of Hazardous Substances, 40 C.F.R. § 302.4 tbl.302.4 (2005).

[180] *Murtha*, 958 F. 2d at 1200.

[181] Resource Conservation and Recovery Act (RCRA) of 1976, Pub. Law No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992 (2000)). RCRA sets up a system for the management of hazardous waste to ensure that the method of disposal prevents the escape of the hazardous waste into the environment. *Id.* The statute also provides an enforcement mechanism. *Id.*

tic sewage and mixtures exception to liability, thereby exempting public sewer system authorities from RCRA liability, some argue that there is an implicit exemption under CERCLA as well.[182] However, the fact that RCRA has a domestic sewage exception does not mean that there is a domestic sewage exception under CERCLA too.[183] In fact, the existence of RCRA's domestic sewage exception supports the opposite conclusion.[184] Congress created the RCRA domestic sewage exception prior to its enactment of CERCLA.[185] Yet, when it created CERCLA, it failed to provide a domestic sewage exception.[186] Thus, the fact that Congress failed to create such an exception shows that Congress did not intend to provide a domestic sewage exception to CERCLA liability.[187]

Moreover, the courts have rejected similar arguments made by municipalities regarding RCRA's municipal solid waste exception.[188] In *B.F. Goodrich Co. v. Murtha*,[189] the Second Circuit addressed the question of whether RCRA's municipal solid waste exception limited CERCLA's definition of a hazardous substance.[190] The municipalities argued that Congress intended for RCRA's exception of household hazardous waste to be incorporated, through CERCLA section 101(14)(C), into CERCLA's definition of a hazardous substance.[191] The Second Circuit rejected the argument, holding that RCRA's exclusion of municipal solid waste does not apply to CERCLA's definition of a hazardous substance.[192]

2. Both Combined Sewer Systems and Combined Sewer Overflows Are "Facilities" Under CERCLA

CERCLA liability requires a covered person to dispose of a

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[182] Peter R. Hinckley, Comment, *State and Municipal Sewer System Authority Liability Under CERCLA: Who Should Pay for the Cleanup of Hazardous Industrial and Commercial Sewer Discharges?*, 22 B.C. ENVTL. AFF. L. REV. 89, 99 (1994).

[183] *Id.* at 101.

[184] *Id.*

[185] 42 U.S.C. § 6903 (2000).

[186] 42 U.S.C. § 9601.

[187] Hinckley, *supra* note 182, at 101.

[188] *Id.*

[189] 958 F.2d 1192 (2d Cir. 1992).

[190] *Id.* at 1203.

[191] *Id.*

[192] *Id.*

"hazardous substance" at a "facility."[193] Therefore, one must determine whether CSSs or CSOs are "facilities."[194] CERCLA defines a "facility" as:

> (A) any building structure, installation, equipment, *pipe or pipeline (including any pipe into a sewer of publicly owned treatment works)*, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling tock, or aircraft, or; (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.[195]

CSSs and CSOs are unquestionably facilities under subsection (B). Courts have interpreted the language of subsection (B) to mean that the term "facility" includes "every conceivable place where hazardous substances come to be located."[196] Given the broad definition, it is clear that sewer lines qualify as subsection (B) facilities because they are places where a hazardous substance has come to be located.

Some debate, however, exists as to whether CSSs and CSOs are "facilities" pursuant to subsection (A).[197] CSO defendants have argued that CSOs are not subsection (A) facilities. For instance, in *Westfarm,* the Washington Suburban Sanitary Commission defendants argued that Congress excluded sewers and POTWs from subsection (A) facilities.[198] In addition, the only scholar to address the issue agrees with these defendants, writing that: "the language of [subsection (A) of] the statute implies Congressional intent to exclude POTWs and their sewer lines from the meaning of 'facility;' [because] to read the statute otherwise renders the relevant language of the statute devoid of any meaning."[199]

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[193] N.J. Tpk. Auth. v. PPG Indus., Inc., 197 F.3d 96, 103-04 (3d Cir. 1999).

[194] It is important to note that the issue is not whether the river is the "facility," but whether the CSS or CSO is a "facility."

[195] 42 U.S.C. § 9601(9)(A)-(B) (2000) (emphasis added).

[196] Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1151 (1st Cir. 1989); United States v. Meyer, 120 F. Supp. 2d 635, 638-39 (W.D. Mich. 1999).

[197] *See infra* text accompanying notes 198-206.

[198] Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n, 66 F.3d 422, 429-30 (4th Cir. 1995), *cert. denied,* 517 U.S. 1103 (1996).

[199] *See* Frye, *supra* note 62, at 76-79 (arguing that although the term "facility" is defined broadly, "the language of the statute implies Congressional intent to exclude POTWs and their sewer lines from the meaning of 'facility'"). Frye posits that the rules of statutory construction require that a court first look to the plain statutory

When examined, however, it appears that CSSs and CSOs could be subsection (A) "facilities."[200] The question of whether CSSs and CSOs are subsection (A) "facilities" turns on whether they are "pipe or pipeline" or "sewers." If the CSOs are "pipe or pipeline" they undoubtedly fall within subsection (A)'s definition of "facilities."[201] However, if they are "sewers," one must look to the canons of construction to determine whether they are "facilities."

The principal argument made in favor of excluding sewers from subsection (A)'s definition is that Congress did not intend to include sewers or POTWs in subsection (A)'s definition because the parenthetical language of subsection (A), "including any pipe into a sewer or publicly owned treatment works," would then be mere surplusage.[202] To conclude that CSOs are "facilities" would be to ignore the traditional maxim of statutory interpretation, that the inclusion of one is the exclusion of the other.[203]

This argument, however, is unfounded and the few courts that have addressed the question rejected this conclusion.[204] The

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language. *Id.* He notes that the plain language rule does not offer assistance in this situation, so the court must look to "two other rules of statutory construction applied in tandem." *Id.* at 77. The first is "that each word in a statute must be given effect," and "[s]econd, a proviso generally applies to the clause that immediately precedes it." *Id.* at 78. Thus, although a sewer line is a "pipe or pipeline" in the plain understanding of those words, the proviso "including any pipe into a sewer or publicly owned treatment works," which follows the term "pipe or pipeline," should be understood as excluding sewers from the term "facility." *Id.*

[200] *See infra* text accompanying notes 201-206.

[201] 42 U.S.C. § 9601(9)(A)-(B) (2000).

[202] United States v. Union Corp., 277 F. Supp. 2d 478, 486 (E.D. Pa. 2003).

[203] *Westfarm*, 66 F.3d at 678.

[204] *Id.* at 669 (holding that POTWs, like sewers, are subsection (A) facilities); *see also Union Corp.*, 277 F. Supp. 2d at 486 (holding that Congress did not intend to exclude sewers from its subsection (A) definition of "facilities"). In *Westfarm*, the court reasoned that:

> Congress expressly abrogated state sovereign immunity under CERCLA, thereby subjecting "facilities" owned and operated by state governments to liability. A narrow exception to the definition of "owner or operator," however, was carved to exclude state and local governments from liability when they have acquired ownership of a facility involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title. The traditional maxim of statutory interpretation that the inclusion of one is the exclusion of the other, reminds us that if Congress has intended to exclude state and local governments from liability in other situations such as when they, through their POTWs, are otherwise liable under CERCLA Congress would have

canons of construction require that courts read a statute as a whole, which leads to the conclusion that CSOs are "facilities."[205] As noted by the Fourth Circuit, it appears that Congress included the language, "including any pipe into a sewer or publicly owned treatment works," not to exclude sewers and POTWs from subsection (A) "facilities," but rather to "emphasize the point that pipes leading into sewers are the responsibility of the owner or operator of the pipes, not the sewer or POTW."[206] Thus, application of the canons of construction actually reveals that CSOs and CSSs are subsection (A) "facilities."

C. *Polluterville's CSOs Constitute "Releases"*

CSOs fall within CERCLA's definition of a "release."[207] CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."[208] A liberal interpretation of CERCLA's definition of "release" is appropriate because courts consistently give the term a liberal reading and reject attempts to limit CERCLA's reach through restrictive interpretations.[209] Accordingly, the term "release" encompasses the "entire

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> either: (a) excluded all state and local governments from the definition of "owner or operator," rather than limiting the exclusion to the involuntary acquisition situation; or (b) included POTWs in the list of entities excluded from the definition of "owner or operator."

Westfarm, 66 F. 3d at 678.

[205] United States v. Thompson/Center Arms Co., 504 U.S. 505, 512 n.5 (1992) (holding that the "normal canons of construction caution [courts] to read the statute as a whole."); *Westfarm*, 66 F.3d at 678.

[206] *Westfarm*, 66 F.3d at 678.

[207] If there is a release of a hazardous substance from a facility, it must also cause the incurrence of response costs necessary and consistent with the National Contingency Plan. Castiac Lake Water Agency v. Whittacker Corp., 272 F. Supp. 2d 1053 (C.D. Cal. 2003). It is not necessary to establish that any particular waste, once in the custody of Polluterville, caused the incurrence of response costs. Rather, it is sufficient to provide that contaminants, once in the custody of Polluterville, could have traveled into the Pristine River, and that subsequent contaminants in the Pristine River, chemically similar to the contaminants once in Polluterville's CSOs, caused the incurrence of cleanup costs. *See* Lincoln Props. v. Higgins, No. S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *71 (E.D. Cal. Jan. 21, 1993).

[208] 42 U.S.C. § 9601(22) (2000).

[209] *See, e.g.*, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989); Lincoln Props. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992); United States v. Hardage, 761 F. Supp. 1501, 1510 (W.D. Okla. 1990); Amland Props. Corp. v. Aluminum Co.

universe of ways in which hazardous substances may come to exist in the environment."[210]

Some argue, however, that there can be only one release of the hazardous substance into the environment, meaning that only the person who first introduces the hazardous substance into the environment can be held liable under CERCLA.[211] This argument lacks merit for several reasons. First, the weight of judicial authority indicates that there can be more than one "release" of a hazardous substance.[212] Second, the "one release" argument is inconsistent with the language and structure of CERCLA since nothing in the statutory language suggests that a release can occur only once.[213] Third, the "one release" concept would effectively introduce, through the definition of "release," a new defense to liability, ignoring that Congress has carefully set forth "specific and limited defenses to liability in a separate statutory section."[214] Lastly, the "one release" argument directly conflicts with Congress's ex-

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of America, 711 F. Supp. 784, 793 (D.N.J. 1989).

[210] *Lincoln Props.*, 823 F. Supp. at 1536.

[211] *See id.* at 1537; *see also* Tanglewood E. Homeowners v. Charles-Tomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).

[212] *Lincoln Props.*, 823 F. Supp. at 1537; *see Tanglewood*, 849 F.2d at 1573 (holding that developers who spread contaminated soil over a site could be liable under CERCLA, even though they did not introduce the hazardous substances into the environment in the first place); *Shore Realty*, 759 F.2d at 1045 (holding that "the leaking tanks and pipelines, the continued leaching and seepage from the earlier spills, and the leaking drums all constitute 'releases'").

> The statutory language does not suggest that the release of a substance occurs only once if the substance is migrating, or that liability is limited to the owner or operator that introduced the substance initially or was the source of the substance, or that a "passive" owner or operator is exempted from the Act. These concepts are not incorporated expressly or otherwise in the statutory definition of release. If Congress had intended such a limitation surely such language would appear in the statute.

Lincoln Props., 823 F. Supp. at 1536.

[213] *Lincoln Props.*, 823 F. Supp. at 1536. In *Lincoln Properties*, a shopping center owner and the center's dry cleaning tenants sought recovery from the county, under CERCLA, for cleanup costs of property that became contaminated when PCE entered groundwater due to an alleged CERCLA release from county owned "facilities." *Id.* at 1535. The county argued that under CERCLA there can be but one release, which occurred when the dry cleaners placed the PCE into the sewer pipes. *Id.* at 1536. The county argued further that any subsequent migration of the PCE, to and from other lands, was not another release, "so long as the adjoining facility owner remained passive." *Id.*

[214] *Id.*

press intent.[215] In section 107(p), the "Municipal Solid Waste Exemption," Congress explicitly excludes residential property owners, operators, or lessees from liability under CERCLA for their generation of municipal solid waste, even though they are the first parties to introduce the hazardous substances into the environment.[216] As such, with respect to municipal solid waste, Congress has clearly exempted the first person to introduce the hazardous substance into the environment, thus showing that there can be liability for more than just the first release. Therefore, the "one release" argument directly conflicts with congressional intent because in some situations Congress itself has exempted from liability those who cause the first release.

Thus, although Polluterville may try to argue that the discharge of untreated sewage from the CSOs does not constitute a "release" because there can be only a single release, which occurs when someone else introduces the untreated sewage into the environment for the first time, CSOs do constitute "releases."[217] As a result, Polluterville did "release" the hazardous substances for purposes of CERCLA liability.

D. *A Summary of CSO Liability Under CERCLA*

A CERCLA-liable party can establish a prima facie case of CERCLA liability against Polluterville for its pollution of the Pristine River. First, Polluterville falls within at least one, if not all, of the classes of "covered persons" listed in section 107(a) of CERCLA. Second, untreated sewage from a CSO is a "hazardous substance" that was or is being disposed of at a "facility." Third, there has been a "release" of a hazardous substance from the facil-

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[215] *See infra* text accompanying note 216.

[216] 42 U.S.C. § 9607(p)(1)(A) (2000).

> In general. Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is – (A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility.

Id.

[217] *See supra* text accompanying notes 211-216.

ity into the environment. Therefore, assuming the CSOs cause the incurrence of response costs, the question then is whether any defenses are available to Polluterville.

IV. Defenses or Exceptions to CERCLA Liability Are Not Available to Polluterville

CERCLA provides many defenses and exceptions to liability, but only two are arguably applicable to this situation: (1) the innocent landowner defense; and (2) the federally permitted release exception.[218] This section will examine whether the innocent landowner defense or the federally permitted release exception can protect Polluterville from liability under CERCLA.

A. *The Innocent Landowner Defense Is Not Available to Polluterville*

The innocent landowner defense provides that

> [t]here shall be no liability . . . for a person . . . who can establish by a preponderance of the evidence that the release [and the resulting damages] were caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . .[219]

If a third party is the sole cause, the defendant must also establish, by a preponderance of the evidence, that:

> (a) [the defendant] exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) [the defendant] took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[220]

Hence, for Polluterville to receive the protection provided by the innocent landowner defense, it must demonstrate: (1) that an-

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[218] 42 U.S.C. §§ 9607(b), (j).

[219] *Id.* § 9607(b)(3).

[220] *Id.*

other party was the "sole cause" of the release of hazardous substances and the subsequent damages; (2) that the other responsible party did not cause the release in connection with a contractual, employment, or agency relationship with the municipality; and (3) that the municipality "exercised due care with respect to the hazardous substance" and took reasonable precautions against the foreseeable consequences of those acts.[221] Applying the aforementioned three-part test, Polluterville is not an "innocent landowner."

1. Another Party Was Not the "Sole Cause" of the Release

The courts have taken three different approaches to determine what Congress meant by the "caused solely by" language used in section 107(b)(3).[222] The first and most common approach incorporates the concept of legal or proximate cause into the "caused solely by" language.[223] Under this approach, the innocent landowner defense is available when "the defendant's release was not foreseeable, and if its conduct—including acts as well as omissions—was 'so indirect and insubstantial' in the chain of

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[221] *Id.*; Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n, 66 F.3d 669, 682 (4th Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996); Carson Harbor Vill., Ltd. v. Unocal Corp., 287 F. Supp. 2d 1118, 1179 (C.D. Cal. 2003). In *Union Corp.*, the District Court for the Eastern District of Pennsylvania determined that a third party defense is available to an owner who can show by a preponderance of the evidence that:

> 1) the release or threat of release of a hazardous substance, and the damages resulting therefrom "were caused solely by another party," unrelated to the owner by employment, agency, or contract; and 2) the owner (a) "exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances," and (b) "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions."

United States v. Union Corp., 277 F. Supp. 2d 478, 487 (E.D. Pa. 2003) (interpreting 42 U.S.C. § 9607(b)(3)). Although the *Union Corp.* court breaks down the analysis in a unique way, it appears to require a showing of the same elements.

[222] *See infra* note 223.

[223] Lincoln Props. v. Higgins, 823 F. Supp. 1528, 1542 (E.D. Cal. 1992). The second approach is a "but for" causation standard. United States v. Poly-Carb., Inc., 951 F. Supp. 1518, 1530-31 (D. Nev. 1996) (holding that if the release would not have happened but for the defendant's actions, "then an intervening third party act will not exonerate the defendant"). The third approach is a combination of the proximate or legal cause approach and the "but for" causation standard. G.J. Leasing Co. v. Union Elec. Co., 854 F. Supp. 539, 567 (S.D. Ill. 1994).

events leading to the release . . . ."[224] In our hypothetical, Polluterville's release was foreseeable, Polluterville's actions were not indirect or insubstantial, and the release would not have happened without Polluterville's actions. Accordingly, the innocent landowner defense is unavailable.

2. The "Sole Cause" Did Not Cause the Release in Connection with a Contractual, Employment, or Agency Relationship

The second part of the innocent landowner test asks whether the party identified as the "sole cause" caused the release in connection with a contractual, employment, or agency relationship with the municipality.[225] With respect to municipal pollution of rivers through CSOs, there is no other party that is the "sole cause," and as such, the second part of the test is inapplicable. However, even if Polluterville is able to show that those persons who placed hazardous substances into the CSS were the "sole cause," those other parties caused the release in connection with a contractual relationship with Polluterville. Hence, Polluterville fails the second part of the three-part innocent landowner test.

3. Polluterville Did Not Exercise Due Care with Respect to the Hazardous Substance and Did Not Take Reasonable Precautions Against the Foreseeable Consequences of Those Acts

The third part of the innocent landowner test asks whether the municipality "exercised due care with respect to the hazardous substance" and took reasonable precautions against the foreseeable consequences of those acts.[226] Polluterville did not, and still does not, exercise due care with respect to the untreated sewage, nor has it taken reasonable precautions against the foreseeable

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[224] *Lincoln Props.*, 823 F. Supp. at 1540-42. Several district courts adopted the proximate or legal cause standard announced by the *Lincoln Properties* court. *See, e.g.*, Castiac Lake Water Agency v. Whittacker Corp., 272 F. Supp. 2d 1053, 1082 (C.D. Cal. 2003); Advanced Tech. Corp. v. Eliskim, Inc., 96 F. Supp. 2d 715, 718 (N.D. Ohio 2000); United States v. Meyer, 120 F. Supp. 2d 635, 640 (W.D. Mich. 1999); United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1263, 1274 (E.D. Cal. 1997).

[225] 42 U.S.C. § 9607(b)(3) (2000).

[226] *Id.*

consequences of its acts. By the latter part of the nineteenth century, the hazards associated with untreated sewage were well known to the populace.[227] In the 1880s and 1890s, "the rate of typhoid deaths rose in cities with drinking water intakes downstream of untreated wastewater discharges."[228] Additionally, "[b]acterial analysis confirmed the link between sewage pollution in rivers and epidemics of certain diseases."[229] Large cholera outbreaks, which killed thousands of people, were also linked with sewage-contaminated water supplies.[230] Therefore, for those years that Polluterville discharged all untreated sewage directly into the Pristine River, the municipality did not exercise due care with respect to the hazardous substance and did not take reasonable precautions against the foreseeable consequences of those acts.

And, the fact that CSOs continue to leak untreated sewage directly into rivers during dry weather events, despite the installment of POTWs,[231] is further evidence of a failure to satisfy the third prong of the innocent landowner test. Therefore, because Polluterville cannot satisfy any part of the three-part innocent landowner defense, Polluterville is not an innocent landowner.

B. *The Federally Permitted Release Exception Will Not Protect Polluterville from CERCLA Liability*

Congress exempts certain "federally permitted" releases from the strict liability scheme of CERCLA.[232] Under this exception, neither the EPA nor another responsible party can recover response costs for any releases caused by another person that are "federally permitted."[233]

Federally permitted releases include discharges in compliance with the CWA.[234] As discussed earlier, under the CWA, "certain pollutant discharges are illegal unless they are in compliance

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[227] IMPACTS AND CONTROL, *supra* note 15, at 2-3.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] For a discussion of the frequency of dry weather releases see *supra* notes 39-40.

[232] 42 U.S.C. § 9607(j) (2000); Carson Harbor Vill., Ltd. v. Unocal Corp., 287 F. Supp. 2d 1118, 1183 (C.D. Cal. 2003); Lincoln Props. v. Higgins, No. S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *76-77 (E.D. Cal. Jan. 21, 1993).

[233] 42 U.S.C. § 9607(j).

[234] *Id.* § 9601(10)(A).

with an NPDES permit."[235] Therefore, if a release occurs in compliance with a NPDES permit, the "federally permitted release" exception protects the release from CERCLA liability.[236] However, if some releases are in compliance with NPDES permits and others are not, the EPA or another responsible party can recover, so long as they can show that the releases that were not federally permitted contributed to the natural injury.[237]

Notwithstanding the fact that most municipalities have had permits since the 1970s, today many pollutant discharges from CSOs are still not in compliance with NPDES permits at all relevant times.[238] Most NPDES permits incorporate the nine EPA-recommended minimum controls for CSOs.[239] Yet some CSOs release during dry weather,[240] in direct violation of the fifth minimum control, which requires the "[e]limination of CSOs during dry weather."[241] Therefore, the federally permitted release exception to CERCLA liability will not always protect municipalities from CERCLA liability for pollution of rivers through CSOs.

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[235] *Carson Harbor*, 287 F. Supp. 2d at 1183; 33 U.S.C. §§ 1311(a), 1342 (2000).

[236] 42 U.S.C. § 9607(j).

[237] *Carson Harbor*, 287 F. Supp. 2d at 1183; United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1540 (E.D. Cal. 1993); *In re* Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 897 (D. Mass. 1989). It is important to note that it should not be difficult to show that those releases that were not federally permitted contributed to the natural injury given that the releases that were not federally permitted include all releases prior to the issuance of the NPDES permits.

[238] *See supra* text accompanying notes 39-40.

[239] NINE CONTROLS, *supra* note 18, at 1-7. The Nine Minimum Controls are:

1. Proper operation and regular maintenance programs for the sewer system and the CSOs
2. Maximum use of the collection system for storage
3. Review and modification of pretreatment requirements to assure CSO impacts are minimized
4. Maximization of flow to the publicly owned treatment works for treatment
5. Prohibition of CSOs during dry weather
6. Control of solid and floatable materials in CSOs
7. Pollution prevention
8. Public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts
9. Monitoring to effectively characterize CSO impacts and the efficacy of CSO controls

Id.

[240] *See supra* notes 39-40.

[241] NINE CONTROLS, *supra* note 18, at 1-7.

Moreover, one can recover response costs for any releases that occurred prior to the issuance of any permits because the federally permitted release exception does not protect such releases.[242] As such, all of the CSO releases prior to the 1970s, when permits for CSOs were first issued, are not protected by the federally permitted release exception. Thus, the federally permitted release exception does not protect nearly one hundred years of Polluterville's CSO occurrences. In conclusion, the three different pollution phases of Polluterville, discussed in Part IV of this paper, are not protected by the federally permitted release exception.

V. It Is Sound Public Policy to Hold Municipalities Liable Under CERCLA for Pollution of Rivers Through CSOs

After careful analysis it appears that municipalities like Polluterville can be held liable under CERCLA for the pollution of rivers through CSOs. The pressing question then is whether such liability is appropriate. The threat of CERCLA liability will encourage municipalities to repair aging CSSs in order to stop their continued pollution of rivers through CSOs during dry weather. In addition, such liability will result in the cleaning of pollution already present in the rivers. Despite this positive end result, there are many policy objections to municipal liability for the pollution of rivers. These policy objections to municipal liability can be broken down into two categories: fairness and financial capability. In the end, however, the benefits of CERCLA liability outweigh the negative aspects.

A. *Contribution Actions Are Beneficial*

As discussed earlier, current EPA practices pursuant to the CWA are not placing enough pressure on municipal sewer communities to stop polluting rivers through CSOs.[243] As a result, many municipal sewer communities are not taking the cleanup of our nation's rivers seriously. In 1994, the EPA established its CSO policy, which required all municipal sewer "communities to estab-

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[242] *Carson Harbor*, 287 F. Supp. 2d at 1183; *Iron Mountain Mines*, 812 F. Supp. at 1541; Idaho v. Bunker Hill, 635 F. Supp. 665, 673-74 (D. Idaho 1986).

[243] *See supra* text accompanying notes 39-55.

lish nine minimum controls for CSOs by January 1, 1997."[244] Nine years have passed since the deadline set by the EPA, and still "most communities have not established their nine minimum controls yet."[245] Even more problematic is that little more than half of municipal sewer communities have even implemented long-term control plans for CSOs, as required by the EPA,[246] and only thirty percent of CSO permitees have implemented controls for preventing dry weather releases.[247] Hence, it is clear that given the current system of enforcement by the EPA, municipalities are not acting with alacrity to stop the pollution of rivers through CSOs.

If the EPA (or state entities) enforced the provisions of the CWA against all municipalities polluting rivers through CSOs, or initiated CERCLA actions against municipalities, it would most likely encourage municipalities to stop CSOs during dry weather events. Nevertheless, because the EPA (and state entities) is not taking such action, we must find additional solutions.

CERCLA contribution actions, initiated by industrial CERCLA-liable parties, may curb municipal pollution of rivers through CSOs. These CERCLA-liable parties, motivated by their desire to shift some of the total cost of cleanup, will probably seek contribution, under CERCLA, from municipalities that have polluted rivers through CSOs. Given the requirements for liability to attach, it is unlikely that municipalities will be able to escape such liability.[248] Therefore, municipalities, fearing any additional CERCLA liability for continued pollution and the financial burden it will place on them,[249] are likely to repair leaking CSOs and implement the nine minimum controls. Hence, CERCLA contribution actions against municipalities should decrease the number of CSOs during dry weather, and other releases that are not in

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[244] Integrity Project, *supra* note 54.

[245] *Id.*

[246] IMPLEMENTATION, *supra* note 40, at 6-8; Bruninga, *supra* note 53, at A-10.

[247] IMPLEMENTATION, *supra* note 40, at 6-8.

[248] *See supra* text accompanying notes 127-242.

[249] The average cost of cleaning a single Superfund site in 1992 was $24 million. William H. Rogers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws*, 22 ENVTL. L. 417, 422 (1992). Average clean-up costs do not include transaction costs, which can amount to millions of additional dollars. JANE PAUL ACTION & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS 43-49 (1992).

compliance with NPDES permits, resulting in a decrease in the pollution of our nation's rivers.

B. *Holding Municipalities Liable Under CERCLA for Pollution of Rivers Is Fair*

Despite the benefits, there are two viable "fairness" objections that can be made with regard to municipal CERCLA liability for the pollution of rivers through CSOs. The first objection is that holding a municipality liable is so unfair to residents of the municipality that such liability should be impermissible.[250] The second objection is that holding municipalities liable for their pollution of rivers violates the "polluter pays" principle.[251] This section will address both objections.

1. Municipal CERCLA Liability Is Not Unfair to the Residents of the Municipality

If held liable under CERCLA, municipalities will most likely finance their liability through increases in property taxes.[252] Unless a municipality has a CERCLA reserve fund, these tax increases may impose extreme financial burdens on residents.[253] Some may argue that taxing residents for cleanup costs is "fundamentally inequitable" since it forces them to pay additional taxes based solely on where they reside.[254] Moreover, municipal sewage disposal decisions are beyond the control of individual residents, especially decisions made before an individual moved into the municipality, and therefore, municipalities should not be held liable.[255]

After careful examination, however, these objections lack strength.[256] Residents of a municipality are in a far greater position

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[250] *See infra* text accompanying notes 252-258.

[251] *See infra* text accompanying notes 259-267.

[252] Fraccascia, *supra* note 59, at 1106-07; Steven Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 274 (1988).

[253] Fraccascia, *supra* note 59, at 1107.

[254] *Id.* (explaining that this argument has been made in the context of municipal liability for the disposal of MSW).

[255] *Id.* at 1107-08.

[256] *See infra* text accompanying notes 257-258.

of control than the objection acknowledges. This power stems from a municipal resident's ability to vote in municipal elections.[257] If residents of a municipality are dissatisfied with the decisions of an elected official, residents have the power not to re-elect that official or to move to a different municipality, neither of which are appealing to the elected official. Municipal officials are ultimately responsible to their constituents, and thus must try to satisfy them.

This need to satisfy constituents or risk defeat in the elections, and a mass exodus from the municipality, adds to the fairness of CERCLA liability for municipalities. Municipal residents, had they wanted to, could have pushed municipal officials to repair leaking CSOs prior to the threat of CERCLA liability. For decades, municipal residents were in the position to push for CSO repair, yet failed to do so. Although many residents were probably unaware of CSO occurrences during dry weather, a failure to avail oneself of the information pertaining to CSOs should not give municipal residents the opportunity to raise the "fairness" objection under the threat of a property tax increase. Also, residents should not be protected from the costs of CERCLA liability if they knew of the CSO occurrences and still failed to demand the repair of the aging sewer system due to a lack of interest or a desire to keep taxes low. Lastly, although many current residents may not have lived in the municipality during the decades of CSO pollution, and thus were not in a position to push municipal officials to repair the aging sewer system, these residents, prior to moving to the municipality, could have availed themselves of the situation, and resided elsewhere.

Another reason the ability to elect officials cuts against the "fairness" argument is that residents are in a position to urge municipalities to settle their CSO liability with the EPA before the industrial CERCLA-liable parties pursue contribution actions.[258] Should municipal residents feel that contribution actions are "unfair," they are in a position to encourage municipal officials to settle their liability with the EPA for a lesser amount and implement

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[257] *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 (2000) (discussing voting in municipal elections).

[258] For an example of a time when the EPA permits settlement of CERCLA liability, see Announcement and Publication of the Policy for Municipality and Municipal Solid Waste: CERCLA Settlements at NPL Co-Disposal Sites, 63 Fed. Reg. 8197, 8198 (Feb. 18, 1998).

a payment plan that is economically feasible for the municipality.

Yet another difficulty with accepting the municipal resident's "fairness" objection is that it is "unfair" for one municipality to determine whether a river will remain polluted. One municipality should not be able to determine whether residents and non-residents alike are able to enjoy the assets of an unpolluted river. It is in fact "unfair" for a municipality, such as Polluterville, to pollute a river when that pollution affects a far larger number of people than merely the residents of that municipality. Hence, not holding a municipality liable for its pollution of a river through CSOs is "unfair."

2. Holding a Municipality Liable Does Not Violate the "Polluter Pays" Principle

The second possible "fairness" objection to holding municipalities liable for pollution of rivers is that such liability violates the "polluter pays" principle. Since its inception, CERCLA has been based on the "polluter pays" principle, meaning that those who have contributed to a Superfund site should be held responsible for its cleanup.[259] In the 1980s and 1990s, many scholars argued that the "polluter pays" principle would be destroyed if industrial CERCLA-liable parties could get contribution from municipal MSW generators and transporters for the cleanup of co-disposal landfill sites.[260] The argument rested on the notion that MSW is largely non-hazardous, and thus it violated the "polluter pays" principle to transfer liability onto a party believed to be relatively innocent.[261]

However, even if holding municipalities liable for their generation or transportation of MSW violates the "polluter pays" principle, CSOs present a very different story.[262] Unlike MSW, where hazardous substances generally comprise only one percent of the weight of household waste, most untreated sewage is a hazardous

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[259] Ward, *supra* note 109.

[260] *See id.* (discussing his belief that industrial polluters were violating the "polluter pays" principle by seeking contribution from municipalities for their generation and/or transportation of MSW); Schenck, *supra* note 93, at 1 (examining the argument that holding municipalities liable for transportation and generation of MSW violates the "polluter pays" principle); Hinckley, *supra* note 182, at 91.

[261] Ward, *supra* note 109.

[262] *See infra* text accompanying notes 263-264.

substance.[263] As discussed earlier, on average, the concentrations of bacteria in untreated sewage that enters rivers through CSOs can be several thousand times greater than water quality criteria.[264] Accordingly, CSOs present a far greater threat to the health of humans, as well as the environment in general, than does MSW. Thus, unlike MSW, holding a municipality liable for its pollution of rivers through CSOs does not violate the "polluter pays" principle because the municipality is a "polluter."

Moreover, it would be "unfair" not to hold municipalities liable for their pollution of rivers through CSOs.[265] To give municipalities a free pass on liability would be unfair to all the other responsible parties, especially small businesses with low budgets,[266] because they would be held responsible for the large "orphan share" created by a municipality's failure to pay.[267] Failing to hold municipalities liable would be a far greater violation of the "polluter pays" principle than holding municipalities liable.

C. *Municipalities Can Survive the Financial Burdens Caused by CERCLA Liability*

The average cost of cleaning a single Superfund site in 1992 was $24 million.[268] It is likely that the cost of cleaning a Superfund river will be much more.[269] For example, the cleanup of the Hudson River is estimated at $460 million.[270] Hence, those who oppose CERCLA liability for municipal pollution of rivers may rest their

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[263] ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 284, 333 (2d ed. 1996).

[264] IMPACTS AND CONTROL, *supra* note 15, at ES-7.

[265] *See infra* text accompanying notes 266-267.

[266] Small businesses, like municipalities, "share many of the same concerns, such as low budgets and high transaction costs." Schenck, *supra* note 93, at 34. Moreover, the financial burden may be even greater for those responsible parties whose businesses no longer exist, but the owner can still be found.

[267] The pollution of rivers often involves hundreds or even thousands of responsible parties. *Environmental Symposium*, *supra* note 60, at 42.

[268] Rogers, *supra* note 249, at 422. Average clean-up costs do not include transaction costs, which can amount to millions of additional dollars. ACTION & DIXON, *supra* note 249, at 43-49.

[269] Cindy Skrzycki, *GE Ads Zap the EPA over PCB Cleanup*, WASH. POST, July 24, 2001, at E01.

[270] *Id.* It appears that the cleanup up of some rivers may cost billions of dollars. *Id.*

objection on a single contention—that many municipalities will not be able to withstand the financial burdens caused by the imposition of CERCLA liability.

This objection presents a parade of horribles. Municipalities, in order to finance their CERCLA liability, will have to cut back on many public services. As a result, public transportation will decline, schools will deteriorate, and law enforcement will decrease. In addition to reducing municipal services, the municipality will have to raise property taxes. As a result, angered municipal residents will move from the municipality, thus decreasing the local tax base needed to finance the municipality's CERCLA liability. Eventually, public services will disappear, residents who can afford to move will leave, and the municipality will be left in ruin.

This parade of horribles, however, overlooks the many options municipalities have to avoid such a demise, as well as the fact that: (1) no municipality held liable under CERCLA has experienced bankruptcy or financial devastation; and (2) no municipality required to renovate its sewage system and pay penalties pursuant to the CWA has experienced bankruptcy or financial devastation, despite the high costs associated with such renovations and fines.[271] However, even if a municipality were to face ex-

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[271] This is significant given the costs to municipalities. For example, in the consent decree entered into by the City of Baltimore, MD the city "agreed to complete the construction work associated with increasing the capacity of its collection system and eliminating physical overflow structures by June 2007 and complete an extensive sewer upgrade by 2016." EPA, CITY OF BALTIMORE, MARYLAND, SEWER OVERFLOWS SETTLEMENT (2002), *available at* http://www.epa.gov/compliance/resources/cases/civil/cwa/baltimore.html. The EPA estimates that to implement such a program, it will cost approximately $940 million over the course of fourteen years. *Id.* The City of Baltimore must also pay a penalty of $600,000 and design a "biological nutrient reduction facility for the removal of nitrogen at the City-owned Patapsco Wastewater Treatment Plant," which is estimated to cost $2.7 million. *Id.*

In another example, Youngstown, Ohio, estimated that it would spend $12 million in short-term improvements and then, over two decades, an additional $100 million in order to develop and implement a "long-term" sewage discharge control plan to reduce its significant raw sewage discharges from its CSS into the Mahoning River. EPA, CITY OF YOUNGSTOWN, OHIO, SEWER OVERFLOWS SETTLEMENT (2002), *available at* http://www.epa.gov/compliance/resources/cases/civil/cwa/youngstown.html.

Additionally, in 1977 the Milwaukee Sewage District agreed to spend $2 billion over twenty years to "increase capacity and implement other measures to reduce the number of combined sewer overflows (CSOs) and sanitary sewer overflows (SSOs)." *Water Pollution: Milwaukee Sewer District Asks High Court to Review Decision on 'Diligent Prosecution,'* DAILY ENV'T REP., Jan. 7, 2005, at A-06. In 2001, the State and Sewage

treme financial difficulties, safety nets exist. Below is a discussion of the reasons municipalities will be able to survive the financial burdens caused by the imposition of CERCLA liability for the pollution of rivers.

1. Municipalities Have the Financial Resources to Survive CERCLA Liability

Some may argue that the cost to municipalities, especially municipalities with smaller populations, will be so significant that it will place serious financial burdens on these municipalities.[272] In the United States, there are 39,000 local government entities.[273] Of these, seventy-five percent have less than 3000 residents, and more than fifty percent of those local governments have less than 1000 residents.[274] As a result, critics argue that CERCLA liability will financially devastate municipalities with a smaller tax base over which to spread the cost of CERCLA liability.[275]

Although information concerning whether municipalities can survive CERCLA liability is scarce, the information that exists points to the conclusion that municipalities possess the financial resources to pay cleanup costs.[276] For instance, the Information Network for Superfund Settlements[277] conducted a study of forty-four settlements involving municipal MSW generators and transporters.[278] The report, which studied settlements ranging from $20 to $45.7 million, concluded that municipalities have the financial ability to pay CERCLA cleanup costs.[279]

District reached another agreement requiring the expenditure of $907 million on new tunnels that will expand storage capacity. *Id.*

[272] This argument was made in the context of municipal liability for the disposal of MSW. Hinckley, *supra* note 182, at 119-20; Schenck, *supra* note 93, at 42.

[273] Ferrey, *supra* note 252, at 273.

[274] *Id.*

[275] Fraccascia, *supra* note 59, at 1106 n.84 (quoting Robert G. Torricelli, *Municipal Liability Under Superfund—A Legislative Response*, 16 SETON HALL LEGIS. J. 491, 497 (1992) (Municipal CERCLA liability "can easily bring municipal governments to their knees.")).

[276] *See* INFO. NETWORK FOR SUPERFUND SETTLEMENTS, SUPERFUND MUNICIPAL LIABILITY SETTLEMENTS: A SURVEY REPORT 1 (1993).

[277] *Id.* The Information Network for Superfund Settlements is an organization that includes law firms, cleanup companies, and manufacturers. *Id.*

[278] *Id.*

[279] *Id.*

Moreover, to date there are no reports that municipalities that have faced CERCLA liability have experienced financial devastation and/or bankruptcy. This lack of evidence indicates that municipalities are not experiencing financial devastation as a result of being held liable under CERCLA.

It is important to note that although the amount needed to clean a river may be far greater than the amount needed to clean a landfill, the burden of cleaning that river will fall on many more shoulders than the burden of cleaning a landfill.[280] Unlike many other Superfund sites, rivers often have hundreds or even thousands of responsible parties because they are marked by over a century of industrialization.[281] Consequently, one can infer that municipalities, as in the case of landfills, will be financially able to withstand CERCLA liability for pollution of rivers through CSOs.

2. There Are Many Ways Municipalities Can Obtain the Monies Necessary to Satisfy Their CERCLA Liability

There are many ways a municipality can finance its CERCLA liability, in addition to increasing property taxes, and before having to reduce public services, thereby lessening the financial burden on the residents of the municipality. First, there is the option of selling city property that does not serve any cognizable city function.[282] For example, municipalities could sell vacant lots or private residences taken when owners fail to pay taxes.[283] Second, a municipality can implement and/or increase broad-based service taxes, such as: utilities; admissions to amusement parks; labor repair services; clothing sales; personal services such as barber services, laundry services, and tuxedo rentals; and business services such as advertising, employment agencies, and security.[284] By increasing a variety of service taxes, both residents and non-residents

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[280] *See infra* text accompanying note 281.

[281] *Environmental Symposium*, *supra* note 60, at 39-40.

[282] Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 429 (1993) (discussing the ways debtors could compel cities to meet their financial obligations absent federal statutory law).

[283] *See id.* at 432 (discussing what sorts of city property could be seized to remedy city debt).

[284] *See* FED'N OF TAX ADM'RS, SALES TAXATION OF SERVICES: WHO TAXES WHAT? (1991) (discussing all of the different taxes a state can impose).

who use these services in the municipality will help to finance the CERCLA liability costs. Third, as shown earlier, municipalities can settle their liability with the EPA, implementing a feasible payment schedule before other responsible parties initiate contribution suits.[285] These options give the municipality the ability to avoid the parade of horribles that those who oppose CERCLA liability may fear.

3. A Mass Exodus from the Municipality Is an Unlikely Consequence of CERCLA Liability

Unlike other financial problems that have burdened municipalities, it is unlikely that the additional financial strains presented by CERCLA liability will cause residents to flee municipalities. Municipalities have faced financial devastation for a variety of reasons. For example, Camden, New Jersey began to face financial difficulties after WWII when many factories, including the Campbell Soup Company, which employed many Camden residents, left the city.[286] More recently, in 1994, Orange County, California filed for Chapter 9 protection after County Treasurer Bob Citron mismanaged the county into a financial crisis.[287] Citron provided high-interest income to local government investors by "borrowing money and investing it in derivatives, inverse floaters, and long-term bonds that paid high yields. Then he borrowed more money with the borrowed money."[288] Eventually, county officials discovered that Citron lost approximately $1.64 billion in government funds through risky investments.[289] When the banks that loaned Citron the money began to seize the securities from the county pool, which they held as collateral, the municipality was forced to file for bankruptcy.[290]

Municipal liability for pollution of rivers through CSOs differs from other forms of municipal financial devastation. This is due

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[285] 42 U.S.C. § 9613 (2000).

[286] Anne Marie Vassallo, Note, *Solving Camden's Crisis: Makeover or Takeover?*, 33 RUTGERS L.J. 185, 189 (2001).

[287] MARK BALDASSARE, WHEN GOVERNMENT FAILS: THE ORANGE COUNTY BANKRUPTCY 2 (1998).

[288] *Id.*

[289] *Id.*

[290] *Id.*

to the sheer number of municipalities, all in the same geographic area, that will most likely be held liable under CERCLA for pollution of rivers through CSOs. The vast majority of CSSs are located in the Northeast and the Great Lakes Region.[291] As of July 2004, the EPA had issued 828 active CSO permits to 746-1100 communities in thirty-two states.[292] "These permits regulate 9348 CSO discharge points."[293] Moreover, municipalities in only four states hold over fifty percent of the nation's active CSO permits.[294] Hence, if a resident of one of the many municipalities affected by CSO CERCLA liability wishes to move from the municipality in order to avoid the problems associated with liability, the resident may have a difficult time finding another municipality in that geographic area in which to reside that is not potentially affected by CERCLA.

Thus, whether a municipality will experience a mass exodus largely depends on how the municipality handles its liability. If a municipality manages its monies well, and/or settles its liability with the EPA, municipal residents are likely to remain in the municipality. However, if the municipality mismanages the situation, and as a result municipal services decline and property taxes skyrocket, residents are likely to seek residence in another municipality (even if the new municipality is also facing CERCLA liability for its pollution of rivers through CSOs, so long as that municipality is better handling its CERCLA liability). Thus, the threat of flight will encourage municipal officials to manage their CERCLA liability wisely in order to ensure that residents continue to reside in the municipality.

4. The State Can Step in to Help a Municipality If There Is a Real Crisis

Similar to when a municipality defaults,[295] state governments are in a position to come to the aid of a municipality should it face

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[291] IMPACTS AND CONTROL, *supra* note 15, at 4-13.

[292] *Id.* at 4-13; COMPLIANCE AND ENFORCEMENT, *supra* note 18; NPDES FAQ, *supra* note 18; NINE CONTROLS, *supra* note 18, at 1-1.

[293] IMPACTS AND CONTROL, *supra* note 15, at 4-13.

[294] *Id.*

[295] Municipal default occurs when a local government defaults on its debts. Robert P. Inman, *Transfers and Bailouts: Lessons from U.S. Federalism, in* FISCAL DECENTRALIZATION AND THE CHALLENGE OF HARD BUDGET CONSTRAINTS 43 (J. Rodden ed., 2003).

a financial crisis due to CERCLA liability. Should a municipality face a true financial crisis, such that it is unable to provide public services to its residents and pay its CERCLA liability, the state can, like in the case of municipal default, bailout the municipality, offer state assistance, or offer the municipality loan guarantees.[296] Also, the municipal corporation can liquidate and transfer its obligations to the state. This section will explore the ways in which a state can rescue a municipality facing a crisis due to its CERCLA liability.

a. A State Can Bailout a Municipality by Assuming Responsibility for its CERCLA Liability and Public Services

The first option is for the state to bailout the municipality, meaning the state would fund the municipality's CERCLA liability and most public services. To date, state governments follow a no-bailout policy for municipal defaults, except in the case of Camden, New Jersey.[297] This is not to say, however, that states will necessarily refuse to bailout municipalities facing CERCLA liability.

First, CERCLA liability, although very similar to municipal default, is not municipal default. Because no state has yet decided whether to bailout a municipality facing CERCLA liability for pollution of rivers, it is unclear whether a state would view the situation differently than municipal default.

Second, and more importantly, as with the Camden, New Jersey bailout, certain municipal CERCLA situations may present compelling circumstances. When New Jersey bailed out Camden, the median income of a Camden family of four was $17,000, which was below the poverty level and approximately forty percent of the median New Jersey household earnings.[298] Camden was also the poorest performing municipality in education in the State of New Jersey.[299] As a result, New Jersey bailed out Camden by fully funding "the city's debts and most of the city services for the foreseeable future," because of a "desire to ensure minimal public ser-

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[296] *See id.* at 61 (giving a full explanation of the types of assistance a state can offer a municipality in default).

[297] *Id.*

[298] *See id.* (discussing the bailout of Camden, New Jersey).

[299] *Id.*

vices to the city's residents and the children."[300]

Should a CERCLA liable municipality face a crisis such as the one in Camden, specifically a situation where the median income of municipal residents is significantly less than the median state household income, a state may consider a bailout option for the municipality. Such an option would include payment of all CERCLA liability, as well as subsidization of all public services. If the state bails out the municipality, public services would not cease and a true crisis could be avoided.

b. A State Can Provide Assistance

Unlike a full bailout, states can offer a reasonable amount of assistance to a municipality.[301] Municipal defaults were common in the 1930s.[302] In fact, by 1935 there were over 3200 local governments in default, which in dollar terms translated to $2.4 billion in default.[303] State governments responded by providing an increase, "above its historical trend," in state aid, but did not provide new money for default relief.[304]

Similar to the situation in the 1930s, many municipalities may default due to CERCLA liability for pollution of rivers through CSOs.[305] Therefore, state bailouts in every situation are not an option. However, state aid, in order to ensure that public services continue, with no payment of the municipality's liability under CERCLA, is an option to avoid a municipal crisis.

c. A State Can Provide Loan Guarantees

A third option for assisting financially overburdened municipalities, and probably the most appealing, is state offered loan guarantees.[306] These loan guarantees would "allow the city access to short-term borrowing . . . accelerated grants payments in return for lower future payments, or permission to spend already allo-

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300 *Id.*

301 *See infra* text accompanying notes 302-305.

302 Inman, *supra* note 295, at 58.

303 *Id.*

304 *Id.*

305 *See supra* text accompanying notes 268-270, 291-294.

306 *See infra* text accompanying notes 307-308.

cated state capital grants on current services."[307] In the case of municipal default, states have offered similar loan guarantees, but "no new state monies were provided to repay bondholders or supplement local tax revenues."[308]

In the case of CERCLA liability, such loan guarantees may be appealing to the municipality because they provide it with the monies needed to pay its CERCLA liability, while allowing the municipality to continue to provide public services. In addition, it provides the municipality with a realistic re-payment plan. The loan guarantee option may be appealing to the state because the state can avoid having to bailout the city should the situation in the municipality worsen. Moreover, if a municipality fails to re-pay the state, the state is out only the remainder of the monies the municipality failed to pay. In contrast, should the state have to bailout the municipality, it would loose the full amount. Hence, should the state have to provide the municipality with some assistance, the loan guarantee option seems to be the most promising.

d. Dissolution of the Municipality

Although dissolution of the municipality seems like an unpopular option, for certain municipalities facing CERCLA liability, dissolution may be a better option than trying to pay its CERCLA liability.[309] Municipalities, like corporations, can be liquidated and dissolved, yet keep their physical presence.[310] In fact, 184 municipalities disincorporated between 1960 and 1970.[311] When a municipal corporation liquidates and ceases to exist, the powers and obligations of the municipality revert back to the state or an intermediate level of government designated by the state.[312] This reversion occurs because municipalities are mere "instrumentalities of the state, created by the state for the more effective implemen-

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[307] *See* Inman, *supra* note 295, at 61 (discussing loan guarantees in the context of municipal default).

[308] *Id.* at 60.

[309] *See infra* text accompanying notes 310-313.

[310] McConnell & Picker, *supra* note 282, at 482. In Iowa, for example, for every four incorporated towns, there is one unincorporated town. *Id.*

[311] *Id.*

[312] *Id.*

tation of state policies."[313]

The liquidation option, although likely unappealing to a place like Boston, may be an appealing and viable option for municipalities with small, low-income populations because the base from which to draw the monies needed for CERCLA liability may not exist. Thus, depending on the municipality, a fundamental change, such as dissolution of the municipal corporation, may be a viable option when dealing with CERCLA liability for pollution of rivers through CSOs.

VI. Conclusion

CERCLA liability for municipal pollution of rivers can attach given the elements needed to establish a prima facie case of such liability. Moreover, such liability is appropriate despite policy objections to the contrary. Municipal polluters must have an incentive to stop polluting our nation's rivers. Contribution actions, initiated by industrial CERCLA-liable parties, provide a mechanism that will encourage municipalities to stop polluting rivers through CSOs in violation of NPDES permits. Although ending CSOs during dry weather events alone will not lead to the complete restoration or our nation's rivers, it is a necessary step on the road to swimmable, fishable, and navigable waters.

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[313] *Id.* (discussing Iowa Supreme Court Justice John Dillon's theory on the nature of municipal government, a theory that is widely accepted by the courts and legal scholars).