Taking Responsibility, Passing the Buck, and Cleaning Up the Mess: Making Municipal Liability under CERCLA Work

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I. INTRODUCTION

Americans thrive on convenience. Therefore, it is not surprising that a “throw away” mentality has become the pervasive American attitude with respect to the disposal of everyday household garbage.1 Years ago, the greatest dilemma Americans faced regarding the disposal of their garbage was deciding who was going to carry it down to the curb. Once it was placed there, its final destination became someone else’s problem. Or so we thought. Unfortunately, however, the problem has run a full circle and our garbage has returned to haunt us.

Garbage collected from households is referred to as municipal solid waste (MSW).2 Americans generate approximately 180 million tons of municipal garbage a year,3 three quarters of which goes to landfills.4 Everyday household garbage, once considered

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2. Steven Ferrey, The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste, 57 GEO. WASH. L. REV. 197, 200 (1988). According to the EPA definition, MSW is the “solid waste generated primarily by households, but may include some contribution of wastes from commercial, institutional and industrial sources as well.”

3. Characterization of Municipal Solid Waste in the United States: 1990 Update, 55 Fed. Reg. 24,926, 24,927 (1990). In 1988, Americans produced four pounds of solid waste per person each day; this figure is expected to rise to 4.41 pounds by the year 2000. Id. The amount of garbage generated per person per day is subject to variation. This variation is caused by such factors as the degree of urbanization, the season, the level of economic activity, and the average income level, with lower income households reportedly producing higher quantities of waste due to consumption of products with more packaging. Ferrey, supra note 2, at 201 & nn.7-10.

4. The states have adopted four ways in which MSW may be disposed: source reduc-
harmless, does in fact contain traces of hazardous substances. Given the volume of garbage thrown away, these small concentrations of hazardous substances, when aggregated, become harmful to both human health and the environment.

In the past several years, the liability of municipalities, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), for the disposal of everyday
household garbage has been a persistent source of controversy. This is due both to the severe financial consequences that such liability will create for municipalities and their residents, and to the low toxicity of MSW. As a result, some have argued that municipalities should not be required to bear the burden of environmental liability under the current statutory scheme, and that the allocation of any municipal liability should be altered both to contemplate the unique situation of municipalities and to ease the liability burden. Other commentators, however, have argued that

ended release of a hazardous substance when an imminent and substantial threat to the public health or welfare exists. First, the EPA, itself, may commence a response action. See id. § 9601(25) (defining response); id. § 9604 (describing a response action). Second, the EPA may initiate an abatement (enforcement) action, and compel responsible parties to abate the release or threatened release. See id. § 9606 (1988) (describing abatement actions). CERCLA permits responsible parties to seek contribution from any other person who is liable or potentially liable under § 9607(a). See id. § 9613(q)(1). Currently, the policy of the EPA is not to initiate § 9606 enforcement actions against municipalities who generate or transport MSW. See Interim Municipal Settlement Policy, supra note 2, at 51,072. However, the EPA explicitly stated that the Interim Municipal Settlement Policy does not preclude third parties from initiating contribution actions against municipalities. Id. at 51,071.


11. Municipal liability under CERCLA for the disposal of MSW is particularly threatening because participation in a CERCLA suit or settlement of a CERCLA claim can strain the financial resources of a municipality. See infra notes 83-84 and accompanying text.

12. See, e.g., Ferrey, supra note 2, at 273 (noting that municipalities may have difficulty in obtaining insurance coverage, they inevitably play some role in the handling of MSW, and they are inhibited in their ability to settle and can encounter substantial transaction costs in the settlement process).

13. See, e.g., Ferrey, supra note 2, § IX (proposing criteria for a flexible and equitable approach to municipal liability and suggesting ways in which the aggregate amount of municipal liability can be reduced); Molly A. Meegan, Municipal Liability for Household Hazardous Waste: An Analysis of the Superfund Statute and Its Policy Implications, 79 GEO. L.J. 1783, 1786 (1991) (discussing ways in which liability can be tailored to consider the unique characteristics of municipalities); G. Nelson Smith III, Trashing the Town and Making It Pay: The Problem With the Municipal Liability Scheme Under CERCLA, 26 CONN. L. REV. 585, 607-08 (1994) (suggesting that municipality's share of liability be satisfied from the Superfund in instances where the municipality had arranged for the disposal of MSW and could demonstrate that it had sent the waste to a landfill with a
the current liability standard should be retained, and that municipalities should contribute to the costs of environmental clean-ups in the same manner as other responsible parties.\textsuperscript{14}

However, little effort has been made to develop a comprehensive solution encompassing both facets of the municipal liability dilemma. Any solution must necessarily be two-tiered. First, it must resolve what is perhaps the biggest problem municipalities now face: their liability under CERCLA for past disposal of MSW. Second, and perhaps just as important, it must both alter current municipal waste disposal practices and eliminate, or at least substantially reduce, potential future municipal liability by mandating safe disposal practices from the outset.

This Note begins by acknowledging that municipalities are liable under CERCLA for the disposal of MSW. However, it then proposes that the current systems of cleanup cost allocation and provision of funds (Superfund) must be modified to provide separate funding for municipal liability and to spread the burden of municipal liability equitably among residents of all municipalities. Part II of this Note discusses \textit{B.F. Goodrich Co. v. Murtha},\textsuperscript{15} a landmark Second Circuit decision that held municipalities liable under CERCLA for the disposal of MSW that contained hazardous substances. Part III examines the consequences of municipal liability under the current system and argues that individual municipal liability is inherently inequitable. Part IV analyzes several recent proposals that address the problem of municipal liability, and argues that each necessarily fails to solve the problem. Part V proposes that the current Superfund scheme be modified, and a "Munfund" that provides solely and collectively for the costs of municipal liability be established to equitably distribute liability. It also recognizes that in conjunction with a provision for funding of current municipal liability, efforts must now be made to alter current disposal practices and to reduce future potential municipal liability. This Note concludes that the creation of a "Munfund" would be a wise and necessary reform to the current scheme of

\textsuperscript{14} See, e.g., Norman A. Dupont, \textit{Municipal Solid Waste: The Endless Disposal of American Municipalities Meets the CERCLA Strict Liability Dragon}, 24 \textit{LOY. L.A. L. REV.} 1183, § IV (1991) (asserting that municipalities should be subject to liability under the current liability standard, and proposing that municipalities combat future liability by implementing source reduction and recycling programs).

\textsuperscript{15} B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992).
municipal liability.

II. B.F. GOODRICH CO. V. MURTHA: LANDMARK AND LAND MINE

B.F. Goodrich v. Murtha, a recent Second Circuit decision, held that municipalities are subject to CERCLA liability for the disposal of MSW that contains substances considered hazardous. The case consisted of four consolidated actions concerning the cleanup of two Connecticut landfills, Beacon Heights and Laurel Park. These actions were filed against the alleged owners and operators of the sites, collectively referred to as “Murtha,” for cleanup costs. Murtha then commenced third party actions against approximately two hundred parties, including twenty-four municipal entities. Murtha alleged that the municipalities had arranged for the disposal or treatment of hazardous substances at the two sites, and therefore were liable pursuant to Section 9607(a)(3) for a portion of the cleanup costs.

The court began its discussion with a brief overview of the statutory framework of CERCLA. The two primary goals of

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16. See infra note 43 for the CERCLA definition of “hazardous.”
17. In 1987, actions were filed by the EPA, the State of Connecticut Department of Environmental Protection, the Uniroyal Chemical Company, and the B.F. Goodrich Company and other members of its coalition. Id. at 1196.
20. Id. at 962 & n.3. Subsequently, the original plaintiffs were permitted to amend their complaints and add the third party defendants to the original action. Id. at 964 n.5.
21. This section deems as potentially liable under CERCLA any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .
22. B.F. Goodrich, 958 F.2d at 1196. In 1992, the cleanup costs of the sites were estimated to exceed $47.9 million. Id. The municipal defendants denied liability, and moved for summary judgment, arguing that, as a matter of law, their generation and collection of MSW did not subject them to CERCLA liability. The district court denied this motion, and the municipal defendants appealed. Id. at 1197.
23. Id. at 1197. Congress enacted CERCLA in an attempt to strengthen the EPA’s authority to respond effectively and promptly to situations that threatened human health and the environment. Id. CERCLA authorizes the EPA to initiate “response actions” to abate an actual or threatened release of hazardous substances. Id. (citing 42 U.S.C. § 9604(a)(1)). Response actions include remedial actions to prevent or reduce releases and
CERCLA are to enable the EPA to respond effectively and promptly to hazardous situations and to hold the responsible parties liable for the attendant cleanup costs. Liability under CERCLA is both strict and joint and several. The scope of CERCLA liability is broad and extends to all those who contribute to the problems caused by hazardous substances and to the landowners.

A prima facie case under CERCLA requires that five elements be established. First, the defendant must fall under one of the four categories of potentially responsible parties (PRPs) enumerated in Section 9607(a). Second, the plaintiff must show that the site is a facility. Third, the plaintiff must prove that there is a release or threatened release of hazardous substances at the facility. Fourth, the plaintiff must demonstrate that it incurred response costs as a result of the release or threatened release. Finally, the plaintiff must show that both its costs and response

the removal of the hazardous substance from the site entirely. Id. Under CERCLA, the EPA may also seek to compel PRPs to initiate private response actions when there is an "imminent and substantial endangerment to the public health. Id. (citing 42 U.S.C. § 9606(a)). These parties are then entitled to recover a portion of the response costs they incurred as a result of the cleanup from other PRPs. Id. at 1197-98 (citing 42 U.S.C. § 9613(f)).

24. Id. at 1198 (commenting that a liberal interpretation of the statute is necessary to achieve these goals).
25. Id. There are only three potential affirmative defenses to CERCLA liability: (1) an act of God, (2) an act of war, or (3) an act or omission of a third party other than one with whom a defendant has a contractual relationship. Id. (citing 42 U.S.C. § 9607(b)).
26. Id. Since liability is joint and several, each defendant can be individually liable for the entire cost of cleanup. Carroll E. Dubuc & William D. Evans, Jr., Recent Developments Under CERCLA: Toward a More Equitable Distribution of Liability, 17 ENVTL. L. REP. 10197, 10197 (1987). Since municipalities can only currently be liable through third party contribution actions, the extent of their liability will depend on the manner in which the cleanup costs are apportioned.
27. See supra note 10 (discussing the categories of persons who may be deemed PRPs under CERCLA).
28. B.F. Goodrich, 958 F.2d at 1198.
29. Id.
30. Id.; see also supra note 9.
31. B.F. Goodrich, 958 F.2d at 1198. Section 9601(9) defines facility as

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, 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; but does not include any consumer product in consumer use or any vessel.

actions conform to the National Contingency Plan. The liability of the municipal defendants in B.F. Goodrich turned on whether their actions of arranging for MSW disposal satisfied elements one and three.

The court quickly disposed of the issue presented by the first element, whether a municipality may be liable for arranging for the disposal of hazardous substances. Because CERCLA expressly includes municipalities in its definition of those who may be liable under Section 9607, there was no question that a municipality may be liable as a PRP if it arranges for the disposal of hazardous substances.

The court then proceeded to address the third element, whether MSW is a hazardous substance under CERCLA. The defendant municipalities first argued that CERCLA’s silence regarding MSW indicated a congressional intent to exclude it from the definition of hazardous substance. The court rejected this argument, and began its analysis by examining the plain language of CERCLA. Under the statute, hazardous substance is broadly defined as any substance so designated by the EPA pursuant to Section 9602, or by any of four other environmental statutes.

34. Id. CERCLA created the National Contingency Plan (NCP), and it is implemented by the EPA as a means of prioritizing the hazardous waste sites throughout the nation. Id.

35. Id.

36. Id. at 1198-99.

37. Id. at 1198 (citing 42 U.S.C. § 9601(21)). The court also noted that the plain language of the section clearly showed an abrogation of sovereign immunity for municipalities. Id.

38. Id.

39. Id. at 1199-1206. Since release or threatened release of a hazardous substance was not in dispute, the court’s discussion focused solely on whether MSW is a hazardous substance.

40. Id. at 1200.

41. Id. at 1199.

42. The EPA has listed over 700 hazardous substances. Id. at 1200 (citing 40 C.F.R. § 302 (tbl. 302.4)).

43. Id. at 1199-2000 (citing 42 U.S.C. § 9601(14)). Section 9601(14) states,

The term “hazardous substance” means (A) any substance designated pursuant to section 1321 (b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . . , (D) any toxic pollutant listed under section 1317(a) of title 33, (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 2606 of title 15. The term does not include
In order to qualify as hazardous under CERCLA, a substance need only be designated as such under one of above the statutory options. Although the statute specifically exempts natural gas and oil from its definition of hazardous substance, no other such exemptions were made. Therefore, the court concluded that CERCLA's silence on the issue of MSW does not support the conclusion that it should be excluded from the definition of hazardous substance.

In addition, CERCLA makes no distinction among PRPs or with respect to the source of the hazardous substance. Furthermore, neither quantity nor concentration are relevant factors in determining whether a substance is hazardous. Finally, the court noted that the term "municipal solid waste" need not be listed specifically by its name, rather than by its constituent components, to fall within the definition of hazardous substance. CERCLA liability depends solely upon the presence, in any form, of hazardous substances. Therefore, if a municipality arranges for the disposal or treatment of waste containing any substances that are designated as hazardous under the statute, the municipality may be liable for either response costs or contribution if a subsequent release or threatened release occurs.

The municipalities also argued that Congress intended to exclude 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 mixture of natural gas and such synthetic gas).

44. B.F. Goodrich, 958 F.2d at 1200.
45. See supra note 48.
46. B.F. Goodrich, 958 F.2d at 1201; see also Transportation Leasing Co. v. California, No. 89-7368WMB, 1991 U.S. Dist. LEXIS 20,734 (C.D. Cal. Sept. 20, 1991) (rejecting the defendant municipalities' argument the CERCLA definition of hazardous substance excludes hazardous waste and denying the municipalities' motion for summary judgment). Transportation Leasing Co. was a CERCLA contribution action brought by 64 industrial parties against, among others, 29 municipal defendants.
47. B.F. Goodrich, 958 F.2d at 1200.
48. Id. (stating that the concentration of hazardous substances in MSW is therefore not relevant in determining whether liability under CERCLA is triggered). The court acknowledged that notwithstanding its tremendous volume, household waste contains very low concentrations of hazardous substances. However, despite this low concentration, the cleanup costs of landfills containing MSW may be greater than those encountered at other sites due to the greater volume and lower toxicity. Id. at 1197.
49. Id. at 1201.
50. Id.
51. Id.
clude MSW from the CERCLA definition of hazardous substance through the incorporation of the exemption for household hazardous waste found in the Resource Conservation and Recovery Act (RCRA). The court rejected this argument as well. The court stated that the narrow RCRA household waste exemption does not limit the CERCLA definition of hazardous substance. In addition, the court noted that interpreting this exemption to apply to CERCLA would frustrate CERCLA’s broad remedial goals as well as unjustifiably extend the scope of RCRA’s regulations. The court reasoned that, even though the environmental risks posed by household waste do not require the most stringent regulation of its day-to-day management, this does not mean that the damage caused when these risks materialize is not sufficient to impose liability on those responsible for the harm.

52. Id. at 1200-01. The municipalities contended that the exemption for household hazardous waste in the RCRA regulations was intended to be incorporated, through CERCLA § 9601(14)(C), into the CERCLA definition of hazardous substance. Id. at 1203; see also supra note 48 (quoting § 9601(14)(C)).

53. B.F. Goodrich, 958 F.2d at 1201-03. The primary purpose of RCRA is to regulate current treatment, storage, and disposal of solid and hazardous wastes. Id. at 1201. Under RCRA, the EPA promulgated two separate regulatory systems concerning the transportation of waste and the operation of waste storage and disposal facilities: one for solid wastes and the other for hazardous wastes. Id. (citing Subpart D of RCRA, 42 U.S.C. §§ 6941-49a and Subpart C of RCRA, 42 U.S.C. §§ 6921-39b, respectively). Of the two types of wastes, hazardous wastes are regulated more stringently. Id. Hazardous wastes are listed in 40 C.F.R. §§ 261.30-33. Id. In the regulations that identified and listed hazardous wastes that are subject to RCRA Subtitle C regulations, the EPA excluded certain solid wastes from the definition of hazardous wastes, for regulatory purposes, despite the fact that these wastes might otherwise be considered hazardous. Id. (citing Notification of Treatment, Storage and Disposal Facilities, 46 Fed. Reg. 22,144, 22,145 (1981)). Pursuant to congressional plan, the EPA included household wastes among those solid wastes excluded from the RCRA Subpart C hazardous waste regulations. Id. The household waste exclusion was promulgated by the EPA pursuant to a congressional intent that such waste should not be subject to the same stringent standards with regard to its everyday transportation, storage, and disposal, and that certain waste streams were to be excluded from RCRA regulation. Id.

54. Id. at 1202. The EPA itself expressly acknowledged the limited scope of the exemption by stating that those solid wastes exempted were wastes that might otherwise be considered hazardous. Id. (citing 46 Fed.Reg. 22,144, 22,145 (1981)). In addition, the court stressed the distinction between wastes, to which RCRA applies, and substances, to which CERCLA applies. The RCRA exemption applies to household wastes; CERCLA, however, is concerned with hazardous substances. Id. RCRA regulations depend, in part, upon threshold quantity or concentration requirements. Such factors are irrelevant in defining hazardous substances under CERCLA, and to incorporate these considerations into CERCLA would be inconsistent with the statute, which imposes liability without regard to the amount of a hazardous substance present. Id.

55. Id. at 1202. “RCRA is preventative; CERCLA is curative.” Id.

56. Id. The municipalities asserted a third argument, based on the notification require-
Next, relying mainly on the Environmental Protection Agency’s Interim Municipal Settlement Policy, the municipalities argued that the EPA itself interprets CERCLA to impose no liability on municipalities that arrange for the disposal of MSW. They asserted that the EPA, by virtue of its policy, created a rebuttable presumption that the generation and transportation of MSW would not trigger CERCLA liability. The court, however, did not agree with the way in which the municipalities characterized the EPA’s interpretation of CERCLA, and noted that the EPA does in fact interpret CERCLA to impose liability on municipalities that arrange for disposal of MSW. The court explained that the EPA’s Interim Municipal Settlement Policy was designed to guide the agency’s regional offices in exercising their enforcement discretion. The Settlement Policy simply indicates that the EPA does not currently intend to commence enforcement actions against municipalities that generate or transport MSW. Moreover, the Settlement Policy expressly provides that it does not affect any party’s potential liability under CERCLA, and that it does not preclude a third party from commencing a contribution suit.

The court concluded that the plaintiffs had established a prima facie case of liability under CERCLA, and affirmed the district court’s denial of the defendants’ motion for summary judgment.

57. See supra note 2.
58. B.F. Goodrich, 958 F.2d at 1205.
59. Id.
60. Id. (commenting that the municipalities’ characterization of the EPA’s interpretation was “more wish than reality”).
61. Id. (citing 54 Fed. Reg. at 51,071). The court reasoned that policies regarding enforcement discretion, which inherently reflect various administrative constraints, do not necessarily mirror the CERCLA liability scheme. Id. at 1205. The EPA is permitted to selectively prosecute only the major contributors to a hazardous site, and it typically prosecutes the largest contributors or those most able to pay cleanup costs, leaving such parties to seek contribution from other liable parties. Id.
62. Id. at 1205. However, the EPA will pursue municipalities if the total privately generated commercial hazardous substances are insignificant in comparison to the MSW. Interim Municipal Settlement Policy, supra note 2, at 51,072.
63. Interim Municipal Settlement Policy, supra note 2, at 51,071. In addition, the Settlement Policy also states that CERCLA does not provide an exemption from liability for MSW. Id. at 51,074. The court concluded that the EPA does not interpret CERCLA to exempt MSW. B.F. Goodrich, 958 F.2d at 1206.
64. Id. at 1206. The court summarized its holding by stating that the plain meaning of
In its final analysis, the court acknowledged that holding municipalities as responsible parties under CERCLA and including MSW within the statute's definition of hazardous substances will have "far reaching implications for municipalities and their taxpayers." The remainder of this Note focuses on these "far reaching implications" and proposes a system to ease the municipal liability burden.

III. THE IMPLICATIONS OF MUNICIPAL LIABILITY

A. The Land Mine Explodes: A Look Beyond B.F. Goodrich

The implications of B.F. Goodrich extend far beyond its holding that municipalities are subject to CERCLA liability for the disposal of MSW. Although the current EPA policy is to refrain from commencing enforcement actions against municipalities, the Settlement Policy explicitly states that it does not preclude a third party from commencing a contribution suit against a municipality. Consequently, responsible parties in CERCLA suits now can sue municipalities. The EPA has identified 320 sites that involve municipalities or MSW. Given the tremendous volume of MSW and the presumable ability of municipalities to spread the costs of cleanup among their taxpayers, the consequences are clear. Municipalities across the nation will routinely become the target of contribution actions initiated by responsible parties, and municipali-
ties will routinely be required to contribute to the costs of cleaning up the sites at which they disposed of MSW.\textsuperscript{69}

\section*{B. The Inherent Inequities Of Municipal Liability}

Throwing garbage away is a concept familiar to all; indeed, we are a "throw away" society. Regardless of where one resides or the amount of garbage one throws away, everyone has contributed to problems created by the disposal of MSW. One of the greatest problems inherent in the notion of municipal liability is that it is a selective solution\textsuperscript{70} to a comprehensive, nationwide dilemma. We have all contributed to the damage caused by the disposal of MSW, yet, under the current system, not everyone will contribute to the costs of cleaning up the mess.

1. A Tale of Two Cities: One Rich, One Poor

States have traditionally authorized municipalities to provide residents with essential public services, such as sanitation.\textsuperscript{71} In order to finance these services, municipalities assess local property taxes.\textsuperscript{72} Municipalities are unequal by nature.\textsuperscript{73} They vary tremendously in terms of both size and public service needs.\textsuperscript{74} In addi-

\textsuperscript{69} Industrial PRPs have already filed several third party lawsuits involving liability for MSW at sites across the nation. Rena L. Steinzor & Matthew F. Lintner, \textit{Should Taxpayers Pay the Cost of Superfund?}, 22 ENVT. L. REP. 10089, 10089 (1992). Such suits have arisen in California, Connecticut, Massachusetts, Minnesota, New Jersey, New York, and Pennsylvania. \textit{Id.} at n.8.

\textsuperscript{70} The concept of municipal liability for the disposal of MSW is not, itself, selective; all municipalities are potentially liable. However, the way in which it will be implemented, primarily through contribution actions, will arguably be inconsistent and arbitrary, and will depend upon several factors. Such factors include the ability and willingness of responsible parties to initiate contribution suits and the number and location of sites containing MSW that are scheduled for remediation, i.e., the sites that are on the NPL.

\textsuperscript{71} Richard Briffault, \textit{Our Localism: Part I — The Structure of Local Government Law}, 90 COLUM. L. REV. 1, 19 (1990); \textit{see also} Donna R. Lanza, \textit{Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem}, 10 FORDHAM URB. L.J. 215, 218 (1982) (noting that the collection and disposal of solid waste is an essential and traditional governmental function and it is generally performed by municipalities).

\textsuperscript{72} \textit{Id.} Property taxes often do not raise enough revenues. \textit{See} Richard Briffault, \textit{Our Localism: Part II — Localism and Legal Theory}, 90 COLUM. L. REV. 346, 350 (1990). Therefore, many states have granted cities the power to tax incomes and sales, as well as property. \textit{Id.}

\textsuperscript{73} \textit{Id.} at 114 (noting that some municipalities have substantial resources and few needs, while others have significant needs, but are relatively poor). Furthermore, the extent of local needs is often completely unrelated to the availability of local resources. \textit{Id.} at 21.

\textsuperscript{74} \textit{Id.} at 19-20 (explaining that some municipalities, especially large cities, have much greater public safety, public health, and public assistance needs that divert municipal reve-
tion, local settlement patterns reflect differences in race, class, and wealth, and these patterns foster the separation of taxable wealth from public service needs. Since municipal budgets rely primarily on the local tax base, wealth differences among municipalities create marked differences in the quality of services that the municipality can provide.

While wealthy municipalities have more revenues to devote to public services, such as waste disposal, poorer municipalities have less revenues available to furnish such services. Municipal liability under CERCLA does not distinguish between wealthy and poor municipalities: all are potentially liable. However, poorer municipalities may suffer the greatest financial burdens for environmental cleanup costs. Since poorer municipalities have limited financial resources, they may have been unable, due to budgetary constraints, or unwilling, due to more pressing public needs, to adopt adequate disposal precautions from the outset.

In addition, more densely populated municipalities, such as cities, tend to be poor. The EPA’s hazardous site ranking system uses population as a relevant factor in determining which hazardous waste sites will be scheduled for cleanup, with more heavily populated areas receiving priority. Therefore, once again, it is more

75. Id. at 5.
76. Id.; see also Briffault, supra note 72, at 437. The fact that municipalities are segregated by race, class, and function has clear consequences for local public services. Id. The separation of the rich from the poor and of businesses from residences results in a separation of taxable wealth from public service needs. Id.
78. We have only recently learned that the disposal of everyday household garbage can damage the environment. Therefore, years ago, poorer municipalities faced with budgetary constraints most likely directed their spending towards “more important” public services, such as education, health, and safety. The simple solution to the disposal of residents’ garbage was most likely hauling it away to a local dump and forgetting about it.
79. See Briffault, supra note 72, at 424 (commenting that local regulatory decisions are “profoundly affected” by local fiscal capacity); see also id. at 423 (noting that studies have revealed that the quantity and quality of local services varies directly with local fiscal capacity).
80. See Briffault, supra note 72, at 349 (stating that many big cities have large social welfare and infrastructure demands). These cities must deal with problems such as “poverty, unemployment, dependent populations, crime, drug addiction, deteriorating housing and crumbling roads, bridges, and mass transit, even as many of them are in economic decline.” Id. at 350 n.26.
81. Hazardous Sites in Poor, Rural Counties Receive Less Attention than Other U.S.
likely that municipal liability under CERCLA will hit poorer municipalities the hardest. Assuming this argument to be true, poorer municipalities will be required to contribute more money and more often to environmental cleanups, and this will serve to perpetuate both social and economic inequalities.

2. The Tax Man Cometh, But Where Will He Go?

As the court in B.F. Goodrich acknowledged, municipal liability under CERCLA will have “far reaching implications for municipalities and their taxpayers.”\(^2\) CERCLA cleanup costs are extremely high,\(^3\) and pose a devastating threat to municipalities.\(^4\) Municipalities responsible for cleanup costs will most likely finance their liability primarily via increased property taxes,\(^5\) with the burden falling directly on their residents. There are two ways in which municipalities might respond to the threat of CERCLA liability.

First, a municipality might gradually raise property taxes and create its own CERCLA reserve fund.\(^6\) In such a situation, the

\(\text{Sites, 20 ENV'T REP. April 13, 1990, at 1961.}\)

\(\text{82. See supra note 65 and accompanying text.}\)

\(\text{83. The EPA estimates that the average cost of cleaning up a contaminated site ranges from $25 million to $30 million, excluding transaction costs. John Godfrey, Superfund Revenue Mix Under Review, 50 TAX NOTES 819, 819 (1991); see also Steinzer & Lintner, supra note 69, at 10,090 (noting that if cleanup costs are allocated by volume, municipalities that contributed only MSW to a site could be required to pay up to 90\% of the remediation costs for that particular site). In 1992, the EPA attempted to formulate a municipal cleanup cost allocation policy. See 22 ENV'T REP. (BNA) 2333 (Feb. 7, 1992). According to the EPA, the purpose of this new policy would be to develop a cost allocation scheme and a model municipal settlement document to protect municipalities from third party contribution actions. 22 ENV'T REP. 1368 (Sept. 27, 1991); see also David B. Van Slyke, Municipalities and CERCLA: The Cleanup Cost Allocation Conundrum, 5 VITL. ENVTL. L.J. 53 (1994) (discussing other liability allocation formulas considered by EPA). However, municipalities may encounter state or local restrictions in attempting to settle.}\)

\(\text{84. There are 39,000 local government entities; over three quarters of these have less than 3,000 residents, and more than one-half of these have less than 1,000. Ferrey, supra note 2, at 273. Given the extremely high costs of cleaning up hazardous waste sites, the impact on smaller municipalities, such as those with fewer than 1,000 residents, will be crippling both to the municipalities and their residents due to the smaller tax base over which the costs can be spread. CERCLA liability costs “can easily bring municipal governments to their knees.” Robert G. Torricelli, Municipal Liability Under Superfund — A Legislative Response, 16 SETON HALL LEGIS. J. 491, 497 (1992).}\)

\(\text{85. See Ferrey, supra note 2, at 274.}\)

\(\text{86. This might occur when a municipality is aware that a site at which it disposed of its MSW is on the NPL and is scheduled for remediation. However, it should be noted that this option might not be readily available to all municipalities. Many state constitu-}\)
residents of the municipality will by paying higher taxes in anticipation of future liability. Such liability may or may not materialize. If the municipality is found liable, and consequently must contribute to cleanup costs, this increased tax (the municipal reserve fund) will have served its purpose. However, if the municipality is not required to contribute to cleanup costs, the increased tax will have been unnecessary, and will have tied up revenue, diverting it from other, more productive uses.

Second, a municipality might do nothing until it is actually found liable and required to contribute to cleanup costs. In this situation, if the municipality is found liable, the tremendous costs of liability will have to be raised quickly. This could result in one large tax increase, as opposed to gradual increases, for residents.

Since everyone has contributed to the damage caused by MSW, individual municipal liability, financed primarily by property tax increases, creates several inequities. First, residents of municipalities will be subject to increased taxes for environmental damages based solely on where they reside. If the problems created by MSW transcend municipal boundaries, then a system of paying the costs of environmental cleanup based solely on one's place of residence is fundamentally inequitable.

Tions contain provisions that restrict the taxing power of municipalities, especially with regard to property taxes. Jerome G. Rose, Development Fees: To What Extent May Municipalities Shift the Costs of Public Improvements to New Developments?, 15 CURRENT MUN. PROBLEMS 211, 215 (1988-89).

87. This might occur for two reasons. First, a third party contribution suit may never be commenced against the municipality. Second, although the site is scheduled for remediation, the EPA may never actually commence the cleanup, or it may postpone the cleanup due to the site's "hazardous" ranking (priority) on the NPL in comparison to other, more dangerous sites.

88. This, however, may not necessarily be true. MSW does contain hazardous substances, and consequently, any municipality which has arranged for the disposal of MSW is a target for a contribution suit. Therefore, with respect to CERCLA liability, municipalities are confronted with a Catch-22 situation. The fact that they can now be found liable, and the relative ease with which this can occur seem to indicate that a municipality can never be certain that it will not incur liability for cleanup costs in the future.

89. The revenues that the municipality set aside in anticipation of liability could have been used to finance preventive environmental efforts such as waste management programs. See infra notes 180-85 and accompanying text.

90. MSW is disposed of by municipalities across the nation, yet the damage caused by its hazardous components remains the same, regardless of the location of the site at which it was disposed.

91. Arguably, a person's place of residence is largely determined by external forces. Many factors influence where one resides, especially economic factors such as proximity to place of employment and the availability of affordable housing.
Second, municipal waste disposal decisions are largely beyond the control of the individual residents. Residents have no control over the final destination of their garbage, but can only hope that it was placed in a sanitary landfill. They entrust the responsibility of proper disposal to their municipality. Municipal residents have neither the means nor knowledge to ensure the proper disposal of their waste; they pay for the municipality to handle the disposal. Furthermore, waste disposal is an essential public service. While a private entity can choose not to operate a business that generates hazardous waste, a municipality has no such choice. Therefore, municipal residents face enormous potential CERCLA liability for which their elected officials have no alternatives. Finally, while it may be argued that the reason a municipality incurs the costs of CERCLA liability is because of the garbage its residents disposed of, even those who have recently moved to a municipality will be required to pay for the environmental damage caused by residents of that municipality prior to their arrival.

IV. RECENTLY PROPOSED SOLUTIONS FOR THE PROBLEMS CREATED BY MUNICIPAL LIABILITY

It is beyond dispute that municipalities are now subject to
CERCLA liability for arranging the disposal of MSW\(^{97}\) and that CERCLA liability will have a tremendous impact on municipalities and their residents.\(^{98}\) However, there is much debate over what should be done to ease this liability burden. The following analysis focuses on some of the more recently proposed solutions to the problem, and argues that each is fundamentally flawed.

A. **Congressional Response To Municipal Liability: The Toxic Cleanup Equity And Acceleration Act Of 1991\(^{99}\)**

In 1991, the Toxic Cleanup and Equity Acceleration Act (TCEAA) was introduced, and defeated, in both the Senate and the House of Representatives.\(^{100}\) The purpose of the TCEAA was to amend CERCLA to protect citizens, municipalities, and other generators and transporters of MSW and sewage sludge\(^ {101}\) from lawsuits that treat these substances in the same manner as industrial

\(^{97}\) See supra part II.

\(^{98}\) See supra part III.

\(^{99}\) S. 1557, 102d Cong., 1st Sess. (1991) [hereinafter S. 1557]; H.R. 3026, 102d Cong., 1st Sess. (1991) [hereinafter H.R. 3026]. A similar, yet less detailed bill was also introduced into the House and defeated in 1991. It was entitled the Toxic Pollution Responsibility Act of 1991, and was sponsored by Representatives Smith, Dreier, and Saxton. H.R. 2767, 102d Cong., 1st Sess. (1991). The purpose of this bill was simply to amend CERCLA so that municipalities would not be liable for the generation or transportation of MSW. Id.

Since the defeat of the TCEAA, several additional bills have been introduced and defeated in Congress. See, e.g., The Toxic Cleanup Equity and Acceleration Act of 1993, H.R. 870, 103d Cong., 1st Sess. (1993); S. 343, 103d Cong., 1st Sess. (1993) (proposing to amend CERCLA to shield municipalities from contribution actions, capping the aggregate amount of damages that all municipalities at a given site would be liable for as a result of settlement agreements with the EPA, and providing for "in-kind services" in lieu of cash payments for municipalities unable to finance their share of liability). For a more detailed discussion of The Toxic Cleanup Equity and Acceleration Act of 1993 and other recent congressional proposals, see Joseph M. Manko & Madeleine H. Cozine, The Battle Over Municipal Liability Under CERCLA Heats Up: An Analysis of Proposed Congressional Amendments to Superfund, 5 VILL. ENVTL. L.J. 23 (1994). Since all of the congressional proposals espouse essentially the same goal of eliminating or severely restricting municipal liability under CERCLA, only the TCEAA of 1991 will be referred to in the following discussion to serve as an illustration of the flawed reasoning underlying each of them.

\(^{100}\) Virtually the same bill was simultaneously introduced into both the House and the Senate. H.R. 3026 was sponsored by Representatives Torricelli, Dreier, Atkins, Gallo, Hunter, Martinez, Moorhead, Shays, Skaggs, Torres, and Weldon. H.R. 3026, supra note 99. S. 1557 was sponsored by Senators Lautenberg and Wirth. S. 1557, supra note 99. A revised version of S. 1557 was incorporated into a bill entitled the Federal Housing Regulatory Reform Act, and was introduced into the Senate in 1992. See S. 2733, 102d Cong., 2d Sess. (1992). This proposal was also defeated. Id.

\(^{101}\) Although the bills addressed both MSW and sewage sludge, for purposes of this discussion, references to sewage sludge will be omitted.
hazardous waste.\textsuperscript{102} The House version of the bill began by noting several congressional findings.\textsuperscript{103} Included among these findings were (1) that there was a need for a reaffirmation of the policies underlying CERCLA, including the principle that the polluter should pay for cleanup, (2) that Congress did not intend to hold municipalities strictly, jointly, and severally liable under CERCLA for the generation or transportation of MSW, and (3) that third party contribution suits premised on the generation or transportation of MSW distort the intent of CERCLA and delay cleanups.\textsuperscript{104}

Based on these findings, the TCEAA proposed significant modifications to CERCLA.\textsuperscript{105} First, it would have added a definition of MSW to CERCLA Section 101.\textsuperscript{106} Second, it would have eliminated third party contribution suits related to the generation, transportation, or disposal of MSW.\textsuperscript{107} Third, the TCEAA would have codified the Interim Municipal Settlement Policy,\textsuperscript{108} by providing that the EPA would not initiate Section 9606 enforcement actions against municipalities for the generation, transportation, or disposal of MSW, unless "truly exceptional" circumstances existed.\textsuperscript{109} In addition, it would have provided for expedited settlements for municipalities against whom enforcement actions were initiated,\textsuperscript{110} and would have permitted the formation of covenants

\textsuperscript{102} S. 1557 \& H.R. 3026, supra note 99.
\textsuperscript{103} See H.R. 3026, supra note 99.
\textsuperscript{104} Id.
\textsuperscript{105} S. 1557 \& H.R. 3026, supra note 99.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} See supra note 2.
\textsuperscript{109} S. 1557 \& H.R. 3026, supra note 99. The bills stated that truly exceptional circumstances would exist when (1) there was site-specific evidence that the hazardous substances involved are not substances typically present in MSW, and were derived from a commercial, institutional, or industrial process or activity, (2) both the volume and toxicity of the MSW present at the site significantly outweighed the aggregate presence of hazardous substances from other sources, or (3) absent the aggregate contribution of hazardous substances from other sources, the hazardous substances contained in the MSW would be a significant cause of the release or threatened release creating the need for a response action. Id.
\textsuperscript{110} Id. Such settlements would require municipalities to pay for cleanup costs based on the quantity of hazardous substances present in the MSW, as opposed to payment based on the volume of MSW present at the site, and would limit municipal payments if such payments would force the municipality into bankruptcy or cause it to default on its debt obligations. Id. In addition, municipalities would be encouraged to enter into settlements that would permit them to contribute services instead of money, or to make delayed payments. Id. However, local or state laws may hinder a municipality's ability to participate
not to sue municipalities with respect to sites for which they had entered into settlements.\textsuperscript{111}

Throughout the Congressional Records that pertain to the introduction of the TCEAA, there is one consistent concern: permitting "very guilty" corporations to bring contribution suits against "less guilty" municipalities frustrates the "polluter, not the taxpayer, pays" principle underlying CERCLA.\textsuperscript{112} Indeed, the congressional findings referred to earlier specifically expressed a need to reaffirm this principle.\textsuperscript{113} However, the notion that municipalities are less guilty than corporations seems more convenient than accurate.\textsuperscript{114} While the compositions of industrial waste and MSW differ, it cannot be denied that MSW does in fact contain hazardous substances,\textsuperscript{115} and therefore, creates the same demand for cleanup as does waste from any other source.\textsuperscript{116}

Moreover, while Congress is correct to give great weight to the "polluter pays" principle, in the context of municipal liability, it has failed to identify the polluter. Here, the polluter is the taxpayer. By effectively barring third party contribution actions, a proposal such as the TCEAA would directly contradict the polluter pays principle, because it would, in most cases, shield the polluter

\textsuperscript{111} S. 1557 & H.R. 3026, \textit{supra} note 99.

\textsuperscript{112} See, \textit{e.g.}, 137 Cong. Rec. 10,952 (statement of Senator Lautenberg) (commenting that the TCEAA was designed "to block opportunistic and costly lawsuits by large corporate polluters against such innocent entities as . . . America's local governments").

\textsuperscript{113} \textit{See supra} notes 113-14 and accompanying text.

\textsuperscript{114} "At the heart of the effort to exempt municipalities from Superfund liability are two stubborn fallacies. The first is that 'ordinary garbage' is benign, and the second is that all industrial wastes are harmful." Andrew A. Giaccia \& Roy S. Belden, \textit{Why Municipalities Should Not Receive Special Treatment Under Superfund}, 22 ENVTL. L. REP. 10431, 10431 (1992).

\textsuperscript{115} \textit{See supra} notes 5-7 and accompanying text (explaining that while MSW does contain smaller concentrations of hazardous substances than waste from other sources, the tremendous volume of MSW produces large quantities of potentially toxic substances); \textit{see also} Giaccia \& Belden, \textit{supra} note 114, at 10431 (stating that even a low percentage of high volume MSW can produce a large total quantity of hazardous substances); note 48 and accompanying text (commenting that despite the low concentrations of hazardous substances in MSW, the cleanup costs of sites containing MSW may be greater than those at other sites). Furthermore, due to its volume, MSW may increase the height and width of the area that requires remediation at a hazardous waste site. Jeffrey N. Martin, \textit{Superfund Liability for Municipal Waste}, 6 NAT. RESOURCES \& ENV'T 6, 9 (1991).

\textsuperscript{116} MSW contains significant amounts of hazardous substances and therefore contributes to site contamination. Giaccia \& Belden, \textit{supra} note 114, at 10432. "There is nothing magical about the fact that such contamination comes from consumers instead of industrial sources. The impact on the environment is identical." \textit{Id.}
from having to pay. It would also negate any deterrent effect that might otherwise serve to shape current municipal disposal practices. Finally, assuming that the overall goal of environmental legislation is to clean up the environment, a measure that eliminates liability where the responsible parties, municipalities, and their residents can clearly be identified, directly frustrates this goal and should not be accepted as a viable solution. Protecting municipalities from liability merely shifts the burden of responsibility to others. However, adherence to the polluter pays principle dictates that this is a burden that the residents of municipalities (taxpayers) should properly bear.

B. Other Recent Proposals

While all seem to agree that something must be done to solve the problems created by municipal liability under CERCLA, there is considerable disagreement with respect to exactly what this might be. In response to the ongoing dilemma, some have argued that municipalities should not be required to bear the burden of environmental liability under the current statutory scheme, and that the allocation of any municipal liability should be altered both to contemplate the unique situation of municipalities and to ease the liability burden. Others, however, support retention of the current liability standard, and maintain that municipalities should contribute to the costs of environmental clean-ups in the same manner in which other responsible parties do. While each proposal has its merits, the following analysis will illustrate that none of them fully embody the comprehensive solution necessary to solve the problem.

Some advocate altering the current scheme of liability allocation in order to ease the burden on municipalities; they have posited several methods by which this can be achieved. Suggested

117. While one of the congressional findings was that Congress did not intend to hold municipalities liable under CERCLA for the generation or transportation of MSW, Congress expressed no such intention in the statute. In fact, there are several indications that Congress did intend for municipalities to be subject to CERCLA liability. See supra part II.

118. See supra note 13.

119. See supra note 14.

120. The analysis that follows focuses on a mere sampling of the more recent proposals in order to highlight the complexity of the problem and illustrate the need for a comprehensive solution.

121. See supra note 13.
modifications include crediting municipalities for waste minimization efforts or for handling MSW on a non-profit basis,\textsuperscript{122} allocating only certain cleanup costs to municipalities,\textsuperscript{123} exempting municipalities from financing "orphan shares" of cleanup costs that result from the joint liability scheme,\textsuperscript{124} exempting municipalities from liability under certain circumstances,\textsuperscript{125} and using equitable mitigating factors when allocating cleanup costs among parties.\textsuperscript{126}

The difficulty with these solutions is that they focus primarily on the present, and are intended to reduce the costs that a municipality incurs as a result of CERCLA liability. First, while municipal liability is unquestionably a problem that presently plagues municipalities, it is by no means a temporary problem and there are no indications that it will soon disappear. The environmental damage to which MSW contributes will only be abated and eliminated by specific efforts to alter current disposal practices. This requires a waste reduction strategy for the future. Consequently, any solution that focuses primarily on the present only begins to address the problem.

Second, and perhaps more important, a solution predicated on reducing contributions to cleanup efforts only inhibits individual cleanups, and effectively thwarts the overall objective of cleaning up the environment. Since residents of all municipalities have contributed to the damage caused by MSW, and since municipal liability is a local problem that has created a nationwide dilemma, it seems appropriate to consider a national solution.

By approaching the problem from a national perspective, and by requiring residents of all municipalities to contribute to the costs of cleaning up the damage caused by MSW, regardless of where they reside and regardless of where the damage may current-

\begin{footnotes}
\item[122] See, e.g., Ferrey, \textit{supra} note 2, at 276.
\item[123] See, e.g., id.
\item[124] See, e.g., id.
\item[125] See, e.g., Smith, \textit{supra} note 13, at 607-08.
\item[126] It has been argued that when allocating costs, courts should utilize the equitable factors included in the unsuccessful Gore Amendment to CERCLA. These factors include (1) the ability of a PRP to show that its contribution to the site was distinguishable from other PRPs, (2) the amount of hazardous substances that the PRP contributed to the site, (3) the degree of toxicity of these substances, (4) the degree of the PRP's involvement with the hazardous substances, (5) the degree of care exercised with regard to the hazardous substances, and (6) the degree of a PRP's willingness to prevent public harm. Meegan, \textit{supra} note 13, at 1799 (citing 126 \textsc{Cong. Rec.} 26,781 (1980) (statement of Rep. Gore)).
\end{footnotes}
ly be manifesting itself, the concept of municipal liability suddenly becomes less intimidating, and the consequences of municipal liability become more equitable. Therefore, the solution should not focus on reducing the liability of individual municipalities. Rather, it should concentrate on combining the resources of the residents of all municipalities, and should take advantage of the tremendous opportunity to spread the costs of cleanup among all who have contributed to the problem.

While some assert that the current liability scheme should be altered, one commentator has argued that it should be maintained. He maintains that this is the only way municipalities will be motivated to consider disposal alternatives other than landfilling, and suggests that municipalities combat CERCLA liability by changing current waste disposal practices. Unlike other proposed solutions, this one recognizes the need for planning for the future. In this respect, it is correct. However, CERCLA liability does not look forward; it remedies the consequences of the past. Therefore, because this proposal fails to provide municipalities with any assistance in dealing with their present liability due to their past disposal practices, it is not an adequate solution.

The problems created by municipal liability under CERCLA are extensive, and solutions that address only the present or the future are necessarily incomplete. Municipal liability requires a comprehensive solution that establishes both a method of easing the present liability burden and a system that provides for the future by altering current disposal practices. The proposal that follows illustrates how this might be achieved.

V. MAKING MUNICIPAL LIABILITY WORK

A. Taking Responsibility

I have a story. It is the story of a man who lived in the world and to him the world looked one way for a long time and then it looked another and very different way. The change did not happen all at once. Many things happened, and that man did not know when he had any re-

127. See supra, note 13.
128. See Dupont, supra note 14, § IV.
129. Id. at 1201-02 (commenting that this may be achieved through source reduction, recycling, and composting).
responsibility for them and when he did not. There was, in fact, a time when he came to believe that nobody had any responsibility for anything...  

Although many years have passed since the above words were written, the story seems especially relevant to the problem of environmental liability. The issue of responsibility is critical to any environmental solution; it is embodied in the “polluter pays” principle underlying CERCLA. However, municipal liability under CERCLA has come to be viewed as a game of shifting responsibility, and the players have all taken their positions. The EPA has explicitly declared that it will not pursue municipalities, yet it has also asserted that it is permissible for third parties to do so. As a result, third parties are now successfully taking advantage of their right to initiate contribution actions against municipalities, yet municipalities still maintain that they should not be burdened with CERCLA liability. Moreover, recent proposals are sympathetic to the plight of municipalities and focus on reducing aggregate municipal liability. If such proposals were to be adopted, they would effectively shift the liability burden back to third parties.

Properly viewed, contribution suits allow CERCLA liability to be allocated and spread, not shifted, among responsible parties. By condemning the system as one that permits some parties to take advantage of others, attention becomes too focused on who is trying or should be

130. ROBERT P. WARREN, ALL THE KING’S MEN 435 (1946).

131. This is reflected by the congressional concern that permitting corporations to bring contribution suits against municipalities violates the “polluter pays” principle. See supra notes 112-13 and accompanying text. However, with respect to contribution suits against municipalities, liability is not being shifted from one party to another. Rather, it is being spread more equitably among responsible parties, thus directly effectuating the “polluter pays” principle.

132. See supra notes 60-63 and accompanying text (explaining the EPA’s Interim Municipal Settlement Policy).

133. See supra notes 100-26 and accompanying text (discussing proposals that advocate eliminating, or at least reducing municipal liability). But see notes 128-29 and accompanying text (discussing a proposal that maintains that municipalities should face CERCLA liability in the same way in which other responsible parties do).

134. See Steven B. Russo, Contributions Under CERCLA: Judicial Treatment After SARA, 14 COLUM. J. ENVTL. L. 267, 275 (commenting that the congressional purpose of the CERCLA contribution provision was to encourage quicker, more equitable settlements and to decrease litigation, thereby facilitating cleanups).
able to avoid liability; the goal of cleaning up the environment gets lost in the process. At this point, adherence to the notion of taking responsibility becomes crucial.\textsuperscript{135} If CERCLA is to be an effective tool for cleaning up the environment, especially in the context of municipal liability, it must be firmly committed to the concept of taking responsibility, and it must adhere to the “polluter pays” principle from the outset, instead of merely relying on it as a convenient means to justify the end.\textsuperscript{136}

Fortunately, the story quoted above does not remain the same; our throw-away society appears to be changing. While convenience is still important to Americans, the environment is also becoming more and more important. People are beginning to understand that their actions affect the environment, and that, both individually and collectively, they can become part of the solution. Public surveys continuously indicate that society ranks the management of hazardous and toxic waste as one of the nation's highest environmental priorities.\textsuperscript{137} Moreover, a 1988 poll revealed that the public is more concerned about proper waste disposal than about police or fire protection or affordable housing.\textsuperscript{138} It seems apparent that society has become willing to take responsibility for cleaning up the environ-


\textsuperscript{136} The flawed reasoning underlying the TCEAA provides an illustration. According to proponents of the TCEAA, (1) the polluter should pay, (2) the polluter is industry, not the taxpayer, and therefore (3) industry should pay. On the first count, they are correct: the polluter should pay. The fundamental flaw is that they incorrectly identified the polluter. In the context of municipal liability, the taxpayer is the polluter. However, since the goal of the TCEAA was to eliminate third party contribution actions against municipalities, thereby forcing industry alone to shoulder the costs of cleanup, it was necessary to justify this imposition of liability. Since environmental policy dictates that the polluter should pay, the easiest way to do this is to delineate industry as the polluter. However, accepting the fact that here, the taxpayer is the polluter, it becomes clear that designating industry as the polluter was nothing more than a convenient means of achieving the goal of the TCEAA. Adherence to “polluter pays” principle should entail identifying the polluter and then imposing liability, rather than choosing those who “should” be liable, and labelling them the polluter.


\textsuperscript{138} \textit{Public Concern About Garbage Disposal Tops Police, Fire, Affordable Housing, Poll Shows}, 19 ENV'T REP. (BNA) No. 26, at 1247 (Oct. 28, 1988) (referring to a 1988 poll conducted by the National Solid Waste Management Association).
ment. The solution, therefore, should begin by creating a system through which they can.

B. Passing The Buck

Environmental cleanup is an extremely expensive endeavor, and someone must ultimately bear the burden. Environmental policy dictates that the costs of cleanup are properly borne by the polluter. In the context of municipal liability under CERCLA, there is no question that the residents of municipalities are responsible for the generation of MSW; they are the polluters. It follows that municipal residents should pay the costs associated with the cleanup of MSW. However, the current CERCLA liability system of individual municipal liability is inadequate to solve the problems associated with the disposal of MSW.

These problems transcend the boundaries of individual municipalities; we are in the midst of a national garbage disposal crisis. While the present allocation of municipal liability under CERCLA may provide a way to clean up the damage caused by past disposal of MSW, it produces inherently inequitable results. Furthermore, the current liability system does not encompass the national facet of the garbage disposal problem because it fails to incorporate the need to alter current disposal practices on a national level.

While society may now be willing to take responsibility for cleaning up the environment, it must first understand what this entails. Environmental education and consumer awareness are essential to this understanding. Until society is made aware of the environmental damage caused by current garbage disposal practices and the costs of cleaning up this damage, it will not appreciate the effects of its actions, and there will be little incentive to achieve the necessary nationwide change in disposal practices.

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139. See Meegan, supra note 13, at 1797-98 (stating that since municipalities dispose of garbage for the benefit of their taxpayers, it is not unreasonable to require those taxpayers to bear part of the liability burden).
140. See supra notes 70-96 and accompanying text.
142. See supra notes 70-96 and accompanying text.
C. Municipal Liability Gets A Makeover

1. Superfund: The Current Federal Funding Scheme

When enacted, CERCLA established a $1.6 million "Hazardous Substance Response Trust Fund" (Superfund) to enable the government to undertake immediate cleanups. Superfund was to be financed over a five-year period, primarily through taxes on the domestic production and import of chemical "feedstocks." There are two problems with Superfund. First, Superfund is inadequately funded and therefore cannot sufficiently provide for current national cleanup needs. Second, petroleum and chemical "feedstocks" lead to hazardous waste generation only indirectly and to differing degrees. Consequently, many companies which generate hazardous waste are not currently contributing to Superfund.

143. CERCLA actually created two funds. First, there is the Post-Closure Liability Trust Fund, which is funded by a tax on hazardous wastes received at qualified hazardous waste disposal facilities and is used to finance cleanups at sites which have been closed pursuant to CERCLA regulations. Second, there is the Hazardous Substance Response Trust Fund (Superfund), which is used to finance all other remedial actions authorized by CERCLA. See Toxic Waste Litigation, supra note 7, at 1472 n.35.

144. See James J. Florio, Congress As Reluctant Regulator: Hazardous Waste Policy in the 1980's, 3 YALE J. REG. 351, 356 (1986) (explaining that the fund was to be used to clean up sites that presented immediate threats to the public health and environment, and for which judgments against private responsible parties could not be obtained). The EPA may use Superfund dollars to undertake both short term "removal" actions and long term "remedial" actions to respond to actual or threatened releases of hazardous substances. See David C. Clarke, Successor Liability Under CERCLA: A Federal Common Law Approach, 58 GEO. WASH. L. REV. 1300, 1300 (1990). After it has undertaken remedial measures, the EPA is permitted to sue responsible parties for cleanup costs and thereby replenish Superfund. See Toxic Waste Litigation, supra note 7, at 1472-73.

145. See Florio, supra note 144, at 355-56. Chemical "feedstocks" are the basic chemical building blocks used to manufacture most other chemical products. Id.; see also Toxic Waste Litigation, supra note 7, at 1472 n.35 (noting that 87.5% of Superfund was derived from taxes on petroleum and chemical "feedstocks," while the remaining 12.5% came from general revenue appropriations). In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA), which reauthorized Superfund for another five years by adding $8.6 billion to it. See Jack Lewis, Superfund, RCRA, and UST: The Clean-up Threesome, EPA J., July-Aug. 1991, at 7, 9. Then, in 1990, Congress again authorized continuing the program for an additional five years, adding another $5.1 billion to it. Id.

146. See Toxic Waste Litigation, supra note 7, at 1503.


148. Id.
2. Creation of Munfund

The Munfund proposal is designed to remedy the problems created by past disposal. It begins by establishing a national municipal liability trust fund, the Munfund. The creation of Munfund would radically alter the current system of CERCLA liability for municipalities, as it would effectively eliminate individual municipal liability. Munfund would be used to finance all judgments against all municipalities that are found liable under CERCLA and thus required to pay cleanup costs.

Munfund would be financed in the following manner. First, it would require a slight alteration of Superfund. As previously stated, 12.5% of Superfund is derived from general appropriations. This money would be removed from Superfund, and would form the basis of Munfund. Given that Superfund is already inadequately funded to effectuate its purpose, this would appear to be an unwise alteration. However, many companies that generate hazardous waste do not currently contribute to Superfund. Returning to the "polluter pays" principle, it seems to follow that these companies should not be shielded from contributing to Superfund. Therefore, Superfund could be supplemented, and perhaps even achieve more adequate funding, by altering its composition to include contributions from all companies that generate hazardous waste.

The remainder of Munfund would be derived from an additional appropriation from the federal income tax base. This would require either a federal tax increase,
or a change in the current allocation of federal income tax revenues, or perhaps both. Given the resistance of Americans to tax increases, this might also seem like an unwise modification. However, two recent polls indicate that Americans are willing to pay higher taxes to clean up the environment. The use of appropriations from the federal income tax base is also justifiable on the ground that the damage caused by the disposal of MSW is a societal problem, and one that is not confined to individual municipalities. However, if left to fend for themselves, municipalities would face substantial difficulties in raising, and perhaps even in collecting, the funds necessary to satisfy judgments against them.

Two commentators have proposed several goals that an environmental tax might be expected to achieve. First, the tax must be administratively feasible. In terms of implementation, the tax base (the individuals responsible for paying the tax) should be readily identifiable and enforcement should be relatively easy. Munfund would be simple to administer because the tax base is clearly identifiable. Furthermore, enforcement would not pose a problem because the federal income tax system is already well established. Therefore, collection of the money to finance Munfund would be administratively feasible.

155. See Public Willing to Pay Higher Taxes for Cleaner Environment, Survey Says, 20 Env't Rep. (BNA) No. 42, at 1780 (Feb. 16, 1990) (referring to a nationwide survey conducted by the Cambridge Energy Research Associates and Opinion Dynamics Corp., which revealed that more than half of those polled were "definitely willing" to pay an extra $50.00 per year to cleanup the environment); see also Poll Finds Americans Willing to Pay Higher Taxes to Clean Up Environment, 21 Env't Rep. (BNA) No. 34, at 1586 (Dec. 21, 1990) (referring to a Time Magazine-Cable News Network poll revealing that 70% of the respondents would be willing to pay $200 more in taxes per year to cleanup the environment, while 44% of these respondents were even willing to pay $500 in higher taxes for this purpose).

156. See Richard A. Westin, Environmental Taxes: Some Options, 48 TAX NOTES 355, 355 (1990) (noting that an important criteria of an environmental tax is that it be more appropriate to use national, rather than regional, standards).

157. See supra part II.B.2 (discussing ways in which municipalities might raise the money to finance CERCLA liability).

158. J. Lon Carlson & Charles W. Bausell, Jr., Financing Superfund: An Evaluation of Alternative Tax Mechanisms, 27 NAT. RESOURCES J. 103 (1987). While these commentators discussed the seven factors in the context of generating revenues for a continued Superfund, the factors seem equally applicable to the Munfund.

159. Id. at 108.

160. Id. at 109.
The second goal is revenue generation, including the stability of the revenue flow over time. Munfund has the potential to generate substantial revenues. Once the amount of money necessary to sustain Munfund is determined, an appropriation from federal income tax revenues can be made. This would require a tax increase or a change in the current allocation of income tax revenues, or both. Regardless of the manner in which tax revenues are appropriated, however, Munfund will maintain its stability because federal income taxes are collected on an annual basis. Furthermore, since Munfund is a broad-based tax, and would only marginally affect those paying federal income taxes, the stability of the tax base would not be threatened.

Third, the tax should be equitable. In the context of financing the cleanup of hazardous waste sites, there is no clearly established or generally agreed upon result that is "equitable." Some argue that equity is achieved by requiring those whose past actions created the problem (generators) to pay to clean it up. Others maintain that those who have benefitted from less expensive disposal practices in the past should pay. Finally, some advocate that equity will best be served by spreading the burden of cleanup costs over as large a group as possible, since the current problems were not foreseen at the time of disposal.

In addition to the notions of equity discussed above, public finance theory differentiates between two approaches to equity in the context of tax incidence. The benefits principle dictates that an individual should pay an amount of tax that reflects the benefit they will receive from the public service the tax will fund. The "ability to pay" principle holds that individuals should pay taxes based on

161. Id. at 108-09.
162. Id. at 109.
163. See Carlson & Bausell, supra note 158, at 110.
164. Id. This view is essentially the "polluter pays" principle, which is reflected in current law.
165. Id.
166. Id.
167. Id. at 111.
168. See Carlson & Bausell, supra note 158, at 110.
their income.\textsuperscript{169}

While the notions of equity vary, Munfund would arguably come very close to achieving each of them. First, Munfund would effectuate the "polluter pays" principle. While all taxpayers may not have been "equal polluters," all have disposed of MSW and consequently have contributed to the resultant problems. Second, it is arguable that municipal residents have benefitted from lax past disposal practices due to lower property taxes.\textsuperscript{170} Third, Munfund would spread the burden of cleanup costs over a large group: all those who pay federal income taxes. Spreading the burden over all taxpayers would minimize the degree of inequity suffered by any individual taxpayer. Fourth, the tax burden associated with Munfund will be borne not only by all those who created the problem, but also by all those who benefit from the ensuing cleanups: society at large.\textsuperscript{171} Finally, Munfund would require individual contributions only from those who pay federal income taxes.

Fourth, the tax should minimize the potential for litigation by affected parties.\textsuperscript{172} Munfund would provide little, if any, opportunity for litigation regarding tax liabilities, especially since the tax base for Munfund would be clearly defined.\textsuperscript{173}

Fifth, the tax should complement the overall regulatory scheme.\textsuperscript{174} One of the primary goals of CERCLA is to have the parties responsible held liable for the attendant cleanup costs.\textsuperscript{175} Since Munfund would effectuate the "polluter pays" principle underlying CERCLA by requiring all those responsible for the disposal of MSW to contribute to the costs of its clean up, it would significantly foster the

\textsuperscript{169} Id.
\textsuperscript{171} See Carlson & Bausell, \textit{supra} note 158, at 111. While society at large will appreciate the benefits of a clean environment, those residing near a site that is remediated most likely will benefit the most. However, Munfund would facilitate the cleanup of all NPL sites containing MSW, and therefore would directly benefit municipal residents across the nation.
\textsuperscript{172} Id. at 109.
\textsuperscript{173} Id. at 120 (commenting that broad-based taxes, such as Munfund, leave little opportunity for dispute).
\textsuperscript{174} Id. at 109.
\textsuperscript{175} See B.F. Goodrich v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992).
effectiveness of CERCLA.

Finally, the tax should promote economic efficiency, create incentives for waste reduction, and foster alternative disposal methods as a means of minimizing the future costs of the program. Because Munfund is a broad-based tax, the impact on individual taxpayers would most likely be relatively small, especially since Munfund is not related to waste generation. While Munfund alone would not achieve the necessary change in current disposal practices, if supplemented by aggressive environmental education, it has the potential to achieve the desired effect. Requiring all taxpayers to contribute to MSW clean up and informing taxpayers that there are safer disposal alternatives available could operate as an incentive to alter current disposal practices. By compelling taxpayers to pay for the damage caused by past disposal, they would understand the extent to which their actions affect the environment and they would begin to realize the importance of proper disposal practices.

Moreover, with respect to the environment, it is clear

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177. One of the more frequently proposed solutions to the MSW disposal problem is a waste-end tax, which is assessed based upon the actual amount of waste disposed, and which may vary according to the type of waste or the disposal methods employed. See Carlson & Bausell, supra note 158, at 106-08 (discussing of waste-end taxes); see also Michelle L. Washington, A Proposed Scheme of Municipal Waste Generator Liability, 100 YALE L.J. 805, 822-23 (1990) (proposing a household-variable waste tax). While a waste-end tax would achieve economic efficiency by forcing individuals to internalize the costs of waste disposal, it creates several significant problems that a program such as Munfund would avoid. First, in order for a waste-end tax to create the necessary incentives, it must be set high enough to offset any advantage of other available and less desirable disposal techniques. See Carlson & Bausell, supra note 158, at 117-18. This, unlike Munfund, might require substantial individual contributions. A waste-end tax also creates significant problems in terms of administrative feasibility, especially with respect to collection of the tax and the information required to assess it. Id. at 115-16. While a waste-end tax can initially generate sufficient funds, its success in altering disposal methods will significantly reduce the stability of its waste stream over time. Id. at 117. Moreover, the imposition of a waste-end tax may result in increased litigation. Id. at 120. Finally, a waste-end tax may create a perverse incentive and result in illegal waste disposal practices.
178. Anthony D. Cortese, Toward Environmental Responsibility: How Do We Become Literate?, 17 EPA J. 31, 31 (1991) (commenting that a change in the relationship of humans to the environment will require a significant societal effort in environmental education).
179. If individuals are made aware of the fact that they are paying to clean up the damage created by past disposal practices, they might be more inclined to alter their current practices so that they will not have to pay in the future.
that prevention is much less expensive than remediation.\(^{180}\) Therefore, an additional catalyst to the modification of current disposal practices would be the creation of a comprehensive, nationally mandated solid waste management program that emphasizes preventive measures such as source reduction and recycling. Federal statutes do not currently require any comprehensive regulation of MSW.\(^{181}\) An increasing number of states and municipalities have developed household hazardous waste management programs on their own initiative, but the implementation of such programs is strictly voluntary.\(^{182}\) Furthermore, efforts to manage solid waste disposal vary from state to state,\(^{183}\) and are not necessarily consistent with solving the national disposal problem.\(^{184}\) Therefore, since the problem is national in scope, the implementation of a comprehensive federal solid waste management program would be a significant step towards eliminating, or at least substantially reducing, future municipal liability.\(^{185}\)

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180. See Cortese, supra note 178, at 32 (acknowledging that focus should be placed on anticipating and preventing pollution, rather than on controlling and remediating it).

181. Paula J. Meske, The Solid Waste Dilemma: Municipal Liability and Household Hazardous Waste Management, 23 ENVT. L. 355, 355 (1993) (proposing that Congress mandate regulation of household hazardous waste). The EPA has recently issued solid waste disposal facility criteria, which provide minimum federal standards for MSW landfills, including location restrictions, facility design and operating criteria, groundwater monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure requirements. See Solid Waste Disposal Facility Criteria, 40 C.F.R. §§ 257-58 (1991). While this is a step in the right direction, it is only a small step. This strategy concentrates only on preventing the problems caused by waste in landfills, rather than on reducing the amount of waste that reaches landfills.

182. Meske, supra note 181, at 358 (noting that EPA supports such programs, but has not played a strong role in their evolution); see also Meyers, supra note 1, at 569 (stating that §§ 6942-49 of RCRRA provide guidelines for the implementation of state plans for the treatment and disposal of MSW, but compliance with the guidelines is voluntary).

183. Ann R. Mesnikoff, Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home, 76 MINN. L. REV. 1219, 1230 (1992) (noting that there is no uniformity among state approaches). When municipalities undertake responsibility for solid waste management, a variety of problems ensue. See Thompson, supra note 7, at 596. Municipalities often lack the funds and expertise necessary to implement successful programs. See id. Furthermore, municipal officials can be influenced by a variety of political factors, and might therefore be inclined to adopt a program which makes everyone happy. Id.


185. Since the adoption of a program such as Munfund would eliminate any deterrent effect on municipalities, which the current system of individual liability might provide, federal solid waste management standards could play an important role in the implementa-
3. Cleaning Up the Mess

The creation of Munfund would eliminate the inequities inherent in the current scheme of individual municipal liability under CERCLA. As a result of the decision in *B.F. Goodrich v. Murtha*, third party contribution actions against municipalities will increase. Under the current CERCLA liability scheme, municipalities that are found liable are individually responsible for paying the extremely high costs of cleanup. These costs will be paid directly by the residents of these municipalities, most likely through property tax increases. It is far more equitable to spread the costs of cleanup among everyone, regardless of where they reside. This is precisely what Munfund would accomplish. No one municipality or group of residents would be required to bear excessive liability, and municipalities would be freed from the potentially crippling effects of CERCLA liability. The creation of Munfund would also facilitate cleanup efforts. The existence of an established fund, specifically for the purpose of financing municipal liability and replenished annually from income tax revenues, would allow cleanups to begin immediately after municipalities are found liable because it would eliminate the need to delay the commencement of cleanup efforts until the necessary funds are raised.

While some might contend that the residents of "good" municipalities should not be required to contribute to the cleanup costs incurred by "bad" municipalities, this argument does not seem sufficient to justify retaining the current liability scheme. First, municipal liability under CERCLA is extremely unpredictable. The fact that a municipality is not currently facing CERCLA liability does not mean that it is immune from such liability in the future. Therefore, those who would advocate retaining the current liability scheme assume a very real risk. While they may consider themselves safe from having to contribute to
cleanup costs because their municipality is not currently threatened with CERCLA liability, the tables could very easily turn. Then, if their municipality was later found liable and required to raise cleanup costs, they would have to pay an extremely high price to finance their municipality's liability. Given a choice between a marginal contribution to a national liability fund and a potentially large contribution to the costs incurred by a liable municipality, it is arguable that most would choose the former.

Furthermore, the creation of Munfund would foster the "polluter pays" principle, and would provide a comprehensive solution for what has now become a national dilemma. The "polluter pays" principle dictates that the polluter, and not the taxpayer, should pay to clean up environmental damage. It has been established that everyday garbage contains hazardous substances. Consequently, residents of all municipalities, merely by throwing their garbage away, contribute to the problems caused by the disposal of MSW. Therefore, in the context of municipal liability, the polluter is the taxpayer.

Munfund would directly effectuate the "polluter pays" principle because it would require all polluters (taxpayers) to finance the cleanup of environmental damages caused by the disposal of MSW. Although some might argue that requiring all taxpayers to pay for the cleanup costs incurred by individual municipalities would result in some taxpayers paying for damage they did not cause, the hazardous nature of MSW does not vary among municipalities, and MSW does not lose its hazardous nature simply because it is disposed of in one municipality rather than another. While all taxpayers are polluters, the current CERCLA liability scheme makes them pay only when the municipality in which they reside is found liable. Therefore, some polluters are required to pay, but others are not, and the "polluter pays" principle again becomes nothing more than a convenient means to justify an arbitrary imposition of liability. Munfund, however, would require all polluters to pay, and would thus eliminate the fortuitous immunity from liability that some taxpayers currently receive based solely upon

188. See supra note 6 and accompanying text.
where they reside.

Munfund would also eliminate the perceived need to reduce the liability burden that municipalities must bear under the current system. While given the immense costs of cleanup, it may be desirable to reduce the amount that individual municipalities are now required to pay, this will no longer be necessary once a national trust fund is established. Individual municipalities will not have to raise funds to finance cleanups, and they will no longer be threatened by the potentially devastating effects of CERCLA liability.

Moreover, municipalities should not be afforded special treatment with respect to CERCLA liability; the only thing this accomplishes is to shift the liability burden onto other responsible parties. EPA should abandon its current policy under which it will not routinely prosecute municipalities under CERCLA for the disposal of MSW. The existence of Munfund, financed directly by those who are responsible for causing the damage, would place municipalities in an ideal position to take responsibility. Enabling municipalities to shoulder their proportionate share of CERCLA liability would spread the costs of cleanup more efficiently and equitably among responsible parties. The fact that liability was being allocated more equitably, and that each party was bearing its proportionate share of the burden, would arguably foster a greater willingness on the part of all responsible parties to contribute to cleanup efforts because as more parties take responsibility, the burden on each decreases.

VI. CONCLUSION

While municipal liability under CERCLA was originally a local concern, it has evolved into a national problem. Therefore, it requires a national solution. The consequences of municipal liability have become too severe for individual municipalities to manage. While it is beyond question that the overall goal is to clean up the environment, this cannot

189. Giaccia & Belden, supra note 114, at 10431 (stating that special treatment for municipalities overlooks the nature of MSW and distorts the purposes of CERCLA). "It cannot be unfair to impose 'disproportionate' liability on municipalities, but fair if the wastes come from an industrial source." Id. at 10432.
190. See Interim Municipal Settlement Policy, supra note 2.
be accomplished by jeopardizing the financial stability of municipalities, especially when a viable alternative is available.

Munfund would not only achieve the goal of cleaning up the environment, but it would also protect municipalities from potential financial disaster. First, it would eliminate the inequities inherent in the current CERCLA municipal liability framework by spreading the costs of cleanup among residents of all municipalities. Second, it would effectively retain the “polluter pays” principle, because it is premised on the notion that the disposal of MSW is a nationwide problem, and that residents of all municipalities must take responsibility and become a part of the solution. Therefore, the creation of Munfund appears to be a necessary and wise reform to the current scheme of CERCLA liability.

While cost will inevitably be the greatest factor in implementing such a solution, we must remember what we are paying for, and we must acknowledge the need to take responsibility. Only then will we be cleaning up the mess. The man with the “story” probably said it best:

*I tried to tell her how if you could not accept the past and its burden there was no future, for without one there cannot be the other, and how if you could accept the past you might hope for the future, for only out of the past can you make the future.*

CHARRISE MARIE FRACCASCIA

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191. WARREN, supra note 130, at 435.