

# PRIVILEGED POLLUTERS

## THE CASE AGAINST EXEMPTING MUNICIPALITIES FROM SUPERFUND

David B. Kopel

### INTRODUCTION

Should municipal governments be given a special exemption from Superfund? The federal Superfund law, formally known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), imposes strict cleanup requirements on sites where hazardous substances are found.<sup>1</sup> All “persons,” including corporations and local governments, which have contributed to the presence of hazardous substances at a site are responsible for the cleanup. Local governments, however, want out – and Congress may grant them their wish as a part of Superfund reform.

It is not surprising that municipal governments would prefer not to be subject to Superfund’s liability regime. Superfund is widely regarded as the greatest failure of all the federal environmental laws.<sup>2</sup> On the one hand, Superfund is the environmental equivalent of the Red Queen’s justice from *Alice in Wonderland*: “Sentence first, verdict afterwards.”<sup>3</sup> The Superfund law allows the Environmental Protection Agency (EPA) to order companies, individuals, or local governments to spend vast sums of money for environmental work at a particular site. Only when the EPA is seeking to enforce an already-determined cleanup plan can the Agency’s decision-making be challenged. The effect is that “the practical chances for obtaining meaningful judicial relief would probably evaporate.”<sup>4</sup>

Under the EPA’s interpretation of Superfund, liability at a site is “joint and several.” This means each “potentially responsible party” at a given site is potentially liable for the cost of cleaning up the entire site. So

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<sup>1</sup> CERCLA is codified at 42 U.S.C. §§ 9601-9675.

<sup>2</sup> See, for example, James V. DeLong, *Superfund XVII: The Pathology of Environmental Policy* (Competitive Enterprise Institute, August 1997); Richard L. Stroup, *Superfund: The Shortcut that Failed* (Bozeman, MT: Political Economy Research Center, 1996); Jerry Taylor, “Salting the Earth: The Case for Repealing Superfund,” *Regulation*, 1995, No. 2. For a more complete list of studies critical of Superfund, see DeLong, p. 1 n1.

<sup>3</sup> The Alice in Wonderland case involved an accusation that the Knave of Hearts had stolen some tarts. The Queen’s “sentence first” proposal was overruled by the King, and the Knave received a trial. Alice in Wonderland justice thus turned out to be fairer than Superfund justice.

<sup>4</sup> Richard G. Stoll, “Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund),” in *Environmental Law Handbook* (Rockville, MD: Government Institutes, 1991), p. 515 (discussing CERCLA § 113[h]).

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if a company caused one percent of the problem at a given site, it is legally responsible for one hundred percent of the cleanup costs.<sup>5</sup> The massive coercive powers of the EPA usually convince most EPA targets to enter into consent agreements, whereby the targets agree not only to pay the heavy cleanup costs, but also to pay the costs of the EPA's staff and retinue of environmental consultants.

Costs are escalated further because cleanup standards at Superfund sites are hyperstringent; typically, a site must be cleaned up so intensively that it would be literally possible for the site to house an orphanage filled with dirt-eating children, and these dirt eating children would not have so much as a one in ten million excess risks of cancer for the rest of their lives, even after years of consuming the site's dirt.<sup>6</sup> In real life, of course, most Superfund sites do not have anyone living there, much less an unusually vulnerable population of children.

But Superfund is widely acknowledged as an environmental failure. Few sites have actually been cleaned up by Superfund; the massive financial expenditures by EPA targets have resulted in very little environmental bang for the buck. Among the major environmental programs, Superfund has the worst ratio of costs to benefits – and things appear to be getting worse.<sup>7</sup> Accordingly, many voices have called for fundamental reform of the federal Superfund program, or even for scrapping the program and letting states and local governments control the cleanup of local pollution sites.

Unfortunately, a fundamental obstacle to reform has emerged. Some of the groups harmed by Superfund are attempting to cut special deals. They argue that Superfund should be “fixed” without addressing the program's fundamental flaws. Under these proposals, certain politically powerful groups would be guaranteed special treatment, while the rest of the Superfund victims are ignored. And as special interest groups lobby for special treatment, nothing is done to make Superfund more effective in cleaning up the environment.<sup>8</sup>

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<sup>5</sup> When enacting Superfund, Congress never formally created joint and several liability, but the EPA has persuaded courts to impose such liability anyway. See, for example, *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6<sup>th</sup> Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160 (4<sup>th</sup> Cir. 1988).

<sup>6</sup> W. Kip Viscusi and James Hamilton, “Superfund and Real Risks,” *The American Enterprise*, March-April 1994, pp. 36-45. For a more in-depth critique of the risk assessments and cleanup standards used for Superfund cleanups, see Steven J. Milloy, *Science-Based Risk Assessment: A Piece of the Superfund Puzzle* (Washington, D.C.: National Environmental Policy Institute, 1995).

<sup>7</sup> See, U.S. General Accounting Office, *Superfund: Times to Complete Site Listing and Cleanup*, T-RCED-98-74, February 1998; U.S. General Accounting Office, *Times to Complete the Assessment and Cleanup of Hazardous Waste Sites*, GAO/RCED-97-20, March 1997.

<sup>8</sup> Of course, special interest lobbying has influenced the reform of Superfund in the past as well. See, for example, Marc Landy & Mary Hague, “The Coalition for Waste: Private Interests and Superfund,” in M. Greve & F. Smith, eds. *Environmental Politics: Public Costs, Private Rewards* (New York: Praeger, 1992).

A classic example of the anti-environmental special interest pleading is the campaign by local governments to obtain special Superfund exemptions in privileges. Faced with heavy cleanup liability arising from CERCLA, many municipalities are finding their legal environmental obligations to be more than they want to bear. (Of course, almost every other Superfund payee feels the same way.) But rather than advocate comprehensive reform, many municipalities and local governments are pushing for a special exemption from CERCLA.

The effort to procure a CERCLA exemption has been headed by a coalition of municipal governments called American Communities for Cleanup Equity (ACCE). The ACCE efforts have been endorsed by the National League of Cities,<sup>9</sup> the National Association of Counties,<sup>10</sup> and other government lobbying groups.<sup>11</sup>

A very broad special municipal exemption passed the Senate in 1992, but was never adopted by Congress as a whole. In the current Congress, a scaled-back version of the special treatment for municipalities is included in S. 8 and H.R. 2727, the Superfund reauthorization bills sponsored by Senator Bob Smith (R-NH) and Rep. Sherwood Boehlert (R-NY) respectively. For instance, S. 8 would give municipalities which operate landfills which have become Superfund sites a special cap on liability: ten percent of “response costs” (the cost of cleaning up the pollution) for small municipalities, or twenty percent for large municipalities. In contrast, non-government owners of identical landfills must pay up thirty percent of total response costs.<sup>12</sup>

Another provision, contained in both S. 8 and H.R. 2727, gives a special Superfund exemption to a type of high-volume, relatively low-toxicity waste – municipal solid waste (MSW) – which is frequently generated by municipal governments. Under S. 8 and H.R. 2727, entities which transported MSW or sewage sludge (processed human waste) to a landfill, or which generated the waste in the first place, would no longer be liable under Superfund. But other, equally undangerous forms of waste which are typically generated by non-government entities would be given no exemption.

Surprisingly, much of the environmental lobby supports special municipal exemptions. While the environmental lobby generally favors

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<sup>9</sup>“Resolution Sponsored by ACCE Member and Adopted by the National League of Cities at its December 1990 Convention.”

<sup>10</sup>“Interim Policies Adopted by the National Association of Counties Board of Directors Sitting as a Resolution Committee,” “Resolution on Local Government Liability Superfund,” March 17, 1991.

<sup>11</sup>ACCE has cosponsored congressional testimony advocating special relief for local governments with the International City/County Management Association, National Association of towns and Townships, U.S. Conference of Mayors, and Municipal Waste Management Association.

<sup>12</sup>S. 8, § 501, creating new 42 U.S.C. § 9607(t).

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broad and strict liability standards, these groups recognize that local governments wield heavy clout on Capitol Hill. If municipalities do not find CERCLA relief through a special municipal exemption, the municipalities might join with American industry in seeking a comprehensive revision of CERCLA. To forestall a potential municipal/industrial alliance, the environmental lobby is supporting the municipalities' push for special treatment.

But while the municipal exemption may make sense as environmental politics, does it make sense as environmentalism? Not at all. The most commonly voiced arguments against imposing liability on municipalities have nothing to do with the fairness or rationality of including local governments, they are objections to Superfund's basic design. Indeed, the primary arguments for a municipal exemption seem to be based on the premise that local governments should receive special treatment because government is virtuous and private business is not. This view stands as an obstacle to the development of sound, equitable, and efficient environmental policy.

#### **INDUSTRIAL AND HOUSEHOLD WASTES: A BAD COMBINATION**

Approximately one fifth of the sites on the Environmental Protection Agency's main list of Superfund sites, the "National Priorities List," are municipal landfills.<sup>13</sup> For many decades, municipal landfills, that is, landfills owned or operated by municipal governments, engaged in the practice of codisposal: the mixing of household and industrial wastes. In codisposal, the household waste picked up by a local garbage service would be disposed along with wastes from industry. The theory was that when the drums of liquid industrial chemical wastes began to leak, the escaping chemicals would be absorbed and contained by the household waste.<sup>14</sup>

Codisposal was entirely legal and represented the state of the art during the 1970s. Codisposal occurred at nearly all the municipal landfills on the EPA National Priorities List. At some sites, household waste may comprise 90 to 98 percent of the total volume of waste.<sup>15</sup> But the fact that an

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<sup>13</sup> 56 *Federal Register* 5598 (February 11, 1991) (number of landfills); 54 *Federal Register* 51071-76 (December 12, 1989) (definition); Environmental Protection Agency, March 10, 1991 draft guidance on municipal settlement, at 4; National Priorities List, 40 C.F.R. pt. 300 app. B (July 1, 1991). Later estimates have raised the scope of municipal liability even further. As many as 403 National Priorities List sites — one-third of all sites — have local governments involved as owners, generators, or transporters. Clean Sites, *Main Street Meets Superfund: Local Government Involvement at Superfund Hazardous Waste Sites* (Washington, D.C.: January 1992).

<sup>14</sup> As David Kolker, of the municipal lobby American Communities for Cleanup Equity acknowledged, municipalities "thought the garbage would mix it up and spread it around." William K. Burke, "Sabotaging Superfund," *Los Angeles Daily Journal*, March 10, 1992.

<sup>15</sup> Tom Johnson, "Polluters Try Legal Tactics to Dump Cleanup Cost on Local Governments," *Newark Star-Ledger*, December 17, 1990, p. 1, 21.

entity engaged in only the best available environmental practices, and carefully followed all applicable laws does not shield the entity from Superfund liability. Indeed, private parties are regularly subjected to Superfund liability despite their use of the best available environmental practices.<sup>16</sup>

While codisposal looked good in theory, the theory was wrong. The household wastes turned into conduits for the leaking industrial waste. In other words, the household waste provided a vector that allowed leaking industrial wastes to travel much further and faster and the leaking wastes would have otherwise traveled. As a result, a site where household wastes and industrial wastes were codisposed costs much more to clean up than a site where industrial waste was disposed by itself. The high volumes of household wastes allow the liquid industrial wastes to spread over a very large area.

In addition, the household waste itself is a “hazardous substance” as defined under CERCLA. Household waste includes pesticides, paints, and various toxic household cleansers. In an industrial setting, these chemicals are strictly regulated, because of their potential dangerousness. The chemicals can be just as dangerous when disposed by a household rather than by a corporation. Moreover, because the quantities of household waste disposed at most landfills are so huge, the household waste may account for a very large percentage of the total amount of hazardous substances at the site. For example, at the Lowry Landfill outside Denver, the quantity of hazardous substances in the household waste is larger than the quantity of hazardous substances contributed by almost every industrial user of the landfill.

Household waste is just one of the types of wastes which municipalities may have deposited at a landfill. Other wastes may include garbage from office buildings and from other nonindustrial users of municipal garbage services; these additional wastes are generally similar to household wastes in terms of public health dangers.

Municipalities may have also deposited large quantities of sewage sludge at a landfill.<sup>17</sup> Sewage sludge (processed human waste) includes small quantities of toxins from whatever chemicals people and businesses flush down their toilet. Sewage sludge also contains heavy metals such as cadmium; as consumers at the top of the food chain, humans accumulate in their bodies (and in their waste) the trace amounts of heavy metals which are present in the soil, air, and water because of industrial activity.

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<sup>16</sup> E.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1<sup>st</sup> Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160 (4<sup>th</sup> Cir. 1988).

<sup>17</sup> Sewage sludge is defined in the National Pollution Discharge Elimination System Sewage Sludge Permit Regulations in 40 C.F.R. part 122 (published as final rule in the *Federal Register* May 2, 1989).

Of course, the foregoing does not mean that landfills necessarily pose a threat to public health. There are many Superfund sites where trace amounts of solvents, pesticides, or other chemicals may pose no genuine health risk; at other sites the risk may be real.<sup>18</sup> In either case, the source of the chemicals has nothing to do with the gravity of the risk.

### **CITIES HOOKED ON SUPERFUND LIABILITY**

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As a general matter, the EPA has been reluctant to force waste-depositing municipal governments to shoulder any of the cleanup costs at municipal landfills.<sup>19</sup> If one local government owned and operated a landfill, and other local governments deposited municipal solid waste at the landfill, the EPA will usually only take action against the municipality that owned the landfill, and not against the municipalities that deposited waste there. The only situation in which the EPA takes enforcement action against a municipality merely for depositing waste is if there is site-specific evidence that the municipal solid waste which was deposited contained hazardous substances derived from commercial, institutional, or industrial activities.<sup>20</sup>

The EPA's generous treatment of waste-depositing municipalities is totally different from the EPA's treatment of corporations which (like municipalities) have sent a large volume of low-toxicity waste to a particular landfill. Rather than being ignored by the EPA, the corporation will typically be assessed "joint and several" liability for one hundred percent of the cost of cleaning up the entire landfill. The different treatment of municipalities and private companies is not based on scientific differences between types of waste, but on the EPA's political decision to treat local governments better than local businesses. One level of government gives special treatment to another.

This discriminatory EPA policy is unjustifiable. If waste from a corporation is dangerous enough to require that the waste generator spend money to prevent the waste from endangering public health, the danger does not vanish when identical waste is disposed by a government. The waste is either a threat or it isn't.

In July 1991, the EPA announced plans to draft guidelines for EPA staff which would order staff to hold municipalities liable for no more than

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<sup>18</sup> However, analysts argue that the public health threat at most Superfund sites is relatively minimal to non-existent, as long as housing is not built on the site. W. Kip Viscusi and James T. Hamilton, "Human Health Risk Assessments for Superfund," *Ecology Law Quarterly*, August 1994: 574-641; Viscusi & Hamilton, "Superfund and Real Risks"; Milloy.

<sup>19</sup> The EPA defines a municipality as any subdivision of a state government. March 10, 1992 draft guidance, at 27.

<sup>20</sup> March 10, 1992 draft guidance, at 5. EPA authority to name Potentially Responsible Parties (PRPs) is found at § 107(a) of CERCLA, 42 U.S.C. § 9607(a).

four percent of the cleanup cost at a site.<sup>21</sup> The draft guidance stalled when Clayton Yeutter, Counselor to President Bush for Domestic Affairs, decided to review it in response of concerns that the plan was unfair.<sup>22</sup> EPA Administrator William Reilly announced in October 1992 that the EPA was dropping the whole issue and leaving it for Congress to resolve.<sup>23</sup>

At any rate, even if the EPA had issued strong pro-municipal guidance, the guidance could only bind the EPA itself, and could not protect municipalities from all “contribution” lawsuits. This is because CERCLA can also be enforced by lawsuits initiated by private parties. When Congress enacted CERCLA in 1980, and reauthorized it in 1986, Congress implicitly stated that it did not trust the EPA to enforce CERCLA with sufficient aggressiveness.<sup>24</sup> Especially after President Reagan’s first term, Congress came to believe that private party enforcement of CERCLA was a necessary adjunct to EPA enforcement. Accordingly, CERCLA allows parties which have deposited waste at an NPL site to bring contribution suits against each other.

In other words, if one corporation deposited 40 percent of the waste at a site, the EPA could order that one corporation to pay to clean up the entire

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<sup>21</sup> The draft guidance was released the next spring. EPA, “Superfund Program: Interim Municipal Settlement Strategy,” March 10, 1992, at 11-12. Although labeled a “Draft Internal Deliberative Document,” the draft guidance was widely circulated, and became available to interested parties on all sides of the municipal liability controversy.

The guidance, which was intended to supplement the EPA’s Interim Municipal Settlement Policy, uses a “unit cost formula” for allocating expenses at CERCLA sites. Closing a municipal solid waste landfill under the Resource Conservation and Recovery Act costs about \$94,000 per acre, and closing an industrial waste landfill costs approximately \$2,279,000 an acre under CERCLA. Since \$97,000 is 4 percent of \$2,279,000 + 94,000, municipalities would have been held responsible for 4 percent of the cost of cleanup of mixed industrial/MSW landfills.

Industry criticized the EPA reasoning since it compares the (relatively low) cost of an RCRA closure [for municipalities] with the (much higher) cost of a CERCLA closure [for industry]. “Superfund Costs for Cities Set at 4% in EPA Plan,” *Inside EPA*, March 27, 1992.

The EPA’s March 1992 draft guidance rejected the “double delta” method of cost allocation which the EPA had proposed at a 1991 meeting. Double delta compares the cost of remediating only the MSW at the site with the cost of remediating only the industrial wastes at the site. The figures result in MSW being assigned approximately 30 percent of the site’s total liability, and provoked outrage from the municipal lobby.

<sup>22</sup> The EPA maintained that as a guidance document, the policy did not require formal White House review. However, the White House was lobbied by a coalition consisting of the American Council on Education, the American Furniture Manufacturers Association, the American Iron & Steel Institute, the American Paper Institute, the American Petroleum Institute, the Can Manufacturers Institute, the Chemical Manufacturers Association, the National Association of Manufacturers, the National Federation of Independent Businesses, the National Food Processors, the National Paint and Coatings Association, the Rubber Manufacturers Association, and the Society of the Plastics Industry. Letter from aforesaid groups to Michael Boskin, Chairman, Council of Economic Advisors, March 26, 1992.

<sup>23</sup> “EPA Dispenses Effort to Exempt Cities from Superfund Cleanup Costs,” *Inside EPA*, October 23, 1992, pp. 1, 6.

<sup>24</sup> See CERCLA § 107(a)(creating private right of action).

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site. The corporation, in turn, could sue the smaller corporations and municipalities which deposited the remaining 60 percent of the waste. The large corporation's "contribution" lawsuits would ask that the smaller corporations and municipalities responsible for the 60 percent of waste be ordered to pay back the large corporation for cleaning up their share of the waste.

In recent years, industrial corporations have become increasingly aggressive in bringing CERCLA contribution claims against municipalities.<sup>25</sup> Municipalities, in turn, have found that involvement in a CERCLA cleanup or CERCLA-based lawsuit is an extremely protracted and expensive affair. Accordingly, municipalities have begun an energetic lobbying campaign to win themselves an exemption from CERCLA. The EPA's legal inability to protect municipalities from private contribution lawsuits under CERCLA necessitates the municipal lobbying campaign for special treatment for municipalities to be placed in the CERCLA statute.

#### **MUNICIPAL SOLID WASTE UNDER SUPERFUND**

Municipalities are asking Congress to change the CERCLA statute because courts have totally rejected municipalities' legal theories for special treatment under the existing CERCLA statute. The special treatment for government theories have been rejected in all courts where they have been offered.<sup>26</sup>

One attempted legal argument in favor of a municipal exemption turns on RCRA, the Resource Conservation and Recovery Act. While CERCLA is a retrospective law, requiring the cleanup of old sites which are contaminated with hazardous substances, RCRA is prospective, providing a system of regulation of current and future industrial uses of hazardous wastes. All hazardous wastes (regulated by RCRA) are automatically considered hazardous substances (covered by CERCLA). CERCLA's definition of hazardous substances also includes many things which are not RCRA hazardous wastes, such as asbestos and PCBs.

RCRA's definition of hazardous waste excludes household waste. Because of the RCRA definition, municipalities have argued that household waste cannot legally be classified as hazardous under CERCLA.<sup>27</sup> This argument, however, has been rejected by the courts for several reasons.

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<sup>25</sup>The provision regarding contribution is found at CERCLA § 113(f); 42 U.S.C. § 9613(f). Relevant regulations are codified at 40 C.F.R. § 300.71. *See also Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989).

<sup>26</sup>*B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 34 E.R.C. 1401 (2d Cir. 1992), *affg.* 754 F.Supp. 960 (D.Conn. 1991); *Transportation Leasing Co. v. California*, 32 E.R.C. 1499, 1501, 1990 WL 300,777 (C.D. Cal. 1990).

<sup>27</sup>Kevin Murphy, "A Funny Thing Happened on the Way to the Landfill: Or How 29 California Cities Discovered Superfund," *Western City*, April 1991.



First of all, even though household waste is not defined as hazardous under RCRA, many substances contained in household waste are considered hazardous by the EPA. According to the EPA, “Commonly discarded household products, such as household cleaners, automotive products, paint thinners, and pesticides may contain hazardous wastes. . .”<sup>28</sup> Accordingly, the Agency has determined that “If a household waste contains a substance which is covered under these CERCLA sections (whether or not it is a RCRA hazardous waste), potential CERCLA liability exists.”<sup>29</sup>

Second, as one court explained, since Congress explicitly exempted certain substances under CERCLA, such as petroleum,<sup>30</sup> it is reasonable to conclude that Congress “certainly knew how to carve out such an exemption” for household waste if it so desired.<sup>31</sup> Since it failed to do so, one can assume that no such exemption was intended. Moreover, since RCRA deals only with “wastes,” while CERCLA addresses the larger class of potentially hazardous “substances,” it is reasonable to infer that RCRA exemptions regarding hazardous wastes should not apply to CERCLA unless Congress explicitly dictates otherwise.<sup>32</sup> Up until now, Congress wisely chosen not to create such an exemption.

*Courts have totally rejected municipalities’ legal theories for special treatment under CERCLA.*

### **SHOULD TOXICITY OR VOLUME MATTER?**

Courts have also rejected the municipalities’ argument that since municipal waste contains a very low volume of hazardous substances, it is not fair to lump municipal waste in with other hazardous substances. Under CERCLA’s scheme of joint and several liability, any party which contributed any quantity of waste to a CERCLA site, no matter how small, is legally responsible for the cost of cleaning up the entire site. Municipalities argue that this is unfair because their contribution to any public health risks at a Superfund site is very small, and that Congress should step in to address this concern.

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<sup>28</sup> 53 *Federal Register* 33, 318 (August 30, 1988).

<sup>29</sup> EPA Office of Solid Waste and Emergency Response, Directive No. 9574.00-1, *Clarification of Issues Pertaining to Household Hazardous Waste Collection Programs*, Nov. 1, 1988, p. 4, quoted in *Transportation Leasing*, 32 E.R.C. p. 1501. See also EPA Interim Settlement Policy, at 51,074 (“the statute does not provide an exemption from liability for municipal wastes”), quoted in *Murtha*, 34 E.R.C. at 1410 (2d Cir.). The sections that the EPA is referring to are sections 101(14) and 102(a) of CERCLA, and the list of hazardous substances at 40 C.F.R. Part 302, Table 302.4.

<sup>30</sup> CERCLA § 101(14); 42 U.S.C. § 9601(14).

<sup>31</sup> *Transportation Leasing Co. v. California*, 32 E.R.C. 1499, 1501 (C.D. Cal. 1990). See also, *Murtha*, 34 E.R.C. at 1405-09.

<sup>32</sup> *Murtha*, 34 E.R.C. 1408. Compare *Eagle-Picher Indus. v. EPA*, 759 F.2d 922, 927 (D.C.Cir. 1985)(limited application of RCRA mining waste exclusion).

Another municipal argument which has not found judicial favor is that sovereign immunity protects municipalities from CERCLA suits. *Artesian Water Co. v. Government of New Castle County*, 605 F. Supp. 1348 (D. Del. 1985).

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The argument that municipalities are not contributing to public health threats by disposing of municipal waste, however, has nothing to do with the waste's municipal origin. It is an argument that is equally applicable to all parties which have contributed high-volume/low-toxicity wastes. Many mining wastes and many industrial wastewaters are just as low in toxicity as household waste. Many industrial wastes which are labeled "hazardous substances" contain less than the 0.5 percent of actual hazardous substances which municipal solid waste is presumed to contain.<sup>33</sup>

To the extent that CERCLA should be revised to relax treatment of high-volume, low-toxicity wastes, it would be logical and equitable to provide such a revision for all such wastes, not merely for a subclass of wastes associated with particular parties. For the same reason, the EPA's March 10, 1992 draft municipal settlement policy would have been more defensible if it applied to all wastes which are high-volume, low-toxicity, and are as easy to remediate as municipal solid waste. The draft policy offered no reason why the EPA is adopting a generous settlement policy for only one type of waste to the exclusion of others.

Of course, some substances deemed "hazardous" are not really hazardous at all. For example, municipal sewage sludge, since it contains trace heavy metals, is considered a hazardous substance. But when municipal sewage districts began applying sludge to the land as a fertilizer, the EPA gave them an award for good environmental practices. The EPA apparently concluded that the trace amounts of hazardous substances in the sludge were so small as to pose no environmental threat in the context of land application.<sup>34</sup>

But again, the argument has nothing to do with the municipal origin of the hazardous substances. As the sludge/fertilizer example illustrates, it is entirely possible that the present definition of "hazardous substance" may be overbroad, and may unfairly include materials that have only *de minimis* quantities of genuinely hazardous substances.<sup>35</sup> But if "hazardous sub-

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<sup>33</sup> "Prepared Statement of John T. Subak" (Chemical Manufacturers Association), in "Superfund Issues Facing Municipalities," at Hearing before the Subcommittee on Superfund, Ocean, and Water Protection of the Committee on Environment and Public Works, 102d Cong., 1st sess., July 29, 1991, p. 97 [hereinafter "July 1991 Hearings"].

<sup>34</sup> July 1991 Hearings, pp. 87, 107.

<sup>35</sup> See *Murtha*, 34 E.R.C. at 1406 ("Quantity of concentration is not a factor either; when Congress wanted to draw distinctions based on concentration or quantity, it expressly provided as much.") See also *Amoco Oil v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989); *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531, 537-40 (N.D.N.Y. 1991); *City of New York v. Exxon Corp.*, 744 F. Supp. 474, 483 (S.D.N.Y. 1990) ("liability under CERCLA attaches regardless of the concentration of hazardous substances present"; the court was not convinced by Exxon's demonstration that the paper and ink which the court and the litigants used had a higher concentration of contamination than the wastes for which Exxon was being held liable); *Louisiana-Pacific Corp. v. ASARCO*, 735 F.Supp. 358 (W.D. Wash. 1990); *United States v. Wade*, 577 F. Supp. 1326, 1340 (E.D.Pa. 1983)(no need for plaintiff to prove quantity of hazardous substance).

stances” should be redefined to include only materials that are really hazardous, the redefinition should apply across the board. How hazardous a substance is has nothing to do with the identity of the party that generated it.<sup>36</sup>

Notably neither S. 8 nor H.R. 2727 includes a provision to deal with the general problem of high-volume, low-toxicity waste. Instead, the bills include provisions aimed at only two types of high-volume, low-toxicity waste (MSW and sewage sludge) for which municipalities are usually responsible. Other high-volume forms of waste, which may be even less dangerous than MSW, are given no relief under S. 8 or H.R. 2727.

### CONGRESS’ ORIGINAL INTENT

Municipalities also argue that Congress had no intention of making municipalities into responsible parties for Superfund cleanups when CERCLA was enacted. Yet because courts have not accepted these arguments, municipalities are calling for Congress to reaffirm its alleged intent to leave them off the hook.

Discerning Congressional intent is often difficult. Therefore, instead of relying on vague assertions about what Congress “must have” intended, courts look to the actual language of the statutes enacted by Congress, as the most reliable guide to legislative intent.<sup>37</sup> The definition of “person” in CERCLA section 101 specifically includes municipalities.<sup>38</sup> The Supreme Court determined that the “cascade of plain language” indicates plain Congressional intent to make states (and therefore their subdivisions) liable under CERCLA.<sup>39</sup> When Congress thought that there were special circumstances under which municipalities should not be liable, Congress carved out a specific exemption (such as the one for municipalities which acquire a polluted site involuntarily).<sup>40</sup>

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<sup>36</sup> See *Murtha*, 34 E.R.C. at 1406 (“Whether the substance is a consumer product, a manufacturing byproduct, or an element of a waste stream is irrelevant.”)

<sup>37</sup> See, for example, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (“we assume ‘that the legislative purpose is expressed by the ordinary meaning of the words used.’”) To the extent that legislative intent can be discerned, it does not support a municipal exemption. Rep. Stockman (R-MI) warned that household waste could fall under the broad definitions of CERCLA, and his corrective amendments were rejected. *Murtha*, 34 E.R.C. at 1409.

<sup>38</sup> CERCLA § 101(21); 42 U.S.C. § 9601(21).

<sup>39</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7-13, 29 E.R.C. 1657 (1989).

<sup>40</sup> 42 U.S.C. § 9601(20)(D). See also 42 U.S.C. § 9607(d)(2)(exemption for municipality that acts to deal with emergency caused by a release at a facility not owned by the municipality); *Murtha*, 34 E.R.C. at 1404.

*How hazardous a substance is has nothing to do with the identity of the party that generated it.*

It is true that the EPA, through its Municipal Settlement Policy, has declined to pursue many municipalities. But the EPA's decision of how to allocate its enforcement resources cannot legally alter the statutory scheme of liability.<sup>41</sup> Indeed, the process by which smaller entities, such as municipalities, are not sued by the EPA, but are later sued by larger polluters, is the intended CERCLA mechanism for making smaller parties pay their share of the cleanup costs. When large corporations at an upstate New York Superfund site brought contribution actions against many local governments and small businesses, the governments and small businesses generated widespread press coverage expressing outrage at the large companies. But New York Assistant Attorney General Dean Sommer commented "This is what we consider a perfect example of how the [Superfund] statute is supposed to work." By pursuing the small-share municipal polluters, the corporations saved the state of New York the heavy expense of tracking down and litigating against the municipalities.<sup>42</sup>

Of course it is legitimate to question whether the Superfund statute operating as it "is supposed to" is really fair. Indeed, the Superfund statute is often very unfair, including when small governments and small businesses find themselves saddled with gigantic liability, even though they did nothing wrong. But the solution to Superfund's unfairness is to fix the entire statute, not to grant a special exemption to a particular group of victims.

### **TOO RICH OR TOO POOR?**

Some municipal exemption advocates complain that municipalities are brought into CERCLA cases because they have a "deep pocket," and hence can afford to pay for extensive remediation disproportionate to the (arguably minor) degree of harm they have caused.<sup>43</sup> The strategy of targeting "deep pockets" is, however, not a newly-discovered flaw in the Superfund scheme. Through imposing joint, several, and strict liability, CERCLA encourages "deep pockets" of all types (private or municipal) to settle expeditiously, and to begin cleanups. The "deep pockets," it is reasoned, will have the resources to pursue contribution cases, so that the overall allocation

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<sup>41</sup> *Murtha*, 34 E.R.C. at 1410; EPA Municipal Settlement Policy, at 51,071 ("nothing in the interim policy affects any party's potential legal liability under CERCLA...nothing in the interim policy precludes a third party from initiating a contribution action.")

<sup>42</sup> Robert Tomsho, "Big Corporations Hit By Superfund Cases Find Way to Share the Bill," *Wall Street Journal*, April 2, 1991, pp. A1, A14.

<sup>43</sup> "Prepared Statement of Donald G. Poss" (City Manager of Blaine, Minnesota), in July 1991 Hearings, p. 65.

of costs ends up being fair. Such allocation, according to CERCLA, should happen after the cleanup process has begun, and should not delay cleanup as various polluters wrangle over their respective liability.<sup>44</sup>

Thus, the objection that municipalities are singled out as “deep pockets” amounts to an objection to CERCLA’s basic operation. Objections to the process would be better addressed to the core of the process, rather than by complaining that one particular type of “deep pocket” is impacted in the same way as every other “deep pocket.” Why should one group of “deep pockets” receive special treatment just because of their clout on Capitol Hill?

In contrast to the “deep pocket” objection, another argument against municipal liability is that many municipalities are facing a “fiscal crunch.” CERCLA pays no regard to the fiscal condition of the polluter, except to allow the EPA discretion to provide for an extended payment schedule or to accept in-kind services to accommodate a particular entity’s cash flow.<sup>45</sup> If further requirements for accommodation to fiscally crunched municipalities are considered desirable, such requirements should logically be applied to all cash-poor parties. Moreover, municipalities have a weaker “fiscal crunch” claim than do most corporations. Corporations can only raise additional revenues through voluntary market transactions, while municipalities can coercively raise additional revenues through tax increases.

### **NOT ALL “POLLUTERS” MAKE A PROFIT**

The theoretical foundation of CERCLA is the premise that “polluter pays.”<sup>46</sup> The parties which polluted a CERCLA site should pay for the cleanup, rather than having the cleanup be paid out of general government revenues. CERCLA’s “polluter pays” principle applies even when the so-called “polluter’s” actions were entirely legal at the time, and even when the “polluter” was acting according to the highest state of the art at the time.

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<sup>44</sup> See, for example, *Tanglewood East Homeowners v. Charles Thomas, Inc.*, 849 F.2d 1568, 1572, 28 E.R.C. 1260 (5th Cir. 1988)(strict liability; PRP acquired contaminated property after previous owner had released hazardous substances); *State of New York v. Shore Realty*, 759 F.2d 1032, 1042, 22 E.R.C. 1625 (2d Cir. 1985)(strict liability); *O’Neil v. Picillo*, 883 F.2d 176, 178-79, 30 E.R.C. 1137 (1st Cir. 1989), *cert. denied sub nom. American Cyanamid Co. v. O’Neil*, 493 U.S. 1071 (1990)(joint and several liability unless defendant demonstrates that harm is divisible, even though rule “may often result in defendants paying for more than their share of the harm”); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506-08, 30 E.R.C. 1553 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990)(strict, joint, and several liability).

<sup>45</sup> See *Murtha*, 34 E.R.C. at 1411 (“burdensome consequences are not sufficient grounds to judicially graft an exemption onto a statute, a graft that would thwart the language, purpose, and agency interpretation of the statute”).

<sup>46</sup> Some commentators, however, have noted that Superfund does not embody “polluter pays” in practice. See, for example, Richard L. Stroup, *Superfund: The Shortcut that Failed* (Bozeman, MT: Political Economy Research Center, 1996).

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Incredibly, municipalities contend that the “polluter pays” standard does not apply to them, because they supposedly did not make a profit from the pollution. Yet other non-profit entities are no more exempt from Superfund’s liability regime than local governments.

One New Jersey mayor points out that CERCLA was intended to make corporate polluters pay because the corporations “earned an artificially high profit, inflated by decades of cheap and inappropriate waste disposal.”<sup>47</sup> Of course, municipalities, like corporations, also benefited from “cheap and inappropriate waste disposal.” They co-disposed of their household waste, office-building waste, and sewage sludge at facilities which were charging artificially low rates because the facilities were also accepting industrial waste. The municipalities chose those facilities with full knowledge the facilities were engaged in co-disposal. Thus, the municipalities offered current and potential residents garbage disposal at “artificially low rates” by engaging in “inappropriate waste disposal.” The municipalities thereby artificially stimulated economic growth and tax revenue increases, earning artificially high extra revenues at the expense of other municipalities which practiced more responsible, and expensive municipal waste disposal.<sup>48</sup>

Of course the degree to which private corporations or municipalities can legitimately be accused of deliberately practicing “inappropriate waste disposal” is debatable, since codisposal was entirely legal when practiced, and actually represented the state of the art. CERCLA does not require any proof of “bad practices” that led to the threat of potential release. To the extent that most CERCLA-liable corporations have benefited from prior cheap disposal, most municipalities have also.

### **PUBLIC GOOD, PRIVATE BAD**

Underlying the municipal exemption drive is a philosophy that municipalities are morally superior to private corporations. The attitude is expressed in the Senate testimony of Littleton, Colorado, City Council President Susan M. Thornton.<sup>49</sup> Attempting to provide a rationale for why municipalities should be given a special exemption from CERCLA, she states that “Municipalities exist because there are things that citizens need that they cannot do for themselves.” While the statement is true, it is of little persuasive weight. Corporations also “exist because there are things that citizens need that they cannot do for themselves.” Most citizens cannot build their own automobiles, generate their own electricity, or manufacture their own telephones.

<sup>47</sup> “State of Hon. Dale Taylor, Mayor, Wenonah, New Jersey,” July 1991 Hearings, p. 44.

<sup>48</sup> *Cf. Murtha*, 34 E.R.C. at 1409-10 (“Although municipalities do not benefit in a proprietary sense from arranging for the disposal of municipal solid waste, their taxpayers do obtain a benefit—given the necessity of disposal of such waste.”)

<sup>49</sup> July 1991 Hearings, p. 107.

Ms. Thornton continues: “When we operate a sewage treatment plant, we perform a public service; we don’t profit from it. We are different from industry and should be treated differently.” Ms. Thornton seems to feel that whether an entity generated a profit should be the determining factor in liability. By her rationale, it would be proper for the EPA aggressively to pursue a case where waste was generated by a private, profit-making utility, but not to pursue a case where the same waste was generated by a municipally-owned nonprofit utility, even if the latter circumstances posed a greater threat to human health and the environment.

From an environmental standpoint, the distinction makes little sense. Governments and corporations both produce goods which are used by the both, and governments and corporations both generate pollution in the course of producing the useful goods. The people who are harmed by environmental contamination are not harmed any less if the contamination was generated by the government instead of by a private corporation.<sup>50</sup> Moreover, private companies make profits by providing consumers with goods and services that they demand. They cannot profit if they do not serve

Building on the profit-based theory of CERCLA, the council president states: “The rationale behind CERCLA is that those who profit from damaging the environment should pay to clean it up, and we strongly endorse that principle.” But the statement does not reflect the CERCLA rationale as it has been commonly accepted. The theory is not “profit-maker pays,” for that theory would exempt a polluter whose unsound disposal practices might have been more expensive than safer disposal options which the polluter did not consider. CERCLA does not care whether the polluter made a profit or not.<sup>51</sup> CERCLA instead asks if the hazardous substances pose a threat to human health or the environment. Whoever was responsible for the creation of the hazard should pay for cleaning it up. Accordingly, the rationale of

*Underlying the municipal exemption drive is a philosophy that municipalities are morally superior to private corporations.*

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<sup>50</sup> Indeed, the lack of a profit motive is no bar to reckless environmental misconduct, as is illustrated by the Love Canal crisis, the disaster that provided the impetus for the enactment of CERCLA. Hooker Chemical Company owned a chemical waste landfill until 1952, when the Niagara Falls school board wanted to acquire land for school construction, and threatened to take Hooker’s land by eminent domain, despite Hooker’s warning that chemicals underlay the site. Faced with the Board’s determination to take the property, Hooker donated the land to the Niagara Falls School Board, which proceeded to scrape off part of the landfill’s clay cap to provide fill dirt for other municipal construction sites. After deliberately building a school on top of a chemical landfill, Niagara Falls then repeatedly punctured the clay walls and cover to run a sewer and then an expressway through the site. Quite plainly, Niagara Falls bears at least as much responsibility for the Love Canal disaster as does Hooker Chemical. Richard L. Stroup, “Hazardous Waste Policy: A Property Rights Perspective,” *Environment Reporter*, September 22, 1989, pp. 868, 870-71.

<sup>51</sup> As noted above, many municipalities did make “profits” from unsound waste-handling practices, in that the artificially low cost of waste handling resulted in fiscal savings to the municipality, and in the encouragement of economic growth in the municipality’s boundaries, at the expense of municipalities which handled their waste in a proper, more costly manner.

CERCLA is “Polluter Pays.” When municipalities are polluters, they should pay for cleanup.<sup>52</sup>

## CONCLUSION

*Whoever was responsible for the creation of the hazard should pay for cleaning it up.*

“Don’t tax you, don’t tax me, tax that feller behind the tree,” was Senator Russell Long’s apt summary of how most people tried to rig the tax laws to minimize their own burdens, and increase burdens on others. CERCLA is an enormously burdensome law, and by many accounts a failure. Proposals to add various exemptions and special favors to CERCLA are just as flawed as proposals to “fix” the income tax system by adding more loopholes and complexity. What is needed is sweeping reform, not special deals for selected lobbying groups.

CERCLA should simply be removed from the federal code, and states should take over the job of cleaning up pollution within their own boundaries. There is ample evidence the states would do a better job of cleaning up old sites at lower cost.<sup>53</sup> Moreover, it is questionable whether Congress ever had the legitimate constitutional authority to enact CERCLA in the first place.<sup>54</sup>

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<sup>52</sup> Municipalities are not, of course, the only special interest group to receive illogical exemptions under CERCLA. Under current proposals, small businesses (under 30 employees) are given a blanket exemption, no matter how much pollution they may have caused. (See, for instance, S. 8, § 501, proposed 42 U.S.C. § 9607(s).) Thus, if a particular site was polluted 95 percent by a business with 25 employees, and 5 percent by a business with 40 employees, the latter business would be responsible for the entire cost of cleanup.

<sup>53</sup> See, for example, J. Winston Porter, *Cleaning Up Superfund: The Case for State Environmental Leadership*, Reason Foundation Policy Study 195, September 1995.

<sup>54</sup> The purported source of Congress’ authority to enact Superfund comes from the interstate commerce clause. Yet pollution cleanup within a single state is not “commerce . . . among the several states,” and therefore is not within the scope of congressional power to regulate interstate commerce.

One district court has held CERCLA not to be a valid exercise of the interstate commerce power. That decision, *United States v. Olin Corp.* was reversed on appeal, and all other courts have sided with the appellate court. *United States v. Olin Corp.*, No. 96-6645 (11<sup>th</sup> Cir., Mar. 25, 1997), rev’g 927 F. Supp. 1502 (S.D. Ala. 1996); *United States v. Alcan Aluminum Corp.*, 1996 WL 637559 (N.D.N.Y. Oct. 28, 1996); *Cooper*, 1996 WL 550128; *United States v. NL Indus.*, 936 F. Supp. 545 (S.D. Ill 1996); *Nova Chemicals, Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996).

The courts which have upheld CERCLA have pointed out that the statute, among the many things it does, protects groundwater. Although the contamination from a CERCLA site is often confined to the site’s boundaries, rarely is found more than a few miles beyond the site’s boundaries, and virtually never crosses a state boundary, courts have held that groundwater is among the “things in interstate commerce” which Congress can regulate. The proposition that groundwater a thing in interstate commerce is often supported by a citation to the Supreme Court’s *Sporhase v. Nebraska*, 458 U.S. 941 (1982). That case involved a successful challenge, under the dormant commerce clause, to a Nebraska statute requiring a permit to export groundwater outside the state.



In the absence of such true reform, however, modifications to CERCLA liability should be based on the quantifiable dangers posed by various types of waste, and not on which politically-favored entities happen to be responsible for them. Creating a special exemption for municipalities from Superfund's liability regime would create an unjustifiable inequity within the program, and stand as an obstacle to more fundamental reform.

*What is needed is sweeping reform, not special deals for selected lobbying groups.*

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The *Sporhase* Court rejected Nebraska's argument that because the state of Nebraska legally owned all the groundwater in the state, groundwater was not an article of commerce. The Court explained that adopting Nebraska's view would not only exempt Nebraska's actions from dormant commerce clause review, but would also preclude Congressional regulation of groundwater.

*Sporhase* certainly supports the proposition that Congress can use the interstate commerce power to deal with the depletion of a large interstate aquifer such as the Ogallala aquifer. But recognizing that groundwater, when transferred interstate, can be an article of interstate commerce does not mean that every drop of groundwater, anywhere in the United States, is an article of interstate commerce. In the context of CERCLA, the groundwater at issue is often unconnected to a major aquifer, and of no commercial interest. Intellectually, citations to *Sporhase* are hardly an adequate basis for finding CERCLA's control of intrastate pollution to actually involve interstate commerce.

In addition to the groundwater rationale, courts have defended CERCLA under the theory that the pollution was created by an economic activity (typically, as a by-product of manufacturing), and that pollution, in the aggregate, substantially affects interstate commerce. *Nova* at 1106; *NL Indus.* at 563. This was precisely the kind of argument which the Supreme Court has ruled to be wrong in the case of *United States v. Lopez*. There, the Solicitor General attempted to defend the federal "Gun-Free School Zones Act" on the theory that guns near schools, in the aggregate, affect economic productivity. Apparently the rejection of the argument by the Supreme Court does not prevent result-oriented lower courts from accepting the same argument.

Courts may well perform intellectual tricks to avoid confronting the Congressional usurpation of power which CERCLA represents. But just because prior Congresses and some current courts ignored their oath to uphold the United States Constitution is no reason for today's Representatives and Senators to ignore their own oath. The Founders of our nation had the wisdom to recognize that local problems should be handled locally. The disaster of Superfund highlights the wisdom of the Founders in confining Congressional powers solely to matters which could not be dealt with by local governments.

## ABOUT THE AUTHOR

David B. Kopel is Research Director of the Independence Institute, a free-market think tank in Golden, Colorado (<http://i2i.org>). Before joining the Independence Institute, he served as an Assistant Attorney General for hazardous waste enforcement for the Colorado Attorney General's Office. He is the author of eight books, including *RCRA Demystified: The Professional's Guide to Hazardous Waste Law* (Washington: Environmental Law Institute, 1996). Among his numerous law journal articles are "Burning Mad: The Controversy over Treatment of Hazardous Waste in Incinerators, Boilers, and Industrial Furnaces," 23 *Environmental Law Reporter* 10216 (Feb. 1993); and "The Anti-Deficiency Act: A Deficient Excuse for Federal Violations of Environmental Laws," 23 *Environmental Law Reporter* 10481 (Aug. 1993).

# **PRIVILEGED POLLUTERS**

## **THE CASE AGAINST A LIABILITY EXEMPTING MUNICIPALITIES FROM SUPERFUND**

**David B. Kopel**

### **EXECUTIVE SUMMARY**

Superfund is widely regarded as the greatest failure of all the federal environmental laws. Formally known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Superfund imposes strict cleanup requirements on sites where hazardous substances are found. All “persons,” including corporations and local governments, which have contributed to the presence of hazardous substances at a site are responsible for the cleanup. Cleanup standards at Superfund sites are hyperstringent, and the resulting financial liability is enormous.

Unfortunately, a fundamental obstacle to reform has emerged. Some of the groups harmed by Superfund are attempting to cut special deals. Faced with heavy cleanup liability arising from CERCLA, many municipalities are finding their legal environmental obligations to be more than they want to bear. Rather than advocating comprehensive reform, many municipalities and local governments are pushing for a special exemption from CERCLA.

Municipalities are subject to extensive liability because approximately one fifth of the sites on the Environmental Protection Agency’s primary list of Superfund sites are landfills owned or operated by municipal governments. These sites pose no less – and no more – of a public health risk than the typical Superfund site, and should be treated no differently. How hazardous a substance is has nothing to do with the identity of the party that generated it. Nonetheless, municipalities want the source of the waste, rather than the threat posed by the site in question, to be the basis for inclusion in the Superfund regime.

The most-commonly voiced arguments against imposing liability on municipalities have nothing to do with the fairness or rationality of including local governments, they are objections to Superfund’s basic design. For instance, some municipal exemption advocates complain that municipalities are brought into CERCLA cases because they have a “deep pocket,” and hence can afford to pay for extensive remediation disproportionate to the (arguably minor) degree of harm they have caused. The strategy of targeting “deep pockets” is, however, not a newly-discovered flaw in the Superfund scheme; it is a central element of cost-recovery for Superfund cleanups.

At bottom, the primary arguments for a municipal exemption seem to be based on the premise that local governments should receive special treatment because government is virtuous and private business is not. This view stands as an obstacle to the development of sound, equitable, and efficient environmental policy. Nonetheless, it appears that Congress may grant municipalities their wish, as bills now pending in Congress would exempt municipalities, at least in part, from Superfund’s liability rules.

Proposals to reform Superfund by adding various exemptions and special favors are as flawed as proposals to “fix” the tax code by adding more loopholes and complexity. What is needed is sweeping reform. CERCLA should be simply removed from the federal code and states should take over the job of cleaning up pollution within their own boundaries. In the absence of such true reform, modifications to Superfund should be based on the quantifiable dangers of various types of waste, and not on which politically favored entities happen to be responsible for them.

ENVIRONMENTAL  
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