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ALLOCATION OF SUPERFUND LIABILITY: CAPPING THE MUNICIPALITIES' SHARE†

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WE in EPA are of the opinion, born of long experience, that statutes may be interesting, regulations may be relevant, but it is Agency policy which is dispositive. And the area of municipal liability raises all sorts of interesting legal, factual and policy questions. This debate identifies all three.

Now let us pose a few of those questions. First, as a matter of law, can generation and transportation of municipal solid waste create CERCLA¹ liability at the disposal site? And for the sake of this discussion, let us make sure we all have the same common understanding of municipal solid waste. When we use this term, or the acronym MSW, we are going to talk about your common, garden-variety household garbage: the garbage that you and I throw out every day and that the garbage guys come and pick up. That is municipal solid waste. We are not talking about industrial waste, even though sometimes a municipality might pick up some of that industrial waste.

That is the "matter of law" question. Let us go further and look at it as a question of fact. Assuming the answer to the first question is yes, what kind of evidentiary proof is going to be needed to support such a claim of liability?

And finally, as a matter of policy, if liability can be assigned to MSW generators and transporters, how should the liability be allocated between them and traditional industrial waste generators?

Let us review the existing law a little bit and see where we are. First, let us remind ourselves of the basis of liability under CERCLA with respect to a site in which there has to be a response action as the result of a release or threatened release of hazardous substances. One is liable for the cost of response at that site if one is: (1) an owner of the site; (2) an operator of the site (including past owners or operators at the time the disposal in question took place); (3) the transporter who brought the wastes, the hazardous substances, to the site (provid-

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980), amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of the Internal Revenue Code and Titles 10, 29, 33, and 42 of the United States Code) [hereinafter CERCLA].

ing the transporter selected the site); or (4) and most importantly, the generator.² (CERCLA does not use the word "generator," but refers to one who arranges for the disposal or treatment of hazardous substances at the site. Actually, CERCLA does not say that; it is impossible to understand what CERCLA really says with respect to generators, but that is what we understand it to mean.)

In defining hazardous substances, CERCLA incorporates four other laws. A RCRA³ hazardous waste is also a CERCLA hazardous substance. If it is a TSCA⁴ regulated toxic substance, a Clean Air Act hazardous air pollutant,⁵ or a Clean Water Act regulated toxic pollutant,⁶ then it is also, by reference, a CERCLA hazardous substance.⁷

Under CERCLA, there is no express limitation regarding the concentration of the material.⁸ It does not matter how diluted it is. If it is one of those substances that is in one of the other laws, it is a CERCLA hazardous substance.⁹ It does not matter what the quantity is. Theoretically, even a molecule would be enough.

We have to look particularly at RCRA, because it is the RCRA list of hazardous wastes which contributes the largest number of chemicals to the CERCLA hazardous substance list. It is important to recognize that all those bizarre details in the RCRA rules do not apply in the CERCLA context.

To be a RCRA hazardous waste, a particular substance has to fit all sorts of bizarre definitions having to do with the source of the waste, the nature of the product, or the source of the industrial operation that generated the waste, and so on.¹⁰ None of those are applicable. The only question in Superfund is whether the substance is one of those chemicals which is listed in the RCRA list as a hazardous waste.¹¹ If the answer is yes, then it is a CERCLA hazardous substance, and those other rules don't apply.

Note well that under RCRA, municipal solid waste is excluded from the definition of RCRA hazardous wastes.¹² But that exclusion does not apply to Superfund.

Now let us review the facts about municipal solid waste and why all of this is an issue. The fact is that study after study has shown that municipal solid waste — household garbage — will contain approxi-

2. 42 U.S.C. §§ 9607(a)(1)-(4) (1988).

3. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901 - 6992(h) (1988)) [hereinafter RCRA].

4. Toxic Substances Control Act, 15 U.S.C. § 2606 (1988) [hereinafter TSCA].

5. Clean Air Act, 42 U.S.C. §§ 7401-7671 (1988).

6. Federal Water Pollution Control Act, 33 U.S.C. § 1317(a) (1988).

7. 42 U.S.C. § 9601(14) (1988).

8. *Id.*

9. *Id.*

10. 42 U.S.C. §§ 6901-6992(h) (1988).

11. 42 U.S.C. §§ 9601-9675 (1988).

12. 42 U.S.C. §§ 6901-6992(h) (1988).

mately one-half percent to one percent,¹³ by weight or volume, hazardous substances. Where does it come from? Well, it comes from all of our household materials. It comes from cleansers. It comes from nail polish, nail polish remover, paint cans and all kinds of things.

Another fact. When a Superfund site¹⁴ is a mixed waste site, where both municipal solid waste and industrial chemical wastes exist, municipal solid waste typically constitutes the largest volume by far that went to that site. So mixed waste sites are usually big landfills which took in a lot of garbage and also accepted some industrial chemical wastes. The volume of the municipal solid waste is by far the dominant one, and drives up the response costs. When you have to do a clean-up, it ends up being a very key component in how much the response costs are going to be.¹⁵

These sites are physically very large. They might be 60, 80, or 100 acres in size. If the remedial response for such a site is putting a big cap over the top of it, or maybe putting a slurry wall around the side of it, the cost of that is going to be determined by the physical area that has to be covered. If you are dealing with a municipal landfill, then you are going to be concerned with a very large space.

In Superfund site clean-ups, allocation among responsible parties has traditionally been by volume. Suppose you sent ten pounds and I sent 100 pounds, and this guy over there sent 1,000 pounds. We should be paying in proportionate shares. And there has traditionally not been much discounting among the PRPs with respect to things like concentration or dilution. It has been largely a volume-driven system. Even though it is difficult to generalize here, volume certainly has been a driving force.

If municipal solid waste renders a municipality liable, and if the volume test is used, then the municipality would end up paying a very large share at these big mixed-waste sites. And by the way, those sites represent roughly one-fifth of all sites on the Superfund list.¹⁶

Now, let us look at the policy. In 1989, EPA formalized a policy which simply adopted past practice. It said that if the municipality is a generator or transporter of municipal solid waste (i.e. household waste), then EPA will not prosecute them as a PRP in a CERCLA site.¹⁷ As an exercise of prosecutorial discretion, EPA simply will not prosecute. But, if the municipality is the generator or transporter of traditional,¹⁸ real honest to goodness hazardous substances, EPA will

13. *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992) [hereinafter *Goodrich II*].

14. Mr. Mugdan later commented, in response to a question from the audience, that the average site now costs about \$25 million to \$30 million.

15. *Goodrich II*, 958 F.2d at 1197.

16. *Clean Sites, Inc., Main Street Meets Superfund: Local Government at Superfund Hazardous Waste Sites*, 5 (Jan. 1992).

17. 54 Fed. Reg. 51,071 (Dec. 12, 1989).

18. *Id.*

prosecute. If a municipal garage that maintains vehicles that generated waste solvents subsequently places them into the landfill, it is liable. If the municipality for one reason or another picked up wastes of an industrial or chemical nature from operations in its area, it might as well be liable for that as well.¹⁹

Where the municipality is the owner/operator of the facility, it can be liable like any other owner/operator.²⁰ The Superfund is not there just to bail out the municipality every time it ends up being the owner/operator of a Superfund site. But if its connection to the Superfund site is merely as a generator or transporter of MSW, EPA will not prosecute.

EPA did not pretend that this was a legal interpretation. It said that this was an exercise of prosecutorial discretion.

Let us review the case law. One case has basically defined the law of municipal liability. It is the *B.F. Goodrich v. Murtha*²¹ case. In 1991, there was a District Court opinion which was appealed.²² The Second Circuit rendered opinions in 1992 and 1993, ordering the court below to continue the case based on the Second Circuit opinion. Then, in 1993, there were two District Court opinions, both in light of the Second Circuit opinion.²³

In 1991, a third-party action was brought by industrial-type generators against municipal solid waste generators. The MSW generators moved for summary judgment and said that, as a matter of law, they were not liable. They listed numerous reasons. They cited EPA policy, among other reasons, as if it were a binding interpretation of law.²⁴ They cited the RCRA exclusion for MSW, and claimed that this exclusion really should apply in the CERCLA context.²⁵ Furthermore, they cited their own status as sovereigns.²⁶

The district court discarded all of those arguments because it has generally been proven that MSW usually does contain some amount of hazardous substances. This has, however, not been argued by the municipalities themselves, nor has it been debated.²⁷ As a matter of law therefore, MSW generators are not off the hook. If the plaintiffs

19. *Id.*

20. *Id.*

21. *Goodrich II*, 958 F.2d at 1192.

22. *B.F. Goodrich v. Murtha*, 754 F. Supp. 960 (D. Conn. 1991) [hereinafter *Goodrich I*].

23. *B.F. Goodrich v. Murtha*, 840 F.Supp. 180 (D. Conn. 1993) [hereinafter *Goodrich III*]; *B.F. Goodrich v. Murtha*, 815 F. Supp. 539 (D. Conn. 1993) [hereinafter *Goodrich IV*].

24. *Goodrich I*, 754 F. Supp. at 967.

25. *Id.* at 965.

26. *Id.* at 961.

27. *Id.* at 966.

can show that the MSW generator had hazardous substances and sent them to the site, the municipality is liable just like anyone else.²⁸

The Second Circuit in 1992 affirmed that view.²⁹ It confirmed that there is nothing in the Superfund law that endorses or incorporates RCRA exclusions for MSW, nor is there any language about sovereigns being somehow immune. There is nothing that distinguishes municipalities from any other kind of PRP.³⁰ The only question is, did they or did they not send hazardous substances to the Superfund site? The case was sent back to the district court level to decide the issue.

In 1993, the district court entertained all sorts of further motions, and rendered two decisions, one in January, and the other in December. The municipalities, I think, should be extremely happy about what they heard from that court. The court concluded that the plaintiffs could not prove, as a matter of fact, that the municipalities had sent hazardous substances to the particular site in question. Of course, these events had taken place in the rather far past — some ten to twenty years ago. So, although the plaintiffs could provide experts who could attempt to allocate liability there was not enough proof to show that a municipality sent a hazardous substance to the particular Superfund disposal site.³¹ As a result, almost all the claims against municipalities which were based solely on municipal solid waste-containing hazardous substances were thrown out. The municipalities were awarded summary judgment. Their motions to dismiss were generally accepted by the courts and they were let out of the case.

So, as a matter of fact, the municipalities have won, while as a matter of law, they had lost. The facts end up being quite important in these cases after all.

Let us look at the Administration's Bill³² and what effects the Bill has had in the area of municipal liability. The Bill has identified that the municipality could be liable.³³ The Administration did not disagree with the Second Circuit nor the original district court opinion on that basis. But as a matter of policy, the Administration is proposing that the liability of all municipal PRPs at a given site be capped in the aggregate at no more than ten percent of the total cost of that site.³⁴

As I understand it, the Bill says that regardless of the actual allocated share that municipal solid waste generators might be assigned by the allocator, (who has been identified pursuant to section 122(a) of this proposed statute), the share is capped at ten percent regardless of total waste deposited. If the allocator says that the municipalities,

28. *Id.*

29. *Goodrich II*, 958 F.2d at 1192.

30. *Id.* at 1205.

31. *Goodrich IV*, 815 F Supp. at 543-46.

32. Superfund Reform Act of 1994, S. 1834, 103d Cong., 1st Sess. (1994).

33. *Id.*

34. *Id.* § 403.

as a group, are liable for two percent, or one percent, then, that is what they ought to pay. But if the allocator says that the municipalities, as a group, are liable for twenty or forty percent of the costs of the Superfund site, then municipalities will have to pay only ten percent.

Presumably, under the allocation scheme in section 122(a), the difference between the ten percent cap and such greater percentages as the allocator may assign is considered an "orphan share."³⁵ The "orphan share" would therefore have to be picked up by the Fund³⁶ or paid for by any other designated means of payment for orphan shares.³⁷

The Administration's Bill contains a *de micromis* exception. One who generates or transports less than 500 pounds of municipal solid waste to a Superfund site is entirely exempt from liability.³⁸ For example, if you have a summer cottage in the country and at the end of the summer you take two or three bags of garbage to the local landfill, and the landfill eventually becomes a Superfund site, you probably will not be liable.

One final observation about the Administration Bill. Interestingly enough, for the liability purposes and the caps on liability proposed for municipalities, it lumps together municipal solid waste and sewage sludge.³⁹ Additionally, sewage sludge is defined quite broadly and expansively to mean any sludge that comes out of the sewage treatment facility.⁴⁰ The definition does not concern itself with whether that sludge is really clean sewage sludge of the type we would all like to have in our backyards on our vegetable garden, or whether it is the kind that has occasionally been seen at Superfund sites containing all kinds of nasty chemicals, such as heavy metals.

There does not seem to be a distinction made in the law. These municipalities would enjoy the ten percent cap. Yet, an allocator who sees a lot of sewage sludge at a Superfund site and concludes that such sewage sludge in fact did contain a lot of hazardous constituents, might assign a higher allocation than ten percent, or might elevate the allocation as a result of that fact.

35. With respect to municipal solid waste, the orphan share is defined as the difference between the aggregate shares that, as the allocator determines on the basis of the information presented, are specifically attributable to contributors of municipal solid waste subject to the limitations in section 1085(d) of this Title, and the share actually assumed by those parties in any settlement with the United States pursuant to subsection 122(g) of this Title.

36. Mr. Mugdan also suggested that the \$300 million set aside for the orphan's share would be used up very quickly, and that given the 10% cap, municipal and industrial landfills could be one of the biggest drains on it.

37. S. 1834, § 702.

38. *Id.* § 403.

39. *Id.* § 605(41).

40. *Id.* § 605(44).

I have been asked to discuss the basis in the Administration's Bill for capping municipal liability at ten percent. In the aggregate, whether there's one municipality or a hundred of them that are involved, why ten percent, and why is that an aggregate cap?

I don't have a very good answer for that, I was not privy to the decision-making. It is, as best as I can tell (and as any such cap would be), an arbitrary number. There was a time when EPA dabbled with the idea of having a cap of four percent as a matter of policy. That is to say, we would have been willing to settle with municipalities in the aggregate for not more than four percent of the cost of clean-up, and thus by settling with them, we would have given them contribution protection and essentially capped their liability at four percent. Some were bringing up that proposal at the time the Administration Bill was written, and the number increased to ten percent, but it still strikes me as being, by definition, an arbitrary number. Whether it's capricious or not we will have to judge for ourselves.

What happens to the \$300 million orphan share fund? I guess my expectation is that this fund will be used up pretty quickly, and large mixed waste (i.e., municipal and industrial landfills) could be one of the biggest drains. I think, really, the biggest drain on the orphan fund would be if the allocated share to an owner operator is fifty percent or seventy-five percent of the cost of clean-up (and I think there's really only two or three district court opinions that have ever touched on that) and that share is going to be allocated to the owner/operators, who are typically the old peach farmers who carved up the back forty and made it into a landfill, there is going to be very large orphan shares out there that have to be borne. So I can only assume that the \$300 million might be exhausted quite quickly

With respect to municipal solid waste, the orphan share is defined as the difference between the aggregate shares that are specifically attributable to contributors of municipal solid waste subject to the limitations in section 1085(d) of this Title, and the share actually assumed by those parties in any settlement with the U.S. pursuant to subsection 122(g) of this Title. The allocator is limited to ten percent and there may be some internal agency legislative history that will confirm that that's their meaning. In fact, if the *Goodrich* principles are applied, allocators may end up determining that there really is no basis for finding liability at all, or that the liability is very low, which takes into account evidentiary concerns. So this may not be a big drain on the orphan fund; but with the sewage sludge in there, and the possibility for contamination in sewage sludge, there may be some large figures that ultimately come forth.

There are a lot of changes, however, that have been suggested in the nature of technical glitches. The Bill itself was drafted fairly rapidly in response to some Congressional deadlines, and in fact, headquarters

admitted that there were a lot of things that slipped through and will need to be clarified, and this is one of those provisions.

So there are some interesting things in the Administration's Bill. We will see how it all plays out.⁴¹

41. Mr. Mugdan offered that one of the reasons EPA shied away from binding arbitration was the need for 30 to 50 additional administrative law judges, along with the burden of the additional case load which would be given to the regional staff.