

Municipal Liability for Disaster Debris Disposal

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Court disaster long enough, and it will accept your proposal.

—Mason Cooley¹

I. INTRODUCTION

Disasters, both natural and man-made, can create a truly staggering quantity of waste. When the World Trade Center was attacked and destroyed on September 11, 2001, an estimated 1.2 million tons of disaster debris, or over one-quarter of New York City's annual municipal solid waste production, was generated.² Now consider Hurricane

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1. THE COLUMBIA WORLD OF QUOTATIONS, (Michael Seidel & Mary Biggs eds., 1996), available at <http://www.bartleby.com/66/81/14481.html>.

2. Office of History, U.S. Army Corps of Engineers, The U.S. Army Corps of Engineers' Involvement in 9-11 Recovery, <http://www.hq.usace.army.mil/History/9-11%20Highlights.htm>. (last visited Mar. 19, 2006); see Michael Cooper, *A Plan To Ship Garbage, but No Destination*,

Katrina. Officials estimate that the storm generated 118 million cubic yards of debris across the Gulf Coast region—enough material to fill the space of a football field to a height of ten and a half miles.³

Because of such dramatic volumes of waste, disposal of disaster debris can be an overwhelming challenge during the short term. Just as significant, however, may be the long-term consequences associated with disposing of the material in a stream of disaster debris. While natural disasters may generate significant quantities of organic materials, such as downed trees and vegetation, when a disaster hits more densely populated areas, debris may consist of toxic substances that exist in the everyday urban environment.⁴ Given the potentially hazardous nature of disaster debris at extraordinary quantities, disposal methods raise concerns about potential future liability, should hazardous substances be released into the environment. The question is who will have to pay for future cleanup? In the past, courts have held municipalities liable as potentially responsible parties (PRPs) for releases of hazardous substances at sites where municipalities owned the site, disposed of, or arranged for the disposal of, municipal solid waste (MSW), which is known to contain some hazardous substances.⁵ Although placing liability on municipalities may be justified, the extraordinary challenge of disaster debris may warrant some reconsideration of the issue.⁶

This Comment will argue that the lack of meaningful distinction between solid and hazardous waste should give rise to an exemption from liability for releases of hazardous substances occurring as a result of MSW disposal. In developing the regulatory framework for the disposal of solid and hazardous waste, both Congress and the Environmental Protection Agency (EPA) have moved closer to eliminating any practical distinction between solid and hazardous wastes.⁷ The idea is that essentially all waste is to some degree hazardous. Under such a theory,

N.Y. TIMES, Aug. 1, 2002, at A1 (indicating that New York City produces roughly 11,000 tons of household waste a day).

3. White House, *The Federal Response to Hurricane Katrina: Lessons Learned*, Chapter One: Katrina in Perspective, <http://www.whitehouse.gov/reports/katrina-lessons-learned/chapter1.html> (last visited Mar. 19, 2006).

4. See generally EPA, *Planning for Disaster Debris*, <http://www.epa.gov/epaoswer/non-hw/muncpl/disaster/disaster.htm> (last visited Mar. 19, 2006) [hereinafter *Planning for Disaster Debris*].

5. *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1206 (2d Cir. 1992); *N.J. Dep't of Env'tl. Prot. & Energy v. Gloucester Env'tl. Mgmt. Serv., Inc.*, 821 F. Supp. 999, 1008-09 (D.N.J. 1993).

6. See generally Diana Ng, Note, *Debating the Wisdom of Placing Superfund Costs on Municipalities*, 69 S. CAL. L. REV. 2193, 2199-2204 (1996) (discussing the arguments against and in favor of limiting CERCLA liability for municipalities).

7. See Hazardous and Solid Waste Amendments, Pub. L. 98-616, 98 Stat. 3221 (1984); 40 C.F.R. § 261.4(b)(1) (2004).

municipalities may be better able to argue that the exclusion of household waste from the definition of hazardous wastes extends to the definition of hazardous substances. However, although disaster debris is a subset of MSW, it is not clear whether household waste generated by a disaster would fall within that exemption. If it does not, municipalities responding to the removal of disaster debris are unlikely to avoid liability for the future consequences of disposal.

Part II of this Comment will examine the structure of the Resource Conservation and Recovery Act (RCRA) and argue that the regulatory exemption for hazardous household waste (HHW) has, in effect, eliminated the need to distinguish between solid and hazardous waste.⁸ Part III will discuss how courts have analyzed the validity of such an exemption under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and suggest that it may be necessary to reconsider such analyses if the “solid waste versus hazardous waste” distinction is merely conceptual.⁹ Part IV will discuss how disaster debris fits into the RCRA framework and the implications for municipal liability under CERCLA for disposal of disaster debris. Part V will conclude that the potential for disaster debris to be hazardous warrants better federal standards and a clear expression of intent by Congress regarding liability for the disposal of disaster debris.

II. REVISITING FEDERAL STANDARDS FOR MUNICIPAL SOLID WASTE DISPOSAL

Although one of the primary objectives of RCRA is to reduce the risk to human health and the environment caused by hazardous waste contamination, RCRA’s statutory and regulatory framework at times seems to undermine that goal.¹⁰ Assumptions about the low risks of disposal associated with certain hazardous wastes, combined with EPA’s discretion to exempt certain hazardous wastes from the being regulated as hazardous, created a scenario in which the health and environmental threats from municipal solid waste landfills and hazardous waste landfills were problematically similar.¹¹ Although Congress later addressed this problem by requiring the EPA to strengthen its regulatory

8. See RCRA §§ 1002-11011, 42 U.S.C. §§ 6901-6992k (2000).

9. See CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675.

10. RCRA § 1003(a), 42 U.S.C. § 6902(a).

11. See generally Steven Ferry, *The Toxic Time Bomb: Municipal Liability for the cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 202 (1988).

requirements for MSW landfills,¹² the EPA interprets the standard set by Congress to be less demanding than that for hazardous waste facilities.¹³ Nevertheless, if the practical effect is to establish nearly the same level of protection against the risks from both solid and hazardous waste, should Congress and the EPA continue to uphold such a distinction? Why not regulate all waste as hazardous? Part II will overview RCRA's statutory and regulatory framework and suggest that the distinction between solid and hazardous waste may no longer be meaningful in the context of municipal solid waste landfills. To erase the distinction would have important implications for municipal liability under CERCLA.

Between 1980 and 2003, the total annual generation of ordinary trash or garbage in the United States increased more than fifty percent.¹⁴ Despite MSW management practices such as source reduction, recycling, composting, and incineration, close to sixty percent of MSW is disposed of in landfills.¹⁵ Although most of the materials disposed of in MSW landfills are not considered toxic, federal regulations under RCRA allow household generated wastes that contain hazardous substances (e.g., paint, batteries, or pesticides) to be disposed of in MSW landfills.¹⁶ In the mid-1980s, Congress required the EPA to improve national standards for MSW facilities to diminish the likelihood that those facilities will release hazardous substances contained in household wastes; nevertheless, both Congress and the EPA permitted HHW to continue to be excluded from RCRA's more stringent requirements for hazardous waste.¹⁷ The EPA only makes the recommendation that state or local governments implement collection programs to dispose of HHW in hazardous waste treatment facilities.¹⁸ The following Subparts will overview the RCRA framework and discuss the development and implications of the household waste exclusion.

12. See Hazardous and Solid Waste Amendments, Pub. L. No. 98-616, 98 Stat. 3221 (1984).

13. Compare 40 C.F.R. § 258 (2004), with *id.* § 266.

14. EPA, Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2003, <http://www.epa.gov/epaoswer/non-hw/muncpl/pubs/msw05rpt.pdf> (last visited Mar. 21, 2006).

15. EPA, Municipal Solid Waste, Basic Facts, <http://www.epa.gov/msw/facts.htm> (last visited Mar. 21, 2006).

16. See 40 C.F.R. § 261.4(b)(1).

17. See Hazardous and Solid Waste Amendments, Pub. L. No. 98-616, 98 Stat. 3221 (1984); 40 C.F.R. § 261.4(b)(1).

18. See generally EPA, Household Hazardous Waste, <http://www.epa.gov/msw/hhw.htm> (last visited Mar. 19, 2006) [hereinafter Household Hazardous Waste].

A. *Identifying Solid and Hazardous Wastes*

In the 1970s, Congress was faced with a challenging prospect: developing a federal managerial scheme to deal with the country's growing solid and hazardous waste disposal problems.¹⁹ Congress's first attempt to address these problems, the Solid Waste Disposal Act,²⁰ was merely a grant program established to enable the states to develop their own solid waste management systems.²¹ RCRA was a substantial amendment to the Solid Waste Disposal Act that "remodeled the nation's solid waste management system and laid out the basic framework of the current hazardous waste management program."²² Under RCRA, Congress established a framework to address the three primary facets of the waste disposal problem—solid waste, hazardous waste, and underground storage tanks.²³ The federal program for disposal of solid wastes under subtitle D sets certain standards for solid waste disposal that are designed to assist states in developing solid waste management plans.²⁴ Subtitle C establishes criteria for the generation and disposal of hazardous wastes.²⁵ In addition, Congress found storage of hazardous substances and oil products in underground storage tanks to be a problem significant enough to warrant specific regulation under subtitle I.²⁶ Pursuant to its administrative authority under RCRA, the EPA has promulgated a series of lengthy regulations to enforce the statute's objectives under these subtitles.²⁷

The statutory and regulatory scheme is a complex one. The path leads from the broad statutory definitions of solid and hazardous wastes into a confusing maze of regulatory requirements and exemptions. First, RCRA defines a solid waste as "any garbage, refuse, sludge . . . [or] other discarded material, including solid, liquid, . . . or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities."²⁸ The regulatory definition further refines what material may qualify as a solid waste by stating that

19. See generally EPA, RCRA Orientation Manual, Introduction to the Resource Conservation and Recovery Act, <http://www.epa.gov/epaoswer/general/orientat/rom1.pdf> (last visited Mar. 21, 2006).

20. Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 997 (1965).

21. RCRA Orientation Manual, *supra* note 8, at I-2-3.

22. *Id.* at I-3.

23. *Id.*

24. See RCRA §§ 4001-4010(a), 42 U.S.C. §§ 6941-6949(a) (2000).

25. RCRA §§ 3001-3019, 42 U.S.C. §§ 6921-6939(e).

26. RCRA §§ 9002-9010, 42 U.S.C. § 6991(a)-6991(i).

27. 40 C.F.R. §§ 260-281 (2004).

28. RCRA § 1004(27), 42 U.S.C. § 6903(27).

a “solid waste is any discard material,” subject to certain other regulatory exceptions.²⁹ Under the statutory definition, a hazardous waste is “a solid waste” which has certain hazardous characteristics that may cause or contribute to an increased likelihood of death or illness or that may pose “a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.”³⁰ RCRA required the EPA to promulgate regulations that establish criteria to list wastes from certain sources or processes as hazardous wastes, as well as to identify certain hazardous characteristics that make a solid waste a hazardous waste.³¹ Accordingly, the EPA issued four lists of hazardous wastes and identified four general characteristics—ignitability, corrosivity, reactivity, and toxicity—that make a waste hazardous.³² In addition, the EPA specifically excludes certain wastes from being solid or hazardous wastes.³³

B. Municipal Solid Waste and the Household Waste Exclusion

The EPA identifies MSW as “durable goods (e.g., appliances, tires, batteries), nondurable goods (e.g., newspapers, books, magazines), containers and packaging, food wastes, yard trimmings, and miscellaneous organic wastes from residential, commercial, and industrial nonprocess sources.”³⁴ MSW remains a significant portion of the nonhazardous waste stream, and both the volumes and per capita generation rates have continued to grow.³⁵ Household waste is one subset of the larger MSW stream.³⁶

29. 40 C.F.R. § 261.2(a)(1). A discarded material is any material which is either abandoned, recycled, inherently waste-like, or military munitions. *Id.* § 261.2(a)(2). EPA further defines each of these terms. *See id.* §§ 261.2(b)-(f), 266.202.

30. RCRA § 1004(5), 42 U.S.C. § 6903(5).

31. RCRA § 3001(b), 42 U.S.C. § 6921(b).

32. 40 C.F.R. §§ 261.30-38, 261.20-24.

33. *Id.* § 261.1-9.

34. EPA, RCRA Orientation Manual, Managing Solid Waste—RCRA subtitle D II, <http://www.epa.gov/epaoswer/general/orientat/rom.pdf> [hereinafter *Managing Solid Waste*]. The definition of MSW is not always straightforward. *See* U.S. CONG., OFFICE OF TECH. ASSESSMENT, *FACING AMERICA’S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE?* 74 (1988). MSW might be defined to include postconsumer solid wastes generated at residences, commercial establishments, and institutions. *Id.* These wastes may be further categorized as either materials or products. *Id.* However, although wastes like construction and demolition debris or wastewater sludges may be discarded in MSW landfills, they may not be included in the definition of MSW. *Id.*

35. Robert B. McKinstry, Jr., *Regulation of Nonhazardous Waste Under RCRA*, in *THE RCRA PRACTICE MANUAL* 381 (Theodore L. Garrett ed., 2004).

36. *See generally*, *Managing Solid Waste*, *supra* note 34.

Pursuant to the EPA's regulatory authority, it exempted household waste from the definition of a hazardous waste.³⁷ Underlying this decision was the historical presumption that such waste is predominantly nonhazardous waste, consisting of "old newspapers, leftover food, random household debris, and the occasional broken toy."³⁸ The EPA interprets the exclusion as implementing Congress's intent that the hazardous waste program under subtitle C not be used "to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances."³⁹ The United States Supreme Court has similarly expressed its understanding of this regulatory exclusion, noting that "[a]lthough most household waste is harmless, a small portion—such as cleaning fluids and batteries—would have qualified as hazardous waste."⁴⁰

Ordinary household waste, however, is not as benign as most people would like to think.⁴¹ The household trash can has been described as "a leaking sieve of toxic and potentially toxic chemical agents . . . [which] are contained in the pesticides, paints, degreasers, preservatives, detergents, oven cleaners, insecticides, and even shampoos. . . ."⁴² Commonly discarded household hazardous substances "contain dozens of metals . . . [and] compounds, all of which qualify as hazardous substances under federal law."⁴³ Approximately 1.6 million tons of household hazardous waste are generated each year.⁴⁴ Although it is not clear how much of that waste makes it into MSW landfills, it is clear that the household waste exclusion allows wastes to be disposed of in subtitle D facilities that may be as threatening to human health and the environment as those disposed of in more stringently regulated hazardous waste facilities.⁴⁵

37. 40 C.F.R. § 261.4(b)(1). Household waste is defined as "any material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas)." *Id.*

38. Ferry, *supra* note 11, at 202.

39. Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, 63 Fed. Reg. 70,233, 70,241 (proposed Dec. 18, 1998) (to be codified at 40 C.F.R. pt. 260, 261).

40. *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 332-33 (1994).

41. *See generally* Ferry, *supra* note 11.

42. *Id.* at 202. The author discusses in detail the hazardous makeup of the MSW stream. *Id.* at 200-11.

43. *Id.* at 205.

44. Household Hazardous Waste, *supra* note 18.

45. McKinsty, *supra* note 35, at 382-83.

C. *Excluding Hazardous Household Waste: Implications and Response*

Although hazardous household waste is only a fraction of the total MSW stream,⁴⁶ by the early 1980s, the presence of hazardous wastes in MSW landfills initiated concerns about the adequacy of the subtitle D program in protecting the public health and environment.⁴⁷ In 1984, Congress significantly amended RCRA by enacting the Hazardous and Solid Waste Amendments (HSWA),⁴⁸ specifically section 4010(c), which required the EPA to strengthen the criteria for sanitary landfills and open dumps receiving hazardous household waste or hazardous wastes from small quantity generators.⁴⁹ In addition, the amendments directed EPA that its revisions to such criteria should, at a minimum, “require ground water monitoring . . . , establish criteria for the acceptable location of new or existing facilities, and provide for corrective action as appropriate.”⁵⁰

With the HSWA, Congress moved to enhance the regulatory impact on MSW in its grave, rather than the cradle. The legislative history of the HSWA points to Congress’s concern that there had been a failure to “recognize that municipal landfills and dumps are very much a part of the hazardous waste disposal problem.”⁵¹ As Senator Randolph explained the problem:

We assume that our trash will be picked up at home, but seldom question where it goes, how it is disposed of, or whether it is an environmental problem. In fact, a substantial amount of hazardous material finds its way to sanitary landfills and open dumps through household waste⁵²

Thus, given that MSW landfills would inevitably “continue to receive some amount of hazardous wastes in household goods which are not regulated under RCRA,” Congress determined that the best solution was to direct the EPA to come up with a plan to improve how facilities ultimately dispose of such waste “to provide better protection of public health and [the] environment.”⁵³

46. Household Hazardous Waste, *supra* note 18. According to the EPA’s Web site, 1.6 million tons of HHW are generated per year in the United States. *Id.* In comparison, in 2003, more than 236 million tons of MSW were produced. *See* Municipal Solid Waste, *supra* note 15.

47. *See generally* John H. Turner, *Off to a Good Start: The RCRA Subtitle D Program for Municipal Solid Waste Landfills*, 15 TEMP. ENVTL. L. & TECH. J. 1, 2-6 (1996).

48. Hazardous and Solid Waste Amendments, Pub. L. No. 98-616, 98 Stat. 3221 (1984).

49. RCRA § 4010(c)(1), 42 U.S.C. § 6949a(c)(1) (2000).

50. *Id.*

51. 130 CONG. REC. 22, 30,694 (1984).

52. *Id.* at 30,693.

53. 129 CONG. REC. 4, 4804 (1983).

Despite the recognition that household waste is a principal part of the hazardous waste problem, Congress sought to clarify the household waste exclusion instead of eliminating or limiting its application.⁵⁴ Prior to the enactment of the HSWA, the administrative interpretation of the household waste exclusion also exempted ash residue of household waste from the definition of hazardous waste.⁵⁵ However, it appeared that ash residue generated by a facility that burned household waste, as well as other nonhazardous waste, was not similarly exempt.⁵⁶ Although the statutory clarification may have been intended to reflect Congress's "original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources,"⁵⁷ a majority of the Supreme Court in *City of Chicago v. Environmental Defense Fund* determined that the provision created an express exemption for certain resource recovery facilities, not the ash waste itself.⁵⁸ In that case, the Environmental Defense Fund sued the City of Chicago on the grounds that disposing of toxic ash that is generated by the burning of household waste and other nonhazardous waste in non-subtitle C facilities is a violation of RCRA.⁵⁹ The Court held that

54. See RCRA § 3001(i), 42 U.S.C. § 6921(i). This provision provides:

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if

- (1) such facility—
 - (A) receives and burns only—
 - (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
 - (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
 - (B) does not accept hazardous wastes identified or listed under this section, and
- (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

55. *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 333 (1994).

56. *Id.*

57. *Id.* at 344 (Stevens, J., dissenting).

58. *Id.*

59. *Id.* at 330. The United States Court of Appeals for the Seventh Circuit originally reversed the decision of the district court, finding that the ash was subject to subtitle C regulation based on the clear text of the provision. *Id.* at 331. During the appeals process, however, the EPA issued a memorandum indicating its view that MSW ash should be exempt from subtitle C regulation. *Id.* In light of the memorandum, the United States Supreme Court vacated the decision and remanded the case back to the Seventh Circuit, which then reinstated its previous

[i]n light of that difference, and given the statute's express declaration of national policy that "[w]aste that is . . . generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment," we cannot interpret the statute to permit MWC ash sufficiently toxic to qualify as hazardous to be disposed of in ordinary landfills.⁶⁰

The household waste exclusion issue highlights the tension between the policy goals established by Congress in RCRA to protect human health and the environment and the regulatory authority of the EPA to exclude certain hazardous wastes from RCRA's most stringent regulations in order to encourage resource recovery.⁶¹ Where the statute is clear, the Supreme Court has indicated its preference to use the text, rather than EPA's interpretation of the text, to reconcile those objectives.⁶²

D. Should Congress Move Toward Eliminating the Distinction Between Solid and Hazardous Waste?

One of the questions raised by the household waste exclusion is if solid waste, particularly MSW, will always be to some extent hazardous then why not eliminate the distinction between solid and hazardous waste? If the risks associated with both are essentially the same then why not require the same standards to minimize those risks? The broader impact of the regulatory exemption for household waste has been to strengthen the disposal requirements for all solid waste. The HSWA brought solid waste much closer to the cradle-to-grave scheme of subtitle C. The statutory clarification of the household waste exemption has been interpreted by the Supreme Court as a limitation on the exclusion.⁶³ A clear recognition exists that the human health and environmental threats from solid waste may be as significant as those from hazardous waste.⁶⁴

The idea that at least one subset of the solid waste stream (i.e., MSW) is hazardous *enough* to warrant a more stringent regulatory

opinion, holding that "because the statute's plain language is dispositive, the EPA memorandum did not affect its analysis." *Id.*; see *Env'tl. Def. Fund v. City of Chicago*, 985 F.2d 303, 304 (7th Cir. 1993).

60. *City of Chicago*, 511 U.S. at 335.

61. *See id.* at 339.

RCRA's twin goals of encouraging resource recovery and protecting against contamination sometimes conflict. It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text. Here that requires us to reject the Solicitor General's plea for deference to the EPA's interpretation, which goes beyond the scope of whatever ambiguity § 3001(i) contains. *Id.*

62. *See id.* at 335.

63. *See id.*

64. *See* 130 CONG. REC. 22, 30,693-94 (1984).

scheme questions whether the “solid waste versus hazardous waste” distinction is relevant at all. Although eliminating the distinction between solid and hazardous waste is a statutory possibility, amending RCRA to eliminate the household waste exception would be a political battle that few in Congress would likely fight. Nevertheless, many communities have collection programs for household hazardous waste, and the EPA “encourages participation” by the general public in such programs.⁶⁵ In 1997, there were more than 3000 household hazardous waste programs or events throughout the country.⁶⁶ Thus, it appears the view that ordinary household waste is to some extent hazardous has moved closer to becoming a public norm.

If Congress were to eliminate the household waste exclusion altogether, not only would the EPA be free to promulgate federal regulations for the collection and disposal of household hazardous waste, but it would be clear that the “solid waste versus hazardous waste” distinction would ultimately have very little meaning.

III. MUNICIPAL LIABILITY UNDER CERCLA

CERCLA is a strict liability statute designed to make polluters pay the cost of cleaning up releases, or threatened releases of hazardous substances into the environment.⁶⁷ It is a far less complicated scheme than RCRA. Four factors will trigger a cause of action under CERCLA.⁶⁸ First, hazardous substances must be present at a facility.⁶⁹ Second, there must be a release or threatened release of hazardous substances.⁷⁰ Third, response cost must be incurred to clean up the release or threatened release.⁷¹ Fourth, the defendant must fit into one of four classes of liable parties: (1) current owners and operators of a facility, (2) past owners and operators of a facility at the time hazardous wastes were disposed, (3) generators and parties that arranged for the disposal or transport of the hazardous substances, or (4) transporters of hazardous waste that selected the site where the hazardous substances were brought.⁷² If found liable, a responsible party may be required to

65. Hazardous Household Waste, *supra* note 18.

66. *Id.*

67. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (2000).

68. CERCLA § 107(a), 42 U.S.C. § 9607(a).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

pay the government or another responsible party for recovery and cleanup costs.⁷³

A. Municipal Solid Waste Under CERCLA

In 2002, Congress amended CERCLA when it enacted the Small Business Liability Relief and Brownfields Revitalization Act.⁷⁴ This provision provides a qualified exemption from liability for response costs under CERCLA § 9607(a)(3) to certain generators of MSW at Superfund sites on the National Priorities List.⁷⁵ These generators include: (1) owners, operators, or lessees of residential property, (2) certain small businesses, and (3) certain nonprofit organizations.⁷⁶ However, the conditional exemption does not apply in three situations: (1) if the MSW contributed significantly, either individually or in the aggregate, to the cost of response or recovery; (2) if there is a failure to comply with an information request issued by the President; or (3) if there is an impediment to a response or recovery action.⁷⁷ The EPA interprets these three exceptions to be “highly fact specific” and the determination of whether an exception applies “should be made on a case-by-case basis.”⁷⁸ For purposes of the exemption, MSW is defined as a waste material generated by a household or generated by a commercial, industrial, or institutional entity, to the extent that the material is essentially the same as waste normally generated by a household, is collected and disposed of with other MSW, and “contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in the waste generated by a typical . . . household.”⁷⁹ Examples include “food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.”⁸⁰

73. *Id.*

74. *See* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

75. CERCLA § 107(p)(i), 42 U.S.C. § 9607(p)(i).

76. *Id.*

77. CERCLA § 107(p)(2), 42 U.S.C. § 9607(p)(2).

78. EPA, Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA § 107(p), at 6 (Aug. 20, 2003), *available at* <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf>.

79. CERCLA § 107(p)(4)(A), 42 U.S.C. § 9607(p)(4)(A).

80. CERCLA § 107(p)(4)(B), 42 U.S.C. § 9607(p)(4)(B).

Prior to enactment of this conditional exemption for MSW, the EPA issued two policy guidance documents for MSW under CERCLA.⁸¹ The primary purpose of its initial policy was to provide guidance to regional offices of the EPA on how they should exercise their enforcement discretion when dealing with municipalities and municipal wastes in the Superfund settlement process.⁸² In the 1989 interim policy, the EPA provided that it would generally not identify a generator or transporter of MSW as a PRP unless site specific evidence exists showing that the MSW disposed by that party contained hazardous substances derived from commercial, institutional, or industrial processes.⁸³ However, it noted that CERCLA does not provide an exemption for either municipalities or for MSW.⁸⁴ For purposes of the policy, it indicates that MSW is

generally characterized by large volumes of nonhazardous substances and my [sic] contain small quantities of household hazardous or other wastes To the extent [MSW] contain[s] a hazardous substance that is covered under . . . CERCLA and there is a release or threatened release, such municipal wastes may fall within the CERCLA liability framework.⁸⁵

The EPA's 1998 guidance continues this policy.⁸⁶

B. *Municipal Liability Under CERCLA*

Even if a municipality disposes of its MSW in complete compliance with RCRA, if the MSW contains household hazardous waste, the municipality is potentially liable under CERCLA for any actual or

81. See Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes, 54 Fed. Reg. 51,071 (Dec. 12, 1989); Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites, 63 Fed. Reg. 8197, 8198 (Feb. 5, 1998).

82. See Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Wastes, 54 Fed. Reg. 51,071 (Dec. 12, 1989).

83. *Id.* at 51,074-75.

84. *Id.* at 51,074.

85. *Id.* The interim policy defines MSW as solid waste generated primarily by households, but may include some contribution of wastes from commercial, institutional and industrial sources as well. *Id.* As defined under RCRA, MSW contains only those wastes which are not required to be managed as hazardous wastes under subtitle C of RCRA (e.g., nonhazardous substances, household hazardous wastes (HHW), or small quantity generator (SQG) wastes). *Id.* Although the actual composition of such wastes varies considerably at individual sites, MSW is generally composed of large volumes of nonhazardous substances (e.g., yard waste, food waste, glass, and aluminum) and may contain small quantities of household hazardous wastes (e.g., pesticides and solvents), as well as small quantity generator wastes. *Id.* Many industrial solid wastes and some commercial and institutional solid wastes are managed separately from household wastes, but may enter the MSW waste stream. *Id.*

86. See Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites, 63 Fed. Reg. 8197, 8198 (Feb. 5, 1998).

threatened releases of hazardous substances at the landfill.⁸⁷ *B.F. Goodrich v. Murtha*, decided in 1992, remains the leading judicial analysis of the issue.⁸⁸ In that decision, the Court of Appeals for the Second Circuit considered whether RCRA's household waste exclusion was extendable to CERCLA's definition of hazardous substances.⁸⁹ The case involved a third-party contribution action under CERCLA against several municipalities by the defendant owners and operators of two Superfund sites.⁹⁰ The third-party suit alleged that the municipal defendants were potentially responsible parties since they had arranged for the disposal and treatment of hazardous substances at the two sites.⁹¹ The municipalities argued that the generation and collection of MSW did not subject them to liability under CERCLA under two theories: (1) MSW does not fit within CERCLA's definition of hazardous substance, and (2) the exemption for household hazardous waste in RCRA extends, through incorporation by reference, to the definition of hazardous substances under CERCLA.⁹² The Second Circuit, noting its awareness that "holding the municipal defendants as responsible parties and including municipal solid waste within the definition of hazardous substances will have far reaching implications for municipalities and their taxpayers," nonetheless rejected the defendants' arguments finding that "burdensome consequences are not sufficient grounds to judicially graft an exemption into a statute . . . that would thwart [its] language, purpose, and agency interpretation."⁹³

In considering the first argument, the court determined that CERCLA plainly does not exempt MSW from the definition of a hazardous substance.⁹⁴ Although the statute is silent as to MSW, that "is not evidence that [MSW] should be excluded from the definition of hazardous substances."⁹⁵ Furthermore, the court reasoned it would be "semantic sophistry" to require that MSW be listed by name, instead of its constituent components, to fall within CERCLA.⁹⁶ Accordingly, since

[l]iability under CERCLA depends only on the presence in any form of listed hazardous substances. . . . [I]f a municipality arranges for the

87. See *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1203 (2d Cir. 1992).

88. *Id.*

89. *Id.* at 1201.

90. *Id.* at 1196.

91. *Id.*

92. *Id.* at 1200-01.

93. *Id.* at 1206.

94. *Id.* at 1201.

95. *Id.*

96. *Id.*

disposal or treatment of waste containing substances listed as hazardous . . . it may be held liable for contribution or response costs under the Act if a subsequent release . . . requires cleanup efforts.⁹⁷

As to the second argument, the court held that RCRA's household waste exclusion "in no way limits the definition of hazardous substances under CERCLA" and that to extend RCRA's exclusion would frustrate CERCLA's "broad remedial purposes as well as unjustifiably expand the scope of [RCRA's] regulations."⁹⁸ The court's analysis distinguished the statutes by each one's purpose (RCRA is preventative, while CERCLA is curative) and application (RCRA applies to wastes, while CERCLA applies to substances).⁹⁹ Based on those distinctions, the court suggested that compliance with RCRA is of no import to compliance with CERCLA:

It does not follow that because the environmental risk posed by household waste is deemed insufficient to justify the most stringent regulations governing its day-to-day handling that the environmental harm caused when that risk is realized is insufficient to require holding liable those responsible for that harm. . . . Even total compliance with [RCRA] Subpart C regulations will not prevent releases or avoid CERCLA liability. Similarly, the increased likelihood of a release occurring pursuant to [RCRA] Subpart D regulations does not necessarily suggest a proportional increased likelihood that a response will be warranted under CERCLA, because of the small concentrations of hazardous substances found in wastes regulated under that Subpart.¹⁰⁰

IV. IMPLICATIONS FOR DISASTER DEBRIS

The United States is at "significant risk" of natural disaster.¹⁰¹ In the past two decades, the President has declared over 700 major disasters.¹⁰² Many of these disaster events have generated substantial volumes of debris that result in enormous challenges for local communities.¹⁰³ The debris from an earthquake, flood, or hurricane can generate volumes of waste up to fifteen times the annual waste generation rate of a

97. *Id.*

98. *Id.* at 1202.

99. *Id.*

100. *Id.* at 1202-03.

101. SUBCOMMITTEE ON DISASTER REDUCTION, NAT'L SCI. & TECH. COUNCIL, REDUCING DISASTER VULNERABILITY THROUGH SCIENCE AND TECHNOLOGY 1 (July 2003), http://www.ostp.gov/NSTC/html/SDR_Report_ReducingDisasterVulnerability2003.pdf.

102. FEMA Disaster Debris Document, <http://www.fema.gov/pdf/rrr/pa/demagde.pdf> (last visited Mar. 21, 2006).

103. Planning for Disaster Debris, *supra* note 4. In 1992, Hurricane Andrew left behind 43 million cubic yards of debris in a single county of Florida alone. *Id.*

community.¹⁰⁴ Analysts have identified the lack of preparedness in disaster debris management as a problem that results in “clean-up delays, cost escalation, and adverse environmental impact.”¹⁰⁵

No better example exists than that of Hurricane Katrina. The devastating storm generated 118 million cubic yards of debris¹⁰⁶ and destroyed 275,000 homes.¹⁰⁷ While the sheer volume of debris creates a significant challenge for proper disposal under state and federal standards, the likely hazardous nature of at least some portion of the hurricane waste stream already has raised concerns about potential liability under CERCLA. Both the federal government, namely the United States Army Corps of Engineers which is the lead agency for removal of Hurricane Katrina debris,¹⁰⁸ and local municipalities, like the City of New Orleans, may be at risk for future CERCLA actions on account of actual and threatened releases of hazardous substances at sites being used to dispose of the hurricane debris.¹⁰⁹

A. *Disaster Debris Management*

Following a natural disaster, local and state authorities are typically responsible for responding to immediate needs, including management of disaster debris.¹¹⁰ However, once the President declares a region or community a disaster area, federal resources may be available to assist the area in removing disaster debris pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).¹¹¹ Under the Stafford Act, if the President determines it to be in the public interest,¹¹² he may authorize federal agencies “to clear debris and

104. DEBRA R. REINHART & PHILIP T. MCCREANOR, DISASTER DEBRIS MANAGEMENT—PLANNING TOOLS 3 (final report submitted to U.S. Environmental Protection Agency Region IV), available at <http://www.people.cecs.ucf.edu/reinhart/DDfinalreport.pdf>.

105. *Id.*

106. *See* White House, *supra* note 3.

107. Robert P. Hardwig, Ins. Info. Inst., Hurricane Season of 2005: Impacts on U.S. P/C Insurance Markets in 2006 and Beyond, available at http://server.iii.org/yy_obj_data/binary/744130_1_0/Katrina.pdf (last visited Mar. 21, 2006).

108. Memorandum from George Pavlov, Senior Fed. Official, New Orleans Field Office, EPA, to John Connolly, Infrastructure Branch Chief, FEMA, at 1 (Nov. 11, 2005), available at http://www.deq.louisiana.gov/portal/portals/0/news/pdf/EPA_Gentilly_Memo.pdf.

109. *See* United States v. City of New Orleans, No. 02-3618, 2003 WL 22208578 (E.D. La. Sept. 19, 2003). The City of New Orleans is the subject of a pending CERCLA action by the federal government for the release of hazardous substances from a landfill that had been used to dispose of Hurricane Betsy debris. *Id.*

110. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 (2000).

111. *Id.* § 5173.

112. *See* 44 C.F.R. 206.224 (2004) (describing the factors to determine whether removal is in the public interest).

wreckage resulting from a major disaster from publicly and privately owned lands and waters” and “to make grants to any State or local government . . . for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.”¹¹³ While the Act does not define “debris” or “debris removal,” the EPA informally interprets both the Stafford Act and its promulgated regulations to “use the term debris removal in a broad sense to encompass the entire process of removing, handling, recycling, and disposing of debris.”¹¹⁴

Although removal of disaster debris is exempt from some statutory requirements,¹¹⁵ removal operations are still subject to compliance with RCRA.¹¹⁶ However, neither RCRA nor its regulations specifically contemplate disposal of “disaster debris.” Instead, the EPA recommends that local communities deal with disaster debris under the rubric of their general solid waste management schemes by developing specific disaster debris management plans.¹¹⁷ As part of these plans, communities should select staging sites for the temporary storage and processing of debris.¹¹⁸ Once disaster debris is collected, it should be handled, sorted, recycled, and disposed of based on the type of waste that the debris has generated.¹¹⁹ Waste types after a disaster might include: greenwaste, metals, mixed debris, woody construction and demolition debris, asphalt roofing, gypsum, plastics, aggregate and rubble, household furnishings and personal property, hazardous wastes (including household hazardous wastes, fugitive commercially generated hazardous debris, and construction and demolition debris containing asbestos and lead paint), and putrescible wastes.¹²⁰ States and communities are not required by federal law to develop disaster debris management plans, but some have done so in the wake of natural disasters.

113. 42 U.S.C. § 5173(a).

114. Planning for Disaster Debris, *supra* note 4; *see* 42 U.S.C. § 5173; 44 C.F.R. § 206.224.

115. *See* 42 U.S.C. § 5159. Pursuant to this provision, debris removal under the Stafford Act is exempt from the National Environmental Policy Act. *Id.*

116. Planning for Disaster Debris, *supra* note 4.

117. *Id.*

118. *Id.*

119. *Id.*

120. Solid Waste Association of North America (SWANA), Hurricane Katrina Disaster Debris Management: Lessons Learned from State and Local Governments, at 5 (Dec. 2005), available at http://swana.org/pdf/swana_pdf_404.pdf.

B. Hazardous Disaster Debris

Only a few years before the unprecedented destruction caused by Hurricane Katrina, the United States District Court for the Eastern District of Louisiana decided that hurricane debris “is simply not ‘released hazardous substances’ pursuant to CERCLA.”¹²¹ In the post-Katrina world will courts have a different perspective? In particular, should Katrina-waste, unusual because of its volume and the degree to which it may be potentially hazardous to health and the environment, be categorically listed as a hazardous waste under RCRA? The average home can accumulate as much as 100 pounds of household hazardous products in the basement and garage and in storage closets.¹²² Approximately 275,000 homes were destroyed by Hurricane Katrina.¹²³ By a rough estimate, the disaster debris from Hurricane Katrina consists of up to 27.5 million pounds of accumulated hazardous household products from the homes that were destroyed.¹²⁴ Does HHW within the disaster debris waste stream qualify for RCRA’s household waste exemption?

Pursuant to RCRA household waste exclusion, hazardous household waste is not federally regulated.¹²⁵ Instead, disposal of household hazardous waste may be disposed of according to the less stringent requirements for nonhazardous waste under subtitle D. Although the definition of household waste refers to “any material (including garbage, trash, and sanitary waste from septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas),”¹²⁶ it fails to “indicate whether a waste is household waste as a result of the place of generation (e.g., a residence), or as a result of who generated it (e.g., a resident of a household).”¹²⁷ EPA’s interpretation of the household waste exclusion places two limitations on the exemption: (1) the waste has to be

121. *United States v. City of New Orleans*, No. 02-3618, 2003 WL 22208578, at *3 (E.D. La. Sept. 19, 2003).

122. Household Hazardous Waste, *supra* note 18.

123. Hardwig, *supra* note 107.

124. Multiplying 275,000 homes by 100 pounds of HHW per household. To put this in perspective, 27.5 million pounds is equal to 13,750 tons. Annually the United States generates 1.6 million tons of household hazardous waste. See Hazardous Household Waste, *supra* note 18.

125. 40 C.F.R. § 261.4(b)(1) (2004).

126. *Id.*

127. Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, 63 Fed. Reg. 70,233, 70,241 (proposed Dec. 18, 1998) (to be codified at 40 C.F.R. pts. 260-261).

generated by individuals on the premises of a household, and (2) the waste must be composed primarily of materials found in the waste generated by consumers in their homes.¹²⁸ Thus household waste meeting these criteria and containing hazardous wastes may be disposed of in the ordinary municipal solid waste stream.

Under these limitations, does household waste generated as a result of a natural disaster qualify for the RCRA exclusion? Because the regulatory definition of household waste is ambiguous, any determination must rely upon the EPA's own interpretation of its regulation. That interpretation clearly requires that in order for household waste to qualify for the exclusion, it must have been generated by an individual on the premise of a household and it must be composed primarily of materials found in the waste generated by consumers in their homes. Household waste generated as disaster debris may fail to meet the first criteria since a natural disaster, rather than an individual, generated the waste. The EPA's criteria clearly suggests that *someone*, not *something*, be the generator of the waste. Generation of household waste by an individual implies that the individual is discarding material after it has been used, essentially that which someone is throwing away. However, in the case of a natural disaster, household wastes generated in disaster debris arguably are not generated until the moment the disaster strikes.

V. CONCLUSION

Disaster debris is another category of MSW that may contain hazardous substances. While most MSW contains only trace amounts of hazardous wastes and thus is considered low risk, when considering the volume of disaster debris and the various sources the potential threat of releasing hazardous substances increases exponentially. Even if municipalities are successful in disposing of disaster debris in compliance with the current national standards for solid waste disposal, they are inevitably at risk for future liability if disposed of disaster debris leaches hazardous substances into the environment.

128. *Id.*; Hazardous Waste Management System, Identification and Listing of Hazardous Waste, 49 Fed. Reg. 44,978 (final rule Nov. 13, 1984).