

INTRODUCTION

**ENVIRONMENTAL LIABILITY ASSOCIATED WITH ASH RECYCLING**

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**For:**

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**AN AFFILIATE OF**

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## INTRODUCTION

The Firm of DeCotiis, Fitzpatrick & Gluck, as a member of the Municipal Waste Management Association's Waste-to-Energy Committee, has prepared this paper as a service to local governments desiring to recycle ash generated from the combustion of Municipal Solid Waste ("MSW"). Approximately 196 million tons of MSW are generated annually in the United States. Sixteen percent (16%) of MSW is combusted in 150 municipal waste combustors ("MWC") around the country. Thirty-one (31) states have at least one of the 112 MWC's classified as waste-to-energy ("WTE") facilities, with Florida, New York and Massachusetts having the largest number of WTE facilities per state.

Approximately twenty-five percent (25%) (by weight) of the waste that is combusted remains as ash, amounting to approximately eight million tons of MWC ash generated annually. Generally these combustion facilities generate two basic types of ash - - "bottom ash" and "fly ash". Bottom ash collects at the bottom of the combustion unit and comprises approximately seventy-five to eighty percent (75-80%) of the total ash. Fly ash collects in the air pollution control devices that "clean" the gases produced during the combustion of the MSW waste and comprises approximately twenty to twenty-five percent (20-25%) of the total.

Local governments and WTE operators that generate ash currently face environmental liability issues if they merely dispose of their ash in a landfill because of the chemical characteristics of the ash and its classification as a waste. Thus, liability concerns about ash are not new to those responsible for waste combustion. However, as this paper demonstrates transferring ash to a bona fide ash recycler creates significant legal defenses to potential liability that do not exist if a generator sends its ash to a landfill.

The concept of using ash generated from the combustion of MSW in various products has been around for a number of years. One reason that this concept has not become the reality envisioned by many local governments and industries, in spite of the many technologies available in Europe and the United States, is uncertainty about the liability associated with ash recycling. However, as demonstrated herein, local governments that generate non-hazardous MWC ash have several levels of protection available to them against environmental liability if (1) they provide the ash to a bona fide recycling operation; (2) the recycler or the local government treats the ash, if necessary, to satisfy state and federal laws; (3) the recycler has obtained all of the necessary state and local approvals; and (4) the MWC ash is used in products in a manner that limits the potential for human exposure.

## **I. RCRA and CERCLA**

In 1976, Congress passed the Resource Conservation Recovery Act ("RCRA") (42 U.S.C. § 3001 *et seq.*) in order to protect health, protect the environment, regulate hazardous waste from creation to disposal, establish guidelines for the disposal of non-hazardous solid waste, promote resource conservation and promote resource recovery systems. To attain these goals, RCRA divides solid waste into two categories, hazardous and non-hazardous. Subtitle C of RCRA establishes strict "cradle to grave" (creation to disposal) standards for hazardous wastes. Subtitle D governs, less stringently, non-hazardous solid waste. RCRA §3001, under Subtitle C, mandates the identification and listing of specific hazardous wastes which require regulation. Section 3001 also exempts specific materials from regulation even though they may exhibit characteristics that would otherwise define them as hazardous. "Household waste" is one category of waste which is exempt from the hazardous waste regulations of Subtitle C. *See* RCRA §3001(i); 42 U.S.C. §6921(i). This exemption was significant because, although MSW is comprised primarily of non-hazardous household waste, MSW generally contains small quantities of hazardous household waste (e.g. household pesticide and cleaning products) the disposal of which would otherwise be subject to the more stringent Subtitle C regulations. However, because this provision did not explicitly mention ash residue created by the combustion of household waste, the regulatory treatment of ash continued to be a controversial issue until 1992.

In addition to its pervasive regulatory functions, RCRA also provides a remedy for environmental endangerment caused by solid or hazardous wastes. The federal government may bring suit against any person who has contributed to, or who is presently contributing to an imminent and substantial endangerment to health or the environment as a result of the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste. *See*, RCRA § 7003, 42 U.S.C. § 6973. A "person," defined broadly by RCRA to include governmental entities, will be held liable if:

- (1) Conditions exist which present or may present an imminent and substantial endangerment to human health or the environment;

(2) The endangerment stems from the handling, storage, treatment, transportation or disposal of a solid or hazardous waste; and

(3) The person has contributed to such handling, storage, treatment, transportation or disposal.

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 U.S.C. § 9601 *et seq.*), also known as "Superfund,"<sup>1</sup> was enacted in 1980 to combat the release or threatened release of "hazardous substances" into the environment. Hazardous substances are defined broadly by CERCLA, and include all "hazardous wastes" as defined under RCRA. Under CERCLA, persons designated as "potentially responsible parties" (PRPs) may be liable both to the federal government and private parties for their share of the cost to clean up hazardous substances. In general, the four categories of PRPs under CERCLA are: (1) the current owner or operator of a facility at which a hazardous substance is disposed, regardless of whether or not the person owned or operated the facility at the time of disposal; (2) the person who, at the time of disposal of a hazardous substance, was the owner or operator of the disposal facility; (3) the person who "arranged for" the disposal or treatment of a hazardous substance at a facility; and (4) the transporter who transported hazardous substances to a facility for disposal. 42 U.S.C. §9607 (a). For municipalities, counties, or other political subdivisions of a state or agency thereof ("local government") generating MSW ash, the most significant category of PRP under CERCLA is the person who "arranged for" disposal or treatment of a hazardous substance. Typically, this category of liability is referred to as "generator" liability because it involves the liability of generators of hazardous substances who sent their wastes to another site for disposal or treatment. At a major cleanup site there may be hundreds of generators.

The costs associated with CERCLA are pervasive and can include costs of removal, remediation, damages to natural resources, health effects studies, and any other necessary costs of response. Since CERCLA's liability scheme imposes retroactive, strict, joint and several liability, a single PRP, such as a generator of hazardous substances, could be held liable for the cost to clean up an entire contaminated site. This potential liability could exist even if the generator disposed of a type of hazardous substance that is different than the type of hazardous substance necessitating the cleanup. Unlimited liability could also exist if the generator disposed of only a tiny fraction of the amount of waste at the

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<sup>1</sup> CERCLA is sometimes referred to as Superfund because the statute establishes a trust fund, known as the "Superfund," to be used by the federal government to finance cleanups of hazardous substances.

contaminated site. With such far-reaching potential liability, thousands of companies have been caught in CERCLA's seemingly endless web of litigation.

Nonetheless, the potential for liability can be addressed in several ways. The evolution of case law addressing RCRA and CERCLA, extensive test data concerning MSW ash, and the ability to obtain contractual indemnification and insurance coverage, should help to alleviate a local government's concern about the potential liability associated with the recycling of MWC or combustor ash.

## II. RCRA and CERCLA CASE LAW

### A. MSW Ash Classification

On May 2, 1994, the United States Supreme Court issued an opinion interpreting Section 3001(i) of RCRA. City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994). The Court held that Section 3001(i) of RCRA does not exempt ash generated at WTE facilities combusting household wastes and nonhazardous commercial wastes from the hazardous waste requirements of Subtitle C of RCRA, which governs hazardous waste. The Court's decision required the United States Environmental Protection Agency ("USEPA") to revise its prior position that MSW ash is exempt from RCRA's hazardous waste regulations. The decision also ended nearly a decade of controversy over the regulatory status of ash from these facilities.

As a result of this decision, ash from WTE facilities has the same status as other solid wastes. The guidelines subsequently established by the USEPA require MWCs to determine whether combusted MSW ash is hazardous under RCRA's hazardous waste identification rules. Since EPA has not listed ash as a hazardous waste, generators must determine whether ash exhibits any of the characteristics of hazardous waste. Ash that exhibits a hazardous waste characteristic must be managed in compliance with RCRA's Subtitle C requirements.

After the Court's decision, WTE facilities through-out the United States tested their ash to determine whether it exhibited the characteristics of a hazardous waste. In almost all cases, the ash did not have the characteristics of hazardous waste. Thus, in the end, City of Chicago had a relatively minor impact on the WTE industry.

Although City of Chicago confirmed that MWC ash generated by the combustion of MSW is regulated under RCRA, an interesting question still remained. What, if any, liability was associated with the beneficial recycling of ash? The following federal case law helps illustrate the potential extent of liability associated with MSW ash recycling projects.

### **B. MSW Generator Liability**

United States v. Petersen Sand and Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992) provides one of the closest analogies to ash recycling. Peterson Sand and Gravel ("Peterson") used an area of land ("the site") to mine sand and gravel. Peterson allegedly allowed parts of the site to be used for disposing of hazardous waste in the 1960's. Peterson allegedly discontinued the practice in the 1970's. In 1982, the Lake County Forest Preserve District ("the Forest Preserve") condemned the site for use as a recreational lake. While working on the site, a Forest Preserve bulldozer struck a buried barrel. The EPA performed a remedial investigation, which revealed that the site contained hazardous substances above levels that occur naturally. The United States sued Peterson for recovery of costs incurred at the site under CERCLA. Peterson sued seven third-party defendants, under CERCLA, for contribution to any judgment the United States obtained against Peterson. Peterson alleged that the third-party defendants were liable for the disposal of fly ash on the site. Peterson contended that Commonwealth Edison Company produced fly ash and that American Fly Ash Company disposed of the fly ash by having it trucked via The Tewes Company of Libertyville, Inc. ("Tewes") to Skokie Valley Asphalt Co ("Skokie Valley"); Skokie Valley stockpiled the ash at the Petersen site for later use.

Petersen alleged that through the sale of fly ash to Skokie Valley, both Commonwealth Edison and American Fly Ash "arranged for disposal" of the ash and were, therefore, subject to CERCLA liability. Disagreeing, the court held that, although it was clear that Commonwealth Edison entered into a "disposal agreement" with American Fly Ash, Commonwealth did not "arrange for disposal" at the Petersen site and, therefore, CERCLA liability was not triggered. The court went on to point out that both Commonwealth Edison and American Fly Ash sold fly ash to Skokie Valley solely for the manufacturing of road base. Therefore, the court concluded that

"[c]ertainly, seller liability for the later misuse by the buyer of useful but hazardous ingredients in a manufacturing process was not intended by CERCLA's authors because such liability would chill permissible manufacturing".<sup>2</sup>

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<sup>2</sup> Id. at 1355

The court also opined that "under the unambiguous terms of §9607 (a)(4)<sup>3</sup> [of CERCLA] and well settled case law<sup>4</sup>, an entity cannot be liable as a transporter unless that entity actually selects the site." Since Tewers did not select the Peterson site for disposal of the fly ash, the court held that Tewers could not be subject to CERCLA liability as a transporter.

Petersen is important for several reasons. First, the court conclusively held that where the nature of a transaction involving hazardous substances is the sale of a valuable commercial product, which is to be incorporated into another product, no CERCLA liability exists for the generator or transporter when the recycler subsequently misuses the product and creates environmental contamination. This concept has become known as the "useful product" exemption to CERCLA liability. Second, the Peterson case concluded there was no CERCLA liability associated with the incorporation of coal fly ash in road base, one of the potential reuses of MWC ash. Lastly, the court clearly determined that a generator and/or transporter will not trigger CERCLA liability unless they arrange for the disposal of the hazardous substance on the site they selected. This is important when one considers that a local government may fall under one or more of these classifications but rarely arranges for the final use, or "disposal", of the recycled product at a particular location they selected.

### C. Useful Product Exemption

Another illustration of the "useful product exception" can be found in Florida Power and Light Company v. Allis Chalmers Corp., 893 F.2d 1313 (11<sup>th</sup> Cir. 1990). In that case, Florida Power & Light Company ("FP&L") purchased transformers from six manufacturers. The transformers contained mineral oil with trace amounts of polychlorinated biphenyls (PCBs), a hazardous substance. FP&L used these transformers over the course of 40 years. FP&L subsequently sold transformers to Pepper's Steel and Alloy (Peppers), a salvager of various metals. Peppers was unaware that the transformers contained PCBs and Pepper's salvage operations resulted in contamination of their facility and surrounding property. The USEPA filed a suit under CERCLA against Peppers and FP&L for recovery of costs expended

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<sup>3</sup> 42 U.S.C. §9607 (a)(4) "Any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person, from which there is a release . . . of a hazardous substance, shall be liable [for response associated costs]."

<sup>4</sup> See, e.g., Acatel Infor. Systems v. Arizona, 778 F.Supp. 1092, 1069 (D. Ariz. 1991); United States v. Western Processing Co., 756 F.Supp. 1416, 1420 (W.D. Wash. 1991); United States v. Hardage, 761 F.Supp. 1501, 1516-17 (W.D. Okla 1990).

during the investigation and remediation of the site. Peppers and FP&L, in turn, brought an action for contribution against the six manufacturers of the transformers.

The transformer manufacturers argued they were not subject to CERCLA liability because they did nothing more than sell a useful product. The court agreed, noting that Peppers and FP&L failed to prove that the manufacturers intended to "otherwise dispose of hazardous waste" when they sold the transformers. As in Petersen, the court held that the generator of a hazardous substance who sells it to another party for the purpose of recycling it into a useful product will not be required to provide monetary contribution to the recycler or purchaser of the recycled product for remediation of contamination associated with the recycled product. See also, Prudential Ins. Co. of America v. U.S. Gypsum, 711 F.Supp. 1244 (D.N.J. 1989) (conveyance of a useful substance, although it contained asbestos, did not subject the producer and transporter to CERCLA liability); Pneumo Abex Corp. v. High Point, et. al., 28 Env'tl. L. Rep. 21,261 (4<sup>th</sup> Cir. 1998) (a railroad company which sold wheel bearings to a foundry that recycled them into new bearings was not liable for pollution at the foundry site.)

The "useful exemption" is not without limitation. In United States v. Aceto Agricultural Chemical Corporation, 872 F.2d 1373 (8<sup>th</sup> Cir. 1989 ), the Court of Appeals for the Eighth Circuit rejected the "useful product" exemption. In Aceto, the USEPA and the State of Iowa sued to recover over \$10 million in response costs incurred in the clean up of a pesticide formulation facility operated by the Aidex Corporation. Aidex operated the facility from 1974 through 1981, when Aidex was declared bankrupt. Investigations by the USEPA in the early 1980's revealed a highly contaminated site. The USEPA undertook various remedial actions to clean up the site. Pursuant to CERCLA, the USEPA brought an action for contribution against eight pesticide manufacturers who hired Aidex to formulate their technical grade pesticides into commercial grade pesticides. The USEPA alleged that although Aidex performed the actual mixing or formulation process, the pesticide manufacturers owned the technical grade pesticide, the work in process, and the commercial grade pesticide, even while the pesticide was in Aidex's possession. The USEPA also alleged that the generation of pesticide containing wastes (e.g. through e.g. spills, cleaning of equipment, mixing and grinding operations, and production of batches which do not meet specifications) is an "inherent" part of the formulation process.

The United States and the State of Iowa alleged that the eight defendants were responsible for all response costs under RCRA "because by the virtue of their relationships with Aidex they 'contributed to' the handling, storage, treatment, [and] disposal of hazardous wastes", and further, "that six of the eight defendants



were liable under §9607 (a)(3) of CERCLA because . . . they 'arranged for' the disposal of a hazardous substance."<sup>5</sup>

In Aceto, the court acknowledged that other courts typically do not impose liability where a hazardous substance is sold to another party as a "useful product" to be incorporated into another product which, when "disposed of", causes environmental contamination. In Aceto, the court distinguished from those cases, stating that "Aidex [was] performing a process on products owned by defendants for the defendants' benefit and at their direction"<sup>6</sup> and, thus, the defendants must be subject to CERCLA liability for wastes generated contemporaneously with the formulation process. In other words, the court determined that the defendants "arranged for" the disposal of hazardous substances at the site where the contamination occurred and were, therefore, liable under CERCLA.

As for the claim under RCRA, the Aceto court again noted that the defendants always retained ownership of the pesticides and that Aidex was not manufacturing a product for its own use, but rather it was processing the defendants' product. Therefore, the defendants were subject to RCRA liability for "contributing to" the disposal of hazardous waste. Thus, Aceto is important because it demonstrates that for the "useful product exemption" to apply, the generator of a hazardous substance must relinquish all control over the product to the purchaser (e.g., a recycler).

#### **D. Sham Sales**

In addition to the foregoing limitation on the "useful product" exemption, courts have been vigilant in guarding against so-called "sham" sales, which merely mask a generator's attempt to "arrange for disposal" of a hazardous substance. In United States v. Pesses, 794 F. Supp. 151 (W.D. Pa. 1992), the court uncovered what it believed to be a "sham" sale. In Pesses, the Metcoa site, a scrap metal recovery facility, was found to be contaminated with large quantities of heavy metals, which are considered a hazardous substance under CERCLA. To recover the response costs incurred at the Metcoa site, the United States sued twenty-six (26) defendants, all of whom allegedly sold scrap metal to Metcoa. The defendants argued that their primary purpose in selling the scrap metal to Metcoa was to make a profit. However, the court noted that "intent" to dispose of a hazardous substance is not required under CERCLA.

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<sup>5</sup> Id. at 1367

<sup>6</sup> Id. at 1381

In Pesses, the court opined that:

"in situations as here, where a defendant characterizes its transactions with a party who has disposed of and/or treated its hazardous substance as a "sale" rather than "arranging [for disposal]", CERCLA liability may be found in the following circumstances:

1. where a defendant sells its hazardous substances and makes the crucial decision on how its substances are disposed of or treated;
2. where a defendant retains ownership of its substances and has authority to control the way its substances will be disposed of; and
3. where a defendant sells its hazardous substances to a facility with knowledge that the substance will be disposed of there."<sup>7</sup>

The Pesses court concluded that by sending hazardous substances to the Metcoa site, the defendants had "arranged for disposal" of the hazardous substances and were, thus, subject to liability under CERCLA. In reaching this conclusion, the court focused on whether the defendants placed the material into the hands of the facility which now suffers from the contamination. Answering this question in the affirmative, the defendants were held liable under CERCLA.

Similarly, State of New York v. General Electric Co., 542 F.Supp. 291 (N.D.N.Y. 1984) further illustrates courts' unwillingness to allow sham sales. In General Electric Co., General Electric Company ("GE") disposed of between four and five hundred fifty-five gallon drums of used transformer oil contaminated with PCBs by selling to the South Glen Falls Dragway, Inc. ("Dragway"). Dragway spread the oil around its track for the purposes of dust control. This practice resulted in heavy contamination of the dragstrip and its environs. The State of New York brought an action for contribution for cleanup costs against GE.

GE raised several arguments, including that it should not be subject to liability because it did not "contract or otherwise arrange for disposal or treatment" of the oil within the meaning of CERCLA. GE argued that it entered into an agreement to supply oil to the dragstrip in the ordinary course of commerce, for the dragstrip owners to use the oil as they saw fit. In rejecting this argument, the court held that GE had actual or imputed knowledge that the substance would be deposited on

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<sup>7</sup> Id. at 156

the land surrounding the dragstrip and thus the agreement was actually an "arrangement for disposal" of hazardous substances, for which CERCLA liability attached.

Other cases which illustrate the courts' careful review of sales agreements involving hazardous substances include Chatam Steel Corp. v. Brown, 858 F.Supp. 1130 (N.D. Fla. 1994) (court determined that when a product, in this case used batteries, can no longer be used for its intended purpose and the product contains hazardous substances, the sale is more than likely an arrangement for disposal); Sandford Street Local Dev. Corp. v. Textron, Inc., 768 F.Supp. 1218 (W.D. Mich. 1991) (holding that sale of a manufacturing facility containing hazardous substances for an amount vastly below estimated value constituted disposal of the substances); U.S. v. Conservation Chemical Company, 619 F.Supp. 162 (W.D. Mo. 1985) (sale of fly ash to neutralize other waste was an arrangement for treatment or disposal under CERCLA).

Together these cases help define three principles important to MWC ash production and beneficial recycling. First, the "sale of a useful product" defense applies only when a new product is manufactured specifically for the purpose of sale, or when a product remains useful for its normal purpose in its existing state and not when the sale is simply an attempt to get rid of a waste or byproduct. This is important to MWC ash recyclers because the ash recycler typically is creating a new product (e.g., aggregate) which is then sold for a useful purpose (e.g. road subbase).

Second, a local government generating the ash can only be held liable if it "arranged for disposal" of ash at the site where contamination occurred. This is important because a local government typically would not select the final destination of the finished recycled ash product.

Third, the generator of the ash cannot be subject to liability for the subsequent mishandling of the a substance by the recycler. Thus, the generator of the ash will be considered to have the liability upon transfer to another party who intends to recycle it into a useful product but fails to do so, and instead causes environmental contamination.

These three principles create considerable protection from potential CERCLA and/or RCRA liability for a local government that becomes involved with the beneficial recycling of MWC ash. However, the applicability of the three principles

and the degree of protection offered by the three principles will require a careful analysis of the facts in each case.<sup>8</sup>

### III. RECENT STATE LEGISLATIVE INITIATIVES

Notwithstanding the possible liability protection offered by CERCLA, and RCRA, a local government that engages in ash recycling activities would still have to be concerned with liability that may be imposed under state law. State liability can arise under statutory law (e.g., Florida imposes liability pursuant to Chapters 373 and 403 of the Florida Statutes), or common law principles (e.g., nuisance, trespass etc.). In addition to liability under state statutory and common law principles, state-level regulatory programs may also exist which establish requirements for ash or solid waste management. Liability under these programs can be imposed if there is a failure to satisfy the regulatory requirements.

The latest of these state-created regulatory schemes was developed by Florida. 62 F.A.C. 62-702 (1989) (Recycling of ash residue). 62 F.A.C. 62-702 requires the generator of ash residue to report the chemical and physical nature of the ash produced. The frequency of this reporting is based upon the particular recycling process involved, the use of the recycled product, and the volume of the ash residue recycled. Moreover, the provision also requires that the recycler of the ash residue demonstrate to the Department of Environmental Protection that the process employed will not cause discharges of pollutants into the environment. Generally, this demonstration will require the recycler of the ash residue to report on (1) the chemical and physical aspect of the finished product, (2) the amount of ash residue used to produce the finished product, (3) the recycling process' ability to alter the chemical and physical properties of the ash residue so that if leaching was to occur it would not cause a violation of other environmental regulations and will not endanger human health or the environment, and (4) any changes in the recycling process or ash residue physical and/or chemical properties.

Although New York has no specific regulation dealing with recycling of ash residue, it has promulgated 6 NY ADC 360-3.5(g)(4) (1998) (treatment of fly ash).

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<sup>8</sup>By way of example, if a generator removed metals from the ash at its WTE facility and used the ash for landfill cover or fill material at its own landfill or a specific known landfill or site, the legal principles described above probably would not apply. This common method of ash recycling would offer few protections from liability beyond those available to those who dispose raw ash in landfills. The absence of a third party recycler, the absence of processing ash into a salable product, and control, and or knowledge of the specific location where the ash is applied to the land are all critical variables in the factual analysis of potential liability.

Similar to the regulations promulgated by Florida, the New York provision requires that the treatment process demonstrate an ability to physically or chemically alter the fly ash, such that the extract produced from exposure to an acidic or non-acidic environment will not result in inorganic constituents at concentrations greater than 100 times the respective ground water level. The recycler must provide certified laboratory analysis that the treatment process can reliably be operated to comply with the provision.

#### **IV. CONTRACTUAL PROTECTION**

Despite the ability to reduce the risk of liability under RCRA and CERCLA, the potential risk of being named in a lawsuit, and the risk of being found liable are, nevertheless, significant. Moreover, legal fees associated with litigation can reach astronomical levels in large, complex environmental cases. It is, therefore, prudent for a local government to obtain contractual protection from ash recyclers. Such contractual protection should cover the local government providing the MWC ash to the recycler and, additionally may also provide protection for other governmental entities depositing municipal solid waste at the WTE facility. In general, a local government should request an ash recycler to defend and indemnify against all liabilities and claims associated with the recycler's use or handling of ash provided by the local government. Contract language should be broad enough to cover all phases of ash handling and processing by the recycler.

Attached as Exhibit A is sample contract language that provides such broad protection. Of course, a contractual commitment to indemnify the local government is beneficial only to the extent that the recycler has the financial assets to fulfill its contractual obligation.

Further, a local government would be prudent to insist that an ash recycler name the local government as an additional insured on policies taken out by the recycler relating to its ash recycling business. As with contractual liability protection and indemnification, a local government can also insist that its contract with a recycler contain language that obligates the recycler to provide insurance coverage, including environmental impairment. Also attached, as Exhibit B, is sample contract language that obligates a recycler to provide insurance coverage. A key consideration in each case is the amount of insurance that will be required by the local government.

## CONCLUSION

Local governments that generate MWC ash have several levels of protection available to them to reduce their potential risk of environmental liability in the event they allow the use of their MWC ash in products that are introduced into the economic mainstream. In general, RCRA and CERCLA do not impose liability against local governments that do nothing more than transfer MWC ash to a recycler for use as an ingredient in a finished product. Contractual protection from liability that can be gained from a recycler to offer a final level of protection for a local government. The foregoing text illustrates how a local government can participate in MWC ash recycling projects while at the same time reducing the potential for environmental liability pitfalls.

## References:

When the plain meaning of a statute is not so plain: the Supreme Court's interpretation of RCRA's clarification of the household waste exclusion: *City of Chicago v. Environmental Defense fund*, Emily Abbott. Villanova Environmental Law Journal Vol. VI p. 345, 1995.

Environmental Liability for Recycling of Municipal Waste Combustion Ash, William R. Darcy, 1998.

## EXHIBIT A

Environmental Indemnification. [Ash Recycler] agrees to indemnify, save harmless, release and defend [Public Entity or Entities], its [their] officers, members, employees, directors and agents (the “[**Public Entity Indemnified Parties**”]) from and against any and all liabilities, claims, penalties, forfeitures, suits, orders, damages, costs and expenses, including but not limited to natural resource damages, the cost of any cleanup, response, removal, remedial or corrective action and the costs of defense, settlement, and reasonable attorneys' fees related to any of the foregoing (collectively “[**Environmental Claims**”)), arising from, related to, or connected with (i) the handling, management, possession, control, disposal or use (either by itself or as a component to a manufactured product) by [Ash Recycler] of [Ash Residue]; (ii) any release or threatened release of Hazardous Materials from any facility location at which any [Ash Residue] is handled, managed, treated, stored, disposed of or used after it is delivered to [Ash Recycler] hereunder; (iii) any violation or alleged violation of Applicable Law by [Ash Recycler]; or (iv) any breach by [Ash Recycler] of its representations, warranties, or covenants under this Agreement. For purposes of the foregoing, “Hazardous Materials” includes (y) any “hazardous substance,” “hazardous material,” “solid waste,” or “hazardous waste,” as defined by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., as amended, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., as amended, any similar State or local laws, and any regulations or guidelines promulgated pursuant thereto, and (z) petroleum and petroleum products (including crude oil or any fraction thereof).



## EXHIBIT B

**The following represents an example of language that could be used in an Agreement with respect to environmental liability insurance coverage:**

"Insurance Policies. During the Term of this Agreement, the [Ash Recycler] shall maintain in full force and effect all of the following insurance policies in form and from insurance companies licensed to do business in the State of \_\_\_\_\_ and acceptable to the [Public Entity] (collectively, the "Policies")...

...Commercial general liability insurance with a minimum combined bodily injury and property damage liability limit of \$\_\_\_\_\_ each occurrence and annual aggregate, covering liability arising from premises and operations, independent contractors, products liability, personal and advertising injury, contractual liability for this Agreement, and explosion, collapse, and underground hazard exposures, release of pollutants or contaminants, and completed operations coverage (for not less than \_\_\_\_\_ years after the expiration or termination of this Agreement) and with the care, custody, and control exclusion deleted, to the maximum extent possible, as determined by the [Public Entity].

If such Broad Form Commercial General Liability policy excludes coverage for the release of pollutants and contaminants, [Ash Recycler] shall procure a separate pollution liability insurance policy with a minimum combined bodily injury and property damage liability limit of \$\_\_\_\_\_ each occurrence and annual aggregate."

**In addition to the foregoing, the Agreement should provide for umbrella liability insurance as follows:**

"... Umbrella liability insurance subject to a minimum \$\_\_\_\_\_ limit per occurrence and annual aggregate on a following form basis, that applies specifically to the Contractor's operation pursuant to this Agreement, with a maximum allowable self-insured retention of \$\_\_\_\_\_, providing coverages in excess of the coverages and limits set forth above, with identical coverage to the primary underlying coverages or, if identical coverage is not commercially available, as determined by the City, coverage as close as possible thereto."

**With respect to the provision of insurance certificates and notice as to cancellation, the Agreement should provide as follows:**

"On or before \_\_\_\_\_, 19\_\_\_\_, the [Ash Recycler] shall deliver to the [Public Entity] certificates of insurance issued or countersigned by duly authorized representatives of the insurance companies evidencing the coverage and limits required by this Section in a form satisfactory to the [Public Entity]. If the [Public Entity] accepts a binder as initial evidence of any insurance coverage, the binder must be effective from the date of issue until the actual Policy is in existence and is delivered to the [Public Entity]. Each Policy required by this Agreement expressly shall be endorsed to require the insurer to give at least 90 Days' advance notice, by certified or registered mail, to the [Public Entity] of the cancellation, intent not to renew, or reduction in coverage by the insurance company. Additionally, each Policy required by this Agreement expressly shall be endorsed to require the insurer to give at least 10 Days' advance notice, by certified or registered mail, to the [Public Entity] of the insurer's intention to terminate any policy based on the non-payment of any premium. The [Ash Recycler] shall provide to the [Public Entity] renewal certificates at least 10 Days before the expiration or anniversary of current coverage of each of the Policies and shall provide, upon request by the [Public Entity], certified true copies of each of the Policies. All Notices and other correspondence to be delivered to the [Public Entity] pursuant to this Section shall be delivered to the [Public Entity's] Designated Representative.

The [Ash Recycler] shall ensure that the [Public Entity] and the [Public Entity] Indemnified Parties are included as unrestricted additional insureds on each of the Policies required by this Agreement (except workers' compensation). If the [Public Entity] elects to place any insurance required by this Agreement itself, the [Public Entity] shall include the [Ash Recycler] as an insured on those policies."