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# Anywhere But Here: An Introduction To State Control Of Hazardous- Waste Facility Location

*A. Dan Tarlock\**

## INTRODUCTION

Safe hazardous-waste management is perhaps the most important environmental issue confronting the country.<sup>1</sup> Legitimate fears about the public-health costs of groundwater contamination, spill episodes and other consequences of improper hazardous waste management practices have recently led to new federal and state legislation in an attempt to minimize the risks incident to the transportation, storage, disposal and treatment of these toxic or dangerous wastes.<sup>2</sup> In 1976 Congress enacted the Resource Con-

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\* A.B. 1962, LL.B., 1965 Stanford University. Professor of Law, Illinois Institute of Technology Chicago-Kent College of Law; Visiting Professor of Law, University of Michigan, spring, 1982. The author wishes to acknowledge the source of his introduction to this area and to express two collective debts of gratitude. During 1979-80, the author was a paid consultant to the Chemical Manufacturers Association (CMA), Washington, D.C., for the purpose of drafting a model state siting statute. That statute was published and distributed by CMA as *A Statute for the Siting, Construction and Financing of Hazardous Waste Treatment, Disposal and Storage Facilities* (1980). In 1981 a version of the model act was adopted in Utah. UTAH CODE ANN. § 26-14a-1-9 (Supp. 1981). The views expressed in this article are solely the author's and in no way represent the position of CMA or any of its members. The author would first like to express his gratitude to all of the members of CMA's Hazardous Waste Management Task Group who took the trouble to educate him about hazardous-waste management. Since 1980, the author has been a participant in a continuing workshop on hazardous-waste management sponsored by the Keystone Center for Continuing Education, Keystone, Colo. He is indebted to Dr. Robert W. Craig, President, and Terry R. Lash, former Director of Science and Public Policy, and to all of the workshop participants. The views expressed in this article are again solely his own but, with gratitude, he admits to appropriating freely many insights expressed by the participants in the workshop meetings.

1. Costle & Beck, *Attack on Hazardous Waste: Turning Back the Toxic Tide*, 9 CAP. U.L. REV. 425, 433 (1980). In 1980 the Environmental Protection Agency estimated that more than 90% of all hazardous industrial chemical wastes were disposed of improperly. S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980).

2. Storage, disposal and treatment along with resource recovery (recycling) are the four post-generation management options. TENN. CODE ANN. § 53-6340 (Supp. 1980) reflects the conventional distinctions among the first three options.

servation and Recovery Act (RCRA)<sup>3</sup> which forces states to choose between the enactment of a qualified state program to administer federal standards or federal preemption of hazardous waste management. Most states have elected to administer qualifying programs, and between 1976-80 most states passed the necessary legislation to implement RCRA.

In brief, RCRA authorizes the Environmental Protection Agency (EPA) to identify those wastes that are hazardous, requires that states have a manifest system to keep track of wastes transported from generation sites to off-site management facilities, and requires that existing and new on- and off-site management facilities be regulated through a permit program. The permit program is designed to "impose best available management" techniques on facility operators to try to ensure that the facility is safely designed and operated and that it is safely maintained after it is closed. Despite these new legislative initiatives, in many states the success of RCRA is being threatened by a problem that was not anticipated in 1976. That problem is strong community resistance to the construction of a new hazardous-waste management facility.<sup>4</sup>

Few communities want to receive a hazardous-waste management facility. Every operator who proposes a facility and attempts to show that the facility conforms to all federal, state, and state-of-the art standards—and thus will minimize exposure to public health risks—must face the Love Canal problem: people do not trust hazardous-waste generators, transporters and managers.<sup>5</sup> In many states local communities are free to base decisions

(c) "Disposal" means the final disposition of hazardous waste into or onto land, water, or air.

(j) "Treatment" means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery or amendable for storage.

(m) "Storage" means the interim containment of hazardous waste, in an approved manner, after generation and prior to disposal.

3. 42 U.S.C.A. §§ 6901-6987 (West 1977 & Supp. 1981).

4. See summary of a recent conference on hazardous-waste siting, *quoted in* [12 Current Developments] ENV'T REP. (BNA) 314-16 (1981)

5. The standard account of the tragedy of Love Canal is M. BROWN, *LAYING WASTE* (1980). The allegation is frequently made that much of the industry, especially transportation, is controlled by organized crime. The industry, of course, denies the allegation. See [12 Current Developments] ENV'T REP. (BNA) 202-03 (1981) for

on the fear of future public health hazards because they have the power to exclude such facilities through the land-use controls process. A hazardous-waste management facility is just another use to be allocated by zoning, and there is increasing evidence that communities throughout the country are using their powers to allocate land uses to exclude these facilities.<sup>6</sup> In response to the local opposition problem, some state RCRA qualifying legislation either impliedly or expressly preempts local land use controls.<sup>7</sup> Several states have gone further and addressed the preemption issue in the context of a special siting process for new or expanded

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an account of hearings on this issue before the House Oversight and Investigative Committee.

6. EXECUTIVE SUMMARY, OPTIONS FOR ESTABLISHING HAZARDOUS WASTE MANAGEMENT FACILITIES AND TECHNOLOGY FOR MANAGING HAZARDOUS WASTES (REPORT PREPARED FOR THE NEW YORK STATE ENVIRONMENT FACILITIES CORPORATION) at II-7 (1979) reports three instances of management facilities that were blocked by local opposition. REPORT OF THE HAZARDOUS WASTE ADVISORY COMMISSION TO GOVERNOR BRENDAN BYRNE 21 (New Jersey 1980) concluded that "[r]ecent experiences in New Jersey and other states raise doubts that private waste management forms, unless assisted by the state, can establish new off-site treatment or disposal facilities, due to intense local opposition." For an account of siting problems in Ohio, see McAvoy, *Hazardous Waste Management in Ohio: The Problem of Siting*, 9 CAP. U.L. REV. 435, 447-49 (1980).

7. See *infra* Part IV. Single-issue preemption is not confined to hazardous-waste sites. Deinstitutionalization facilities raise the same issues. See Lippincott, 'A Sanctuary for People': *Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767 (1979). A more exotic form of single-issue preemption has arisen in Washington, D.C.; Crossette, *Days of Protest, Parties and Propriety*, N.Y. Times, Oct. 15, 1981, at 15, col. 4, reports:

The ranks are forming in something other than receiving lines in northwest Washington's diplomatic neighborhood, where residents are challenging the State Department on the sensitive issue of where a foreign nation can open its chancery offices.

Tucked into a section of the State Department authorization bill for the fiscal year 1982 was language that would have the effect of removing from the District of Columbia's zoning authorities the case-by-case review procedure that can prevent residential property from being used as diplomatic office space. Should the State Department get its way, New York City's foreign missions could also come under its control.

The issue here has focused on a house at 2501 Massachusetts Ave. that Bangladesh bought several years ago and proceeded to begin converting into chancery offices. The Sheridan-Kalorama Neighborhood Council got itself a lawyer.

George Blow of Patton Bogg & Blow, who argued the case, also happens to be a resident of the neighborhood and a former president of the council.

"We know what happens when a home is sold and converted," Mr. Blow said. "They take down the curtains, put in fluorescent lights, blacktop the garden, overrun the neighborhood with cars all day and then desert the place at night. The ambassadors who live here don't like it any better than we do."

In 1978, the zoning appeals board defeated, 5 to 0, Bangladesh's conversion proposal. The house has since remained vacant. When the counterattack came, it wasn't from Dacca but from Foggy Bottom.

hazardous-waste management facilities. However, many states have chosen not to address the issue, to reaffirm the power of local units of government (generally counties) to veto proposed sites, or to allow state preemption only under extraordinary circumstances.<sup>8</sup> Judicial resolutions of the conflict between local vetoes and state permit programs generally endorse dual regulatory schemes.<sup>9</sup> Only in one state, Louisiana, did the state court hold that RCRA and the state's qualifying legislation impliedly preempted local land authority,<sup>10</sup> and that decision was quickly reversed by the legislature.<sup>11</sup> Nor, except possibly in a few states, are courts, absent a clear legislative mandate, likely to force a community to take a management facility on the theory that local land use powers are subject to regional or statewide duties to take a fair share of assigned risks.

The thesis of this article is that unrestrained local autonomy over the location of hazardous-waste management facilities threatens to frustrate three of the four goals of our national hazardous-waste management policy and therefore the costs of local veto powers exceed the benefits. Our national hazardous-waste management policy has the following four goals: (1) to find a mechanism to clean up abandoned or "orphaned" sites and spill episodes and to compensate the victims who suffer injuries from these sites, (2) to bring existing facilities up to state of the art (or at least safer) management and design practices, (3) to encourage the construction of new facilities that use the most environmentally preferable (or at least safest) management methods, and (4) to en-

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8. *E.g.*, CONN. GEN. STAT. ANN. § 22a-124 (Supp. 1981) (two-thirds vote of state hazardous-waste-facility siting board may override a local veto); FLA. STAT. § 403.732 (1980) (state cabinet) Ill. H.B. 1892, 82d Gen. Ass'y (1981) and S.B. 172, 82d Gen. Ass'y (1981) would give landfill site approval authority to municipal and county boards.

9. *County of Cook v. John Sexton Contractors*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979), noted in 1980 U. ILL. L.F. 505.

10. *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979). *But cf. Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981). Pursuant to federal EPA and state approval, North Carolina selected Warren County as a disposal site for PCB-contaminated soil. A county ordinance prohibited the disposal of any measurable amount of PCBs "because there is a generally high ground water table in the county. . . ." Despite an EPA statement that local control of PCB disposal was not preempted, 44 Fed. Reg. 31,514 (1979), issued after the federal EPA approved the site, the district court held that the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629, preempted the local ordinance. The opinion did little more than quote a brief excerpt from *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978), on the power of courts to find implied preemption.

11. Act 748, §§ 1, 2, 5, 1980 La. Acts (codified at LA. REV. STAT. ANN. §§ 30.1136 C, .1144B, 33.1236 (31) (West Supp. 1981).

courage generators to recycle the waste stream whenever feasible. The first goal is partially addressed by the Comprehensive Environmental Response and Liability Act of 1980 (CERCLA or Superfund)<sup>12</sup> and the other three goals are addressed by RCRA.

RCRA's goals run the risk of being frustrated because of the possibility of the following perverse scenario. Although federal standards are currently in a state of flux because of the change in national administrations, whatever standards emerge may require that many existing substandard sites be closed. The closure of substandard sites will produce net social benefits only if the wastes that these sites would have received in the past will now be placed in environmentally superior sites or recycled. If, however, new and safer facilities are not constructed to meet the demand, the closure of substandard sites may encourage generators to evade RCRA, and state and federal administrators to move cautiously against substandard existing sites. Midnight dumping and the use of "substandard" sites may be the net result of closing substandard sites if local communities can block the construction of new and expanded facilities.

This article examines the existing law of hazardous-waste-management facility siting and discusses the available methods to accommodate both the states' interest in meeting the demand for such facilities and the strong and legitimate concerns of local communities about the risks of receiving such a facility. Part I examines briefly the federal law of hazardous-waste management to show how RCRA and the EPA's regulations exacerbate the site shortage problem. Part II discusses the cases which allocate regulatory authority over waste-management sites between local and state government, the cases which impose duties on local communities to consider regional needs, in local decisions, and common law causes of action which can be used to bar facilities. This section argues that judicial remedies are likely to be ineffective in achieving the desired balance between state and local interests. Part III discusses the relevant factors, both scientific and political, that must be considered in the design of siting institutions. Part IV surveys the siting mechanisms contained in the recent RCRA

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12. 46 U.S.C.A. §§ 9601-9657 (West 1980 Laws Spec. Pamph. 1981). CERCLA is a last-minute compromise that provides a fund for clean-up costs incurred by federal or state governments but does not allow persons injured by wastes from an orphaned site to approach the fund and does not provide, as did Administration-sponsored bills, for a federal tort law of industry liability to private parties.

qualifying laws and sketches the requisites for an improved siting process.

## I.

### RCRA AND FACILITY SITING

RCRA regulates existing and new management sites. The stated policy of RCRA is to provide for the "cradle to grave" regulation of hazardous wastes, but the effectiveness of the statute is limited because of structural flaws. RCRA's approach is a combination of classic broad delegations of legislative power to a presumably expert administrative agency, the Environmental Protection Agency, and the cooperative federalism approach pioneered in the Clean Air and Water Acts. However, unlike under these two acts the power of states to impose higher standards under RCRA is unclear.<sup>13</sup> This is somewhat moot as most states have chosen to adopt the minimum required by RCRA, but a few states such as Illinois are beginning to impose higher management standards.<sup>14</sup> Subchapter III of RCRA does little more than to direct the Administrator of the EPA to promulgate regulations dealing with the four distinct phases of hazardous-waste management: (1) transportation off-site, (2) storage, (3) disposal, and (4) on-and-off-site treatment. RCRA is flawed because it neither requires the most efficient solution to waste management, regional treatment, disposal and recovery facilities,<sup>15</sup> nor does it ensure that sufficient new qualifying facilities will be available.

The simple structure of RCRA results from a congressional decision not to deal with some problems of hazardous-waste man-

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13. See Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 635.

14. In 1981 Illinois passed legislation that prohibits the state Environmental Protection Agency from granting a permit for a hazardous-waste landfill after January 1, 1987 unless "the generator has reasonably demonstrated, that, considering technological feasibility and economic reasonableness, the hazardous waste cannot be reasonably recycled for reuse, incinerated or chemically, physically or biologically treated so as to neutralize the waste and render it nonhazardous." S.B. 171 (to be codified at ILL. REV. STAT. ch. 111, para. 39(f) (approved by the governor, September 24, 1981). Governor James R. Thompson's letter approving the legislation noted that in his opinion "the bill has several flaws" and "[t]he delayed implementation date of the bill will, however, allow representatives of government and industry, as well as environmental groups and interested citizens, to work together to solve these problems and to effect whatever changes may be necessary to carry out the intent of the law." Letter from James R. Thompson, Governor, to Members of the Senate and General Assembly (Sept. 24, 1981). See also MINN. STAT. ANN. § 115A.24 (West Supp. 1981).

15. See Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 NAT. RESOURCES J. 249 (1979).

agement and to defer making hard choices about other management options. RCRA is technology-forcing, but the degree of forced innovation differs significantly from the Clean Air and Water Acts. All of Congress' decisions as to what to leave out of RCRA contribute to the current site shortage problem.

In enacting RCRA Congress decided to do nothing directly about controlling the population of hazardous wastes and not to choose among competing management options, although some are more environmentally preferable than others. RCRA places no direct limits on the amount of wastes that are generated because Congress appears to have been persuaded by the argument that generators have little ability to reduce the volume of wastes generated while still responding to market demands for the products that produce the wastes.<sup>16</sup> However, RCRA is having a substantial impact on many production-run decisions. More stringent disposal standards are providing incentives to reduce the volume of waste output by discontinuing product lines and by resource recovery, but the prevailing assumption remains that society will have to decide how to handle more safely increased waste volumes rather than to learn to live without certain products.

A ranking of waste-management strategies in order of environmental preference would probably be (1) recycling, (2) treatment because the chemical content of the waste is altered, (3) disposal, and (4) storage. RCRA limits storage of untreated waste to a temporary option, but it expresses no preference among the other options. Generators may therefore elect not to recycle or treat the waste for cost reasons.<sup>17</sup> This is often the case and disposal is the

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16. This assumption was articulated in GENERAL ACCOUNTING OFFICE, HOW TO DISPOSE OF HAZARDOUS WASTE—A SERIOUS QUESTION THAT NEEDS TO BE RESOLVED (1978).

17. N.Y. Times, May 19, 1981, at 13, col. 5. Other proposed treatment technologies include the use of superoxide, cement-making kilns and ocean burning. There are presently three converted cargo ships that are used to dispose of waste. One ship, the Vulcanus, has two ceramic-lined incinerators in the stern, but the stacks do not have scrubbers since they are not required in international waters. The Vulcanus was used to burn 10,000 metric tons of agent orange in the Pacific Ocean in 1977. *Id.* at 2, col. 6. The use of the sea for waste disposal is controversial. Chlorine-laden halogenated hydrocarbons give off hydrogen chloride which becomes hydrochloric acid (acid rain) when dissolved in water, for example. Current United States laws and policies severely limit the use of the oceans as sinks, but this general prohibition is beginning to be reevaluated. See generally, NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE, A SPECIAL REPORT TO THE PRESIDENT AND THE CONGRESS, THE ROLE OF OCEANS IN A WASTE MANAGEMENT STRATEGY (Jan. 1981); *Symposium, the Oceans as Waste Space?*, 24 OCEANUS 2-67 (Spring 1981).

most popular option. But nationwide, disposal schemes present the greatest controversies.

On the whole, allowing waste managers wide latitude in choosing among disposal options is sensible. Resource recovery is only possible for some but not all wastes. The wide variety of components of any hazardous-waste stream necessitates that the "overall treatment process must be tailored to a specific waste stream and may depend upon the approach used for the complete spectrum of wastes being generated within the plant."<sup>18</sup> No matter how effective treatment is, it can never be a single option because some portion of the waste stream must be disposed of in landfills. If one assumes, as have most studies of the state of the art,<sup>19</sup> that all hazardous-waste streams can be safely managed, Congress' refusal in RCRA to mandate specific treatment and disposal "fixes" is efficient. Relative freedom of choice among compliance options avoids the inefficient resource allocations caused by the specific technologies, such as the scrubbers and cooling towers, mandated by the Clean Air and Water Acts. However, the range of management choice allowed does exacerbate the site shortage problem. Often the least costly alternative, disposal in a secure (lined) landfill, will be chosen and local opposition will be excited. Landfills do not have a good name these days.

In the initial implementation of RCRA, the Carter Administration EPA gave secondary attention to the problem of site acquisition. The fragmented and diverse nature of waste generators and handlers made it very difficult for the EPA to draft RCRA regulations on the problems Congress required to be addressed. Congressional deadlines were missed, suits to compel the preparation of regulations were filed, settlements were negotiated, and finally in mid-1980, the Agency issued its proposed final regulations.<sup>20</sup> The proposed regulations focused on three aspects of hazardous-waste management: (1) the criteria for defining which wastes are

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18. RENSSELAER POLYTECHNIC INSTITUTE, TECHNOLOGY FOR MANAGING HAZARDOUS WASTES, (REPORT PREPARED FOR THE NEW YORK STATE ENVIRONMENTAL FACILITIES CORPORATION) at IV-1 (1979).

19. "[P]ublished literature on the subject indicates that technologies *do* presently exist that can safely handle virtually all components of the hazardous waste stream." REPORT OF THE HAZARDOUS WASTE ADVISORY COMMISSION TO GOVERNOR BRENDAN BYRNE 26 (N.J. 1980).

20. EPA, Hazardous Waste Management and Consolidated Permit Regulations, 45 Fed. Reg. 33,063 (1980); EPA, Hazardous Waste Management Systems, 46 Fed. Reg. 2802 (1981). For a discussion of the regulations see Friedland, *The New Hazardous Waste System: Regulation of Wastes or Wasted Regulation*, 5 HARV. ENVTL. L. REV. 89 (1981).

hazardous;<sup>21</sup> (2) the manifest requirements for tracing the fate of wastes that are transported to off-site facilities;<sup>22</sup> and (3) the timetables for phasing in compliance with various facility standards.<sup>23</sup> EPA's proposed regulations are controversial on many accounts. For example, most generators object to the stringent criteria adopted by the EPA to classify a waste as hazardous. Part III of RCRA is fully triggered if the waste is hazardous, and the chemical industry and others have argued that the criteria are over-inclusive. There is no consensus about the proper method for identifying a waste as hazardous. The Reagan Administration is reevaluating the Carter Administration's criteria to try to determine if "degree of hazard" criteria can be developed to limit regulation to a narrower class of wastes that cause substantial health hazards. This standard would reduce the compliance burden on generators of wastes that pose marginal public health risks.

The 1980 proposed regulations created great uncertainty for both existing and proposed facility operators faced with the decision of upgrading existing facilities or opening new ones because the regulations failed to provide operators with the critical standards. One can read the 500-plus pages of proposed regulations and find no guidance as to what final facility-design standards are required. One is only told that the standard will be "Best Engineering Judgment (BEJ)" and that this judgment will be revealed in future guidelines issued over a five-year period that will set general performance standards that will be applied on a case-by-case basis.

EPA's primary contribution to the facility-siting problem was to commission a study by Booz, Allen and Hamilton<sup>24</sup> to survey site availability in each of its ten regions. Otherwise the agency has not taken an active role in siting. The study projected possible 1981 shortages in many of the nation's prime industrial areas and has been widely cited by advocates of greater public involvement in the siting process. However, the study is not a reliable guide for policy making because it is too inconclusive. For example, the Executive Summary concludes, in consecutive sentences, that the

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21. 45 Fed. Reg. 33,063, 33,121-22 (1980), *codified in* 40 C.F.R. §§ 261.10-24 (1981).

22. 45 Fed. Reg. 33,063, 33,143-48 (1980), *codified in* 40 C.F.R. §§ 262.20-51 (1981).

23. 45 Fed. Reg. 33,063, 33,156-63 (1980).

24. BOOZ, ALLEN HAMILTON, INC. & PULLMAN, HAYES & BARTLETT, HAZARDOUS WASTE GENERATIONS AND COMMERCIAL HAZARDOUS WASTE MANAGEMENT CAPACITY; AN ASSESSMENT, EXECUTIVE SUMMARY (EPA, 1980).

“demand for off-site capacity may increase as EPA’s definition of hazardous wastes expands. Demand for off-site capacity may be reduced by industry’s efforts to reduce the quantities of waste generated.”<sup>25</sup> After its proposed regulations were issued, EPA issued a paper setting forth the Agency’s siting policy: “EPA’s policy is to encourage private sector solutions to the problem of establishing sites. In cases where government involvement is necessary, EPA believes that the States, either separately or in regional groups, must assume prime responsibility for the establishment of adequate capacity.”<sup>26</sup>

A case can be made for the proposition that the uncertainty caused by EPA’s proposed regulations, combined with the lack of an effective siting mechanism in most states, have actually contributed to relieve the pressures for new off-site facilities because the two factors have provided an incentive for generators to avoid compliance with RCRA by reevaluating product lines and stepping up on-site treatment and recycling. But whatever the inadvertent effect the chaos created by EPA’s initial regulations had on relieving pressures for new sites, it has been dissipated by the Reagan Administration’s approach to RCRA, which holds out the promise of substantially relaxed compliance duties.

A reevaluation of RCRA is the first priority on the list of government regulations being reevaluated by Vice President Bush’s Task Force. In February of 1981 existing and new facility specification standards were recalled. There are many signals—such as the substitution of weak performance standards for the previous specification standards for secure landfills, and weakened enforcement—which suggest that the Administration may not push hard on RCRA.<sup>27</sup> If the RCRA regulations are simplified and enforce-

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25. *Id.* at XI.

26. EPA, Hazardous Waste Facility Siting: A Critical Problem 4 (July 1980) (mimeograph). In 1978 EPA considered various general environmental location standards that would have prohibited or severely restricted sites over active fault zones, regulatory flood ways, coastal high-hazard areas, wetlands, critical habitats of endangered and threatened species, sole-source aquifers and would have regulated the location of active facilities within the operator’s property line. The Agency backed away from most of these standards in January, 1981. 46 Fed. Reg. 2810-18 (1981). The proposed final regulations prohibit the location of any facility within 61 meters of a fault line, and any facility located within a 100-year flood plain must either be designed to prevent a washout or the operator must convince the EPA that the waste can be removed before the flood waters reach the facility. 40 C.F.R. § 264.18 (1981).

27. 46 Fed. Reg. 11,126 (1981). Actions taken by the Reagan Administration EPA to modify the RCRA rules promulgated by the Carter Administration EPA will inevitably have the effect of strengthening local opposition to hazardous-waste-facility sites. As a recent report on siting concludes: “States need a good strong, enforceable,

ment is downgraded, incentives to reevaluate product lines and recycling may be reduced. A business-as-usual strategy will most likely intensify local opposition to new sites. Because site opposition cuts across economic and ideological lines, a weakened regulatory program may only stiffen local opposition to new off-site facilities. Thus, we may be back to the situation that existed prior to the 1980 regulations. Of course, it is equally plausible that any regulatory program will be costly enough to comply with that industry will continue to search for ways to opt out of regulation.

## II.

### LOCAL LAND-USE CONTROLS OVER FACILITY SITING

The federal government's decision to leave hazardous-waste facility siting to the states means that the effective power to site a facility often rests with the community in which the site will be located. Since zoning swept the country in the 1920's, states have delegated the power to control the location of most land uses to cities and counties.<sup>28</sup> The costs of local control can sometimes be high for a community may fail to take new interests, such as environmental protection, into account, or may shift unacceptable burdens to the rest of the region or state through parochial decisions. In the last decade the so-called "Quiet Revolution"<sup>29</sup> in land-use controls resulted in many states reclaiming some of their land-use regulatory powers to protect areas of high environmental value that were being stressed by rapid development, and courts have become increasingly willing to intervene to curb perceived parochialism. However, local communities emerged from a dec-

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responsible set of federal regulations in place to base state programs on. . . ." *Special Report on Siting of Hazardous Waste Management Facilities: A Major Problem Facing Industry and the States*, [12 Current Developments] ENV'T REP. (BNA) 871, 874 (Nov. 13, 1981). The most controversial decision taken to date to undermine public confidence in RCRA was the decision announced on February 25, 1982, to allow some use of "containers holding free liquid" in land fills, 47 Fed. Reg. 8807 (1982), but the decision was reversed in less than a month after a storm of public opposition surfaced at an EPA hearing. [12 Current Developments] ENV'T REP. (BNA) 1476 (Mar. 19, 1982). Such actions, even if reversed, can only serve to make it difficult for any regulatory agency or facility operator to argue convincingly that compliance with RCRA regulations is sufficient to protect third parties and the public generally from harm occurring at a site chosen for a facility.

28. Local control subject to a loose reasonableness check on parochialism was sustained in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

29. See F. BOSSELMAN & D. COLLIES, *THE QUIET REVOLUTION IN LAND USE CONTROLS* (1971). J. POPPER, *THE POLITICS OF LAND-USE REFORM* (1981) is a balanced assessment of the "Quiet Revolution" that stresses the revolution's important but ultimately limited achievements.

ade of legislative and judicial activism with their land-use controls authority substantially intact. States are making some efforts to curb local authority to veto new and expanded hazardous-waste management facilities, but the preemption of local authority is usually only partial in theory or in practice. Most of the recent siting statutes merely shift the problem of curbing local exclusion from the courts to administrative agencies. Even in the states that preempt local land use controls it is useful to understand the existing law to resolve conflicts between local self-interest and claim of a broader public interest in order to understand the preemption decisions agencies are called upon to make. Therefore, this section analyzes the cases curbing the power of a local community to veto a use simply to avoid assuming the health and other risks attributable to the site. The fourth section will examine recent hazardous-waste-facility siting legislation.

Any decision to site a hazardous-waste management facility must accommodate two conflicting interests. These are: (1) the state interest in reconciling industrial growth and public health protection through the provision of an adequate number of safe facilities and (2) the local interest in the health and safety of those who will be most directly exposed to the facility. The two interests are likely to conflict because the state, with its dual objectives, will have a higher tolerance for safety trade-offs. Hazardous-waste management facilities are capital- rather than labor-intensive and generally do not offer much of a tax bonanza to local communities. There is even evidence of resistance to expanded and new facilities in already industrialized areas. In short, there is a mismatch between those who benefit from the waste-generating products and those who are exposed to the adverse impacts of the facility. As a result, public and private operators will find it difficult to "bribe" their way into communities by offering extra-ordinance improvements.<sup>30</sup> A hazardous-waste management facility is not a planned unit development.

The conflict between state and local interests is further complicated by different perceptions of the problem. State agencies responsible for licensing and siting facilities are likely to have greater confidence in engineering judgments and to be more will-

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30. New York chose a small community north of Syracuse for a 2,800-acre treatment plan to be constructed by the state. Local opposition was strong; "[t]here was considerably more support for a nuclear power plant that was proposed and later withdrawn for the same site. The nuclear plant would have at least provided jobs and increased property values. . . ." N.Y. Times, May 31, 1981, § I, at 35, col. 1.

ing to live with uncertainty. Local interests are likely to be skeptical of claims that the facility is as safe as one can design it, and are less willing to tolerate risk. Many claim that local interests are "irrational" because they are unwilling to view the problem as primarily a "technical" one.

Absent an express legislative preemption, local units of government have great discretion to veto the entry of a hazardous-waste facility because such a facility is just another land use to be regulated by applicable zoning ordinances. A persistent theme in local government and land-use law is that a community's first duty to its citizens is to protect their health and welfare. This theory of local self-interest has been sustained by the Supreme Court and state courts.<sup>31</sup> As a result, it is difficult for courts to develop an effective law of local duties to consider extra-local interests.

What relevant law that exists is drawn from two related lines of cases. First, there are those cases that deal with the question of whether an "intruder" governmental unit or licensed private entity which wishes to enter a community that has vetoed the activity by its zoning ordinance is immune from the "host" community's land use controls. The second line comes from the scattered precedents which impose some duty on a community to take regional or statewide interests into account in its land-use policies.

Waste-management sites are generally operated by public entities or by private persons licensed by the state. Both public entities and state licenses have traditionally been able to take advantage of land-use controls doctrines that grant immunity to such "intruders". Courts originally followed a series of abstract tests that make the immunity question turn on the presence of attributes of power. Under those tests courts have granted immunity when the "intruder" possessed the power of eminent domain, was acting in a governmental rather than proprietary capacity, and was higher in the hierarchy of governmental units.<sup>32</sup> Both county operated landfills and state licensees fared well under these

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31. In sustaining extra-territorial regulations against an argument that it violates the one-man, one-vote rule, the Supreme Court noted that "[t]he Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their 'city limit' signs, particularly since today's police jurisdiction may be tomorrow's annexation to the city proper." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 74 (1978). *See also* [1978] Op. Ill. Att'y Gen. 165.

32. *See* D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 416-18 (1977) (collection of the leading cases).

tests.<sup>33</sup> In recent years courts have responded to the argument that the abstract tests for immunity do not take into account the legitimate interests of the host government in using its land-use control powers to protect the health and welfare of its citizens.<sup>34</sup> Recent courts are replacing the abstract tests with a more functional balancing approach, but balancing means different things in different jurisdictions. A line of cases, stemming from a landmark 1972 New Jersey case,<sup>35</sup> balances five factors to determine if the legislature intended to grant immunity or if the "intruder" should be immune regardless of legislative intent.

The factors are weighted toward a finding of immunity, and the practical effect of the New Jersey balancing test is to create a rebuttable presumption of immunity. A "host" community may only rebut the presumption by showing that the "intruder's" land use choice is unreasonable as measured either by "host's" existing land use patterns or, one would assume, by the exposure of the public to unreasonable risks.<sup>36</sup> As announced in New Jersey, the balancing test is simply a theory of implied preemption.

A second line of balancing cases from Florida<sup>37</sup> starts from the opposite presumption. That is, the "host" community's interests are stronger than the "intruder's", and state authorization of the activity is not presumed to be an implied grant of immunity. In other states such as Illinois, the state's broad theory of home rule has been relied upon to reach this result.<sup>38</sup> Under this balancing

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33. *Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W. 2d 426 (1972) (dictum) (solid-waste facility); *Unitarian Universalist Church v. Shorten*, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. 1970) (state licensee).

34. *See, e.g., Rutgers, The State Univ. v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972). *See generally*, Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971) for an early statement of the balancing argument.

35. *Rutgers, The State Univ. v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972). The factors are (1) the nature and scope of the instrumentality seeking immunity, (2) the kind of function or land use involved, (3) the extent of the public interest to be served thereby, (4) the effect local land-use regulation would have on the enterprise concerned, and (5) the impact on legitimate local interests.

36. Ross, *Intergovernmental Zoning Disputes: A Continuing Problem*, 32 LAND USE L. & ZONING DIG. 6 (July 1980).

37. *Orange County v. City of Apopka*, 299 So. 2d 652 (Fla. Dist. Ct. App. 1974); *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, (Fla. Dist. Ct. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976). *Accord Brown v. Kansas Forestry, Fish & Game Comm'n*, 2 Kan. App. 2d 102, 576 P.2d 230 (1978).

38. *County of Cook v. John Sexton Contractors*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979). The State Environmental Protection Act does not preempt the host's zoning laws when the host is a home-rule unit. *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975) (Village of Worth was not a home-rule unit, so immunity was granted).

test, the burden is on the "intruder" to show that the "host" community acted unreasonably in applying its zoning ordinance. The "intruder" must show that "the public interests favoring the proposed use outweigh those mitigating against a use not sanctioned by the zoning regulations of the host government. To rebut an exclusion, the intruder can show that there was no good-faith effort to accommodate the use, that suitable sites for the use exist in the community, and that mitigation measures are possible at the chosen site."<sup>39</sup> This approach favors local veto power, especially when it is supplemented, as it has been in a recent line of cases dealing with non-hazardous and hazardous waste landfills, with the theory that state and local regulation perform different but complementary functions. Courts have increasingly adopted the theory that state permit programs focus more on general facility design and operation procedures than on the analysis of site-specific risks.<sup>40</sup> Local-land use regulations are therefore complimentary because they fill a regulatory "gap" and supplement rather than frustrate the goals of state licensing statutes. As has been previously mentioned, only a Louisiana court concluded that RCRA and state-qualifying legislation preempted local regulation,<sup>41</sup> and the legislature was quick to reverse that decision.<sup>42</sup> Judicial approval of local land-use authority will not, of course, make the conflict between local and statewide interests disappear. The balancing and regulatory gap theories should be best viewed as stop-gap measures devised by the courts to resolve "intruder"- "host" tensions until the legislature provides clearer guidelines for

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39. *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens* 322 So. 2d at 579.

40. *See id.* at 513, 389 N.E.2d at 559; *Nelson v. Dept. of Natural Resources*, 88 Wis. 2d 1, 276 N.W.2d 302 (Wis. Ct. App. 1979).

41. *Rollins Environmental Serv. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979).

42. LA. REV. STAT. ANN. § 33:1236(31) (West Supp. 1981). There is no doubt that "home rule" is a general concept that commands substantial political support at the state level, but the case for local autonomy is not well developed. One recent analysis offers three justifications for home rule: (1) the provision of municipal services on an efficient scale; (2) the benefits of local representation; and (3) the promotion of individual choice. Lefcoe, *California's Land Planning Requirements: The Case For Deregulation*, 54 S. CAL. L. REV. 447, 448-56 (1981). Professor Lefcoe finds that the third justification is the most persuasive generally. The promotion of individual choice is a powerful rationale for allowing local communities to decide the level of risk exposure because it is their citizens who are most directly affected by a hazardous-waste facility. However, where self-interest will not compel a party to take into account the full costs of such a decision, here zero or minimum risk, there is a case for intervention at higher levels of government.

the courts or enacts a more comprehensive accommodation procedure.

The need for state action has been underlined by the Supreme Court's 1978 decision in *City of Philadelphia v. New Jersey*.<sup>43</sup> The case holds that RCRA did not preempt the states' power to control the siting of hazardous-waste-management facilities, but that a state ban on the importation of wastes generated out of state is a violation of the negative commerce clause doctrine. *New Jersey* is a classic example of a state statute that discriminates against interstate commerce on its face, and the Court brushed aside New Jersey's argument that the legislation was a valid quarantine. Since a state does not have a right "to saddle those outside the State with the entire burden of slowing the flow of refuse "into [its] remaining landfill sites,"<sup>44</sup> it must follow that a state has a duty to accept its fair share of wastes wherever generated.

If the state land-use law favors "host" over "intruder" communities and the legislature does not preempt local authority, then the tension between local and statewide interests must be resolved in the courts. Such judicial conflicts can be seen as the logical consequences of judicial weakening of abstract rules of government and license immunity. In recognizing greater local discretion, courts have created more municipal power that can be exercised in an unreasonable manner and thus have created the need for further judicial intervention to adjust the balance between state and local interests.

In recent years courts have struggled to develop a theory of local duties to accommodate regional interest in formulating community land-use policies.<sup>45</sup> There are two branches to this law. The first concerns the power of communities to "exclude" those seeking a more diverse housing mix than the community wishes to provide. A discussion of the law of exclusionary zoning is beyond the scope of this brief article,<sup>46</sup> but suffice it to say that experiments in judicial activism are likely to influence the court's treatment of the second branch of the law which is directly relevant to this article. The second branch of law deals with the powers of communities to exclude a particular land use from the commu-

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43. 437 U.S. 617 (1980). *Accord* *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980).

44. 437 U.S. at 629.

45. See generally Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957).

46. See Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues* (Symposium, *Growth Policy in the Eighties*), 43 LAW & CONTEMP. PROBS. 5 (Spring 1979).

nity. In the late 1960's, housing consumers and their developer surrogates had some color of constitutional right to assert in attacking exclusionary zoning.<sup>47</sup> The Supreme Court has subsequently made it clear that it does not want to "constitutionalize" the law of zoning, and there is nothing in the Standard Zoning Enabling Act or in the "common law" of zoning that says that every community must accept every kind of use that wishes to enter.<sup>48</sup> State legislatures have not expressly decided that each community in a state shall be a Noah's Ark. But, courts have always been sensitive to the use of zoning power to exclude undesirable persons and uses, and something of a law of use exclusion has developed. Courts which have been confronted with single use as opposed to housing consumer exclusionary ordinances have developed three positions. First, they have allowed small communities to chart their own destiny as they see fit;<sup>49</sup> second, they have imposed a duty on communities to explain an exclusion and to take one of almost everything or least one of the uses seeking to enter, if the explanation fails;<sup>50</sup> and third, they have allowed communities to use reverse-regionalism arguments. A community may exclude those uses that are adequately provided for elsewhere in the region.<sup>51</sup> One ark per region is enough.

Judicial intervention to compel a community to explain an exclusion, and thus accept an unwanted use if the explanation is not convincing, must be justified on one of two theories, if it can be justified at all. The first theory proceeds from the premise that any property owner who is denied the right to locate has arguable substantive due process claims. Most zoning restrictions can be justified by the reciprocal benefits to the complainants and surrounding parcels created by the zoning ordinance. But, an exclusion is often difficult to justify under the reciprocity of benefit theory, and therefore judicial intervention is necessary to protect the excluded property owner's constitutional rights. A second justification could be based on a theory that an exclusionary zoning ordinance is presumptively *ultra vires*. Courts have sometimes articulated a theory that the essence of zoning is the division of a

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47. See R. ELLICKSON & A. TARLOCK, *LAND-USE CONTROLS* 822 (1981).

48. *Warth v. Seldin*, 422 U.S. 490 (1975).

49. See *McDermott v. Village of Calverton Park*, 454 S.W.2d 577 (Mo. 1970).

50. *Beaver Gasoline Co. v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971). See generally Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971).

51. *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955).

community's territory *among* different land uses.<sup>52</sup> An ordinance that omits an ordinary, non-noxious, land use is thus presumptively *ultra vires* because it lacks the necessary comprehensiveness.<sup>53</sup>

Pennsylvania courts have developed a doctrine which seems to incorporate both these theories. If a community excludes a legitimate land use, the community bears the burden of justifying the exclusion as necessary to protect the public interest.<sup>54</sup> It appears that technically the court has considered an exclusionary ordinance a *prima facie* case of unreasonable zoning and has shifted the burden of going forward to the community. The Pennsylvania courts have recognized an exception for activities "generally known to give off noxious odors, disturb the tranquility of a large area by making loud noises, have the obvious potential of poisoning the air or the water of an area, or similarly have clearly deleterious effects upon the general public. . . ."<sup>55</sup> This exception would seem to describe hazardous-waste management facilities, but a lower court has held that a community failed to carry its burden of justifying the exclusion of an industrial waste processing facility.<sup>56</sup> In reversing the Zoning Hearing Board, the court made the following statement: "Under these circumstances, we conclude that waste disposal facilities do not have the obvious potential for polluting air or water or otherwise creating uncontrollable health or safety hazards. Nor do common knowledge and experience suggest other clear deleterious effects which would inevitably be visited upon the public in general."<sup>57</sup> One wonders whether it would be repeated in other states or again in Pennsylvania now that more information about hazardous-waste disposal has come to light.

Since 1965 Pennsylvania courts have developed strong anti-exclusionary zoning doctrines in the name of manifest destiny or social darwinism. The court's theory seems to be that development will occur and every area of a metropolitan region is equally

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52. See R. ELLICKSON & A. TARLOCK, *supra* note 46, at 793-95.

53. See Justice Heher's dissenting opinion in *Pierro v. Baxendale*, 20 N.J. 17, 118 A.2d 401 (1955).

54. *Beaver Gasoline Co. v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971).

55. *Id.* at 576, 285 A.2d at 509.

56. *General Battery Corp. v. Zoning Hearing Bd.*, 29 Pa. Commw. Ct. 498, 371 A.2d 1030 (1977).

57. 371 A.2d at 1032. Local vetos of hazardous-waste facilities are now preempted in Pennsylvania. See *infra* note 123.

suited for more development.<sup>58</sup> This may be a reasonable assumption for apartment houses, townhouses and condominiums, but it is not a reasonable assumption for hazardous waste management facilities. Pennsylvania's anti-exclusionary rules give insufficient weight to legitimate local interests and impose too many potential risks on local communities in the interests of protecting landowner initiatives.

Just as a balancing test to determine whether an "intruder" is immune from the "host" community's land-use regulations can weigh the interests differently, so can judicially imposed duties to consider regional or statewide interests. In *Associated Home Builders v. City of Livermore*<sup>59</sup> the California Supreme Court suggested that substantive due process required that cities justify growth control ordinances likely to be exclusionary. Ordinances "must have a real and substantial relationship to the public welfare. . ."<sup>60</sup> However, Washington followed California's regionalism theory with an interesting twist. A recent case suggests that a community may have a duty to exclude a use which is environmentally detrimental from a regional perspective. *Save a Valuable Environment v. City of Bothell*<sup>61</sup> found that a community's decision to allow a regional shopping center in a rural but growing area of the Seattle metropolitan area "was arbitrary and capricious in that it failed to serve the welfare of the community as a whole."<sup>62</sup> Once adverse regional environmental impacts are disclosed, a city

may not act in disregard of the effects outside its boundaries. Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdiction borders, the zoning body must serve the welfare of the entire affected community. If it does not do so it acts in an arbitrary and capricious manner. The precise boundaries of the affected community cannot be determined until the potential environmental effects are understood. It includes all areas where a serious impact on the environment would be caused by the proposed action. The impact must be direct. For example, areas which would experience an increased danger of flooding or air pollution, or areas which would experience pressure to alter the land uses contemplated by their own comprehensive plans, would be part

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58. The leading case is *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

59. 18 Cal. 3d 582, 609, 557 P.2d 473, 489, 135 Cal. Rptr. 41, 57 (1976).

60. *Id.*

61. 89 Wash. 2d 862, 870, 576 P.2d 401, 405 (1978).

62. *Id.*

of the affected community.<sup>63</sup>

A common-law nuisance action to enjoin the construction or operation of the facility may provide communities with another means<sup>64</sup> of excluding a facility than land-use controls. However, under conventional nuisance law, it is extremely difficult to enjoin any facility in advance of its operation because of the doctrine of imminent irreparable harm.<sup>65</sup> This doctrine rests on the theory that an activity is not ripe for evaluation as a nuisance until the operators have had a chance to prove that it can operate reasonably. If the facility is a public one, a second doctrine virtually immunizes public or licensed activities from pre-construction injunction suits. There is an almost conclusive presumption that the balance of equities lies with the public interest in the operation of the facility.<sup>66</sup>

These doctrines are still good law, but in recent years courts have begun to substitute risk for proof of cause in fact and the law of imminent irreparable injury has begun to change accordingly. The decisions initially involved legislative and administrative discretion to protect the public from health risks such as cancer,<sup>67</sup> but the courts are beginning to lower the quantum of proof necessary to prove future harm in actions for injunctive relief. A recent Illinois Supreme Court decision, *Village of Wilsonville v. SCA Services, Inc.*,<sup>68</sup> illustrates the developing law of equitable risk-benefit analysis. The village sued to require the removal of a hazardous waste landfill, and the trial court granted an injunction after a 104-day trial on the merits. As is usual in such cases, expert testimony was sharply divided on the risk of future harm that the landfill in fact posed, but the trial court granted the injunction even though it found that the likelihood of substantial future harm was remote. An intermediate appellate court affirmed because of the nature of the hazard involved.<sup>69</sup> The state supreme court affirmed in the face of an argument that the two lower courts had incorrectly "failed to require a showing of substantial risk of

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63. *Id.* at 869.

64. 89 Wash. 2d at 869, 576 P.2d at 405.

65. *Green v. Castle Concrete Co.*, 181 Colo. 309, 509 P.2d 588 (1973).

66. *Brent v. City of Detroit*, 27 Mich. App. 628, 183 N.W.2d 908 (1970).

67. *E.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1 (en banc 1976).

68. 86 Ill. 2d 1, 426 N.E.2d 824 (1981). For a fuller discussion of the controversy see Ill. Legislative Investigating Comm., *Land Filling of Special and Hazardous Waste: A Report to the Illinois General Assembly* 172-203 (1981).

69. *Village of Wilsonville v. SCA Servs., Inc.*, 77 Ill. App. 3d 618, 396 N.E.2d 552 (1979).

certain and extreme future harm.”<sup>70</sup> But, its reasoning will create some future confusion. Instead of directly addressing the question of when a court may base an injunction on proof of risk as opposed to relatively certain injury, the court found that the evidence met the conventional standards of “real and immediate” danger. However, the court’s summary of the evidence and the law leaves little doubt that courts now have more discretion to resolve the uncertainty issue in the public’s favor when hazardous wastes are involved:

In this case there can be no doubt but that it is highly probable that the chemical-waste-disposal site will bring about a substantial injury. Without again reviewing the extensive evidence adduced at trial, we think it is sufficiently clear that it is highly probable that the instant site will constitute a public nuisance if, through either an explosive interaction, migration, subsidence, or the “bathtub effect,” the highly toxic chemical wastes deposited at the site escape and contaminate the air, water, or ground around the site. That such an event will occur was positively attested to by several expert witnesses. A court does not have to wait for it to happen before it can enjoin such a result. Additionally, the fact is that the condition of a nuisance is already present at the site due to the location of the site and the manner in which it has been operated. Thus, it is only the damage which is prospective. Under these circumstances, if a court can prevent any damage from occurring, it should do so.<sup>71</sup>

### III.

#### CRITICAL ISSUES IN SITING

The ultimate goal of a hazardous-waste facility-siting process is the location of facilities at acceptable sites. An acceptable site can initially be defined as one that is determined to be safe by the appropriate regulatory authority. This definition of safety is, of course, a positivistic one for it defines a site as safe simply because a duly constituted public agency says that it is safe. Nonetheless, it is useful to start with this definition of safety because ultimately it may be the best that society can devise. But it is equally necessary to realize the limits of this definition.

The true test of a regulatory institution’s value is whether it can persuade those interested in its activities that its decisions are legitimate. Proponents of the administrative state, brought to full flower in the New Deal and Great Society eras, hoped that agen-

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70. 86 Ill. 2d at \_\_\_, 426 N.E.2d at 824, 836 (1981).

71. *Id.* at \_\_\_, 426 N.E.2d at 836-37.

cies would develop sufficient expertise to convince the public that the right decisions were being made.<sup>72</sup> This has proved to be difficult or impossible to accomplish in many instances because no consensus has developed about what regulatory policies ought to be pursued. In other instances, such as environmental regulation, there has been a reasonably broad initial consensus about the basic objectives of the regulation, but often agencies have been unable to generate the information necessary to demonstrate that a particular rule or decision is necessary to further the general goal.

Hazardous-waste management is a classic example of this problem. It is hard to generate sufficient data either to convince the operator that stringent safety measures are necessary to protect public health or to convince the public that risk exposure has been adequately minimized. As a recent report by the Keystone Center's Hazardous Waste Management Study Group concluded, that because of the uncertainties that surround hazardous-waste decisions, "some people's exaggerated perceptions about risk, however, may be the most serious obstacle to successful siting of new facilities."<sup>73</sup> In short, one cannot expect that those potentially affected by the location of a facility will be convinced that the facility is safe.

A lawyer's or institutional analyst's initial response to the lack-of-legitimacy problem is to try to finesse it by substituting fair procedures and processes for the lack of substantive rightness. It is hoped that interested parties will more readily accept the decision if there has been an opportunity to question the assumptions behind the data and scientific conclusions. In designing newer institutions for resolving environmental conflicts we have recently moved beyond limited and formal opportunities to question decisions into the amorphous area of "effective public participation". Legitimacy has become identified with enhanced opportunities for public "input", although the ability of any process to produce consensus when there are such radical differences among the interested parties is limited. Nonetheless, siting statutes increasingly strive for enhanced public participation as a means of promoting legitimate decisions. A few states have even moved beyond open-ended processes and have begun to experiment with mediation and arbitration to give interested parties a formal stake in the de-

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72. See J. LANDIS, *THE ADMINISTRATIVE PROCESS* 25-46 (1938).

73. Keystone Center, *Final Report of the First Keystone Workshop on Siting Nonradioactive Hazardous Waste Management Facilities* 21 (Sept. 1980) (mimeograph copy on file with author).

cision. This section discusses the basic approaches to convincing the public that a siting decision is legitimate.

The first generation of siting statutes, exemplified by Michigan's 1979 pioneering statute, view the decision as primarily a technical one. The siting board is to consider the following factors:

- (a) The risk and impact of accident during the transportation of hazardous waste.
- (b) The risk and impact of contamination of ground and surface water by leaching and runoff from the proposed disposal facility.
- (c) The risk of fires or explosions from improper storage and disposal methods.
- (d) The impact on the municipality where the proposed disposal facility is to be located in terms of the health, safety, cost and consistency with local planning and existing development. The board also shall consider local ordinances, permits, or other requirements and their potential relationship to the proposed disposal facility.
- (e) The nature of the probable environmental impact, including the specification of the predictable adverse effects on the following:
  - (i) The natural environment and ecology.
  - (ii) Public health and safety.
  - (iii) Scenic, historic, cultural, and recreational value.
  - (iv) Water and air quality, and wildlife.
  - (f) An evaluation of measures to mitigate adverse effects.
- (8) The board also shall consider the concerns and objections submitted by the public. The board shall facilitate efforts to provide that the concerns and objections are mitigated by establishing additional stipulations specifically applicable to the disposal facility and operation at that site. The board also shall to the fullest extent practicable integrate by stipulation the provisions of the local ordinances, permits, or requirements.<sup>74</sup>

Public participation is confined to the traditional hearing-consultation model.

In more recent legislation, non-technical criteria are upgraded and more detailed and innovative public participation techniques, discussed in the next section, are mandated. Perhaps Kentucky has gone the farthest in recognizing the legitimacy of non-technical concerns. The licensing agency is required to consider "com-

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74. MICH. COMP. LAWS ANN. § 299.520(7)-(8) (1980). *See also* MINN. STAT. ANN. § 115A.20 (West Supp. 1980).

munity perceptions and other psychic costs.”<sup>75</sup> Predictably, Minnesota and Massachusetts have attempted to move beyond formal public participation models to something more effective.<sup>76</sup>

Public participation beyond the electoral process has become the vogue as the legitimacy of formal institutions has declined, but the goals and techniques of participation remain quite vague. Lawyers schooled in due process have equated public participation in the administrative process as the right to be heard, but have not been greatly concerned, outside of formal adjudication, as to how much the hearer listens to the participation and what effect the participation has on the participant. Those schooled in behaviorism theories and the nondiscipline of “communication skills” have paid more attention to the quality of the participation and, as a result, find formal adjudication and rulemaking models too restrictive. The basic objections are that the participation comes too late and is not conducive to reaching consensus about the best overall decision.

There are at least six models of public participation available for the consideration of those designing siting institutions. They can be defined as: (1) minimum formal public participation; (2) enhanced formal public participation; (3) enhanced formal participation in a planning process that precedes regulatory decisions; (4) formal due process; (5) direct electoral participation; and (6) interest representation in nonlegislative and adjudicative processes.

Minimum formal public participation is simply a nonadjudicatory or speechmaking hearing, with or without a record. This model is widely used, but the defects are obvious. People seldom feel that such a hearing adequately involves them in the decision. Enhanced public participation involves a greater effort to involve the public in the proceeding at the relatively early stages of decision making. This technique is being increasingly used in the consideration of environmental impact statements, for example, and is required in the siting statutes in Massachusetts and Minnesota. The salient features of enhanced public participation include targeted notice, hearings held in the locality of the proposed facility, advance distribution of relevant documents and multiple hearings. A few states have sought to move the effective decision point from the permit application to a general site identification plan-

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75. KY. REV. STAT. § 224.866(1)(c) (Supp. 1980).

76. See *supra* note 74.

ning process. The theory is that technical criteria can be used to weed out sites that are technically and politically unacceptable and to find sites that are more acceptable by both of these criteria.<sup>77</sup> Formal due process is simply an adjudicatory hearing. Some siting statutes require an adjudicatory hearing before a permit is granted.<sup>78</sup> Parties who meet the jurisdiction's rules for intervention or standing may become formal parties to the proceeding. However, the burden is on the interested party to incur the costs of joining the proceedings so the level of non-permittee interest will often depend on the existence or strength and interest, of a citizens organization.

Direct electoral participation through the initiative and referendum is perhaps the most favorable means of public participation for those who oppose a facility. There is no requirement that those entitled to vote in a valid election act at all rationally. The lack of voter rationality is a problem with any election, but the problem is magnified with single issue, limited electorate elections. Although the issue is controversial, my own view is that the initiative and referenda should not be used to site hazardous-waste facilities because there is too great a risk that permittee and statewide interests in an adequate disposal capacity will be ignored.<sup>79</sup>

Many people dislike the adversary process because it focuses on the wrong issues. Since the mid-1970's, some people have been searching for ways to involve more people in a process that produces a wider range of options in a less hostile (read confronta-

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77. There is a growing literature, mostly written by consulting firms, on siting criteria. Basically, after an inventory of the area's waste-management needs is determined, a number of technical and non-technical screens are applied to target areas. The first screen or group of screens is to exclude sites and focuses on factors such as the geological and hydrological conditions of the soils in the area, the proximity of the site to population concentrations, and whether higher uses exist for the potential site. One obvious purpose of the screens is to exclude locations such as flood plains, although in some places this is hard to do because almost everywhere is technically classified as a flood plain. After the exclusion screens, an attempt is made to find sites that can physically support the facility and that do not excite too much public opposition. See 2 Arthur D. Little, *A Plan for the Development of Hazardous Waste Management Facilities in the New England Region* (Sept. 1979); Delaware Basin Commission & New Jersey Department of Environmental Protection, *Technical Criteria for Identification and Screening of Sites for Hazardous Waste Facilities* (Environmental Resources Management, Inc., Dec. 1979).

78. Am. S.B. 269, 1980 Ohio Laws 5-500, -502 (1980) (to be codified at OHIO REV. STAT. ANN. § 3734.05(C)(3)).

79. See generally Tarlock, *An Economic Analysis of Direct Voter Participation in Zoning Change*, 1 UCLA J. OF ENVTL. L. & POL'Y, 31 (1980).

tional) situation. Two options that are currently being actively explored are mediation and arbitration. Mediation may either involve "intervention" before a situation becomes a focused conflict or may involve an attempt to reach agreement among parties with well defined adverse interests.<sup>80</sup> Mediation attempts to find a relevant negotiating group to approve a solution that may or may not be in the power of the group to implement and as one practitioner of the art has said, "the only basis for mediating disputes is fear—fear that something worse will happen. . . ."<sup>81</sup> Mediation is an evolving art that is highly dependent on the trust placed in the mediators by the participants so at the present time we have only scattered case studies, but no rules as to how the process should work. Arbitration is a more formal process in which the relevant parties (one hopes) voluntarily submit the dispute to someone who will render a binding decision. Considerable effort is now being made to arbitrate disputes in which the many parties that are necessary to a final resolution have no formal interest in the outcome of the conflict, and at least two states, Massachusetts and Wisconsin,<sup>82</sup> hope to apply this evolving dispute-management process to the siting of hazardous-waste management facilities.

#### IV.

##### FACILITY SITING LEGISLATION

States with hazardous-waste legislation dealing with facility siting can be roughly divided into two categories. The first consists of states that have enacted RCRA qualifying legislation and the second consists of states that have enacted specific siting procedures. Both categories deal with the problem of local preemption of land-use controls in different ways.

##### 1. General RCRA Qualifying Legislation

RCRA qualifying legislation contains a definition of hazardous

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80. See generally Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

81. Dembart & Kwartler, *The Snoqualmie River Conflict: Bringing Mediation into Environmental Disputes*, in *ROUNDTABLE JUSTICE: STUDIES IN CONFLICT RESOLUTION—REPORTS TO THE FORD FOUNDATION* 39 (R. Goldman ed. 1980). See also *ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS* (L. Lake ed. 1980).

82. Wisconsin Legislative Council Proposed Bill 283 (not yet introduced in either house) proposes a scheme of negotiations conducted between the applicant and a local committee composed of interested representatives of affected units of local government. The negotiations may be conducted with the aid of a mediator, if both parties request one at any time in the negotiations.

waste, a requirement that haulers and facility operators obtain a state permit, and procedures and financing mechanisms to protect the public after the facility is closed.<sup>83</sup> Local preemption is generally not addressed or dealt with by a simple preemption-local option strategy.

Alabama,<sup>84</sup> Arkansas,<sup>85</sup> California,<sup>86</sup> Iowa,<sup>87</sup> and Kansas<sup>88</sup> appear to have preempted local land-use controls, and therefore a state permit is the only approval necessary to site a facility in these states. Arizona apparently preempts local land-use controls as well, but local entities have a greater chance of influencing the selection process because the issue is made a visible state-wide political choice. The Department of Health Services is directed to select a site and to present the choice to the legislature for approval or disapproval.<sup>89</sup> Local land-use authority is expressly preserved in Kentucky,<sup>90</sup> Louisiana,<sup>91</sup> and Nebraska.<sup>92</sup> Finally, the legislation in Delaware,<sup>93</sup> Georgia,<sup>94</sup> Missouri,<sup>95</sup> Mississippi,<sup>96</sup> New Mexico,<sup>97</sup> Oklahoma,<sup>98</sup> South Carolina,<sup>99</sup> and Tennessee<sup>100</sup> is silent on the issue of preemption.

## 2. Special Siting Procedures

Hazardous-waste-facility siting processes may require the preparation of plans or site inventories, the creation of permanent or ad hoc siting boards,<sup>101</sup> modeled somewhat on powerplant siting

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83. For an analysis of state laws enacted prior to 1980 *see* National Conference of State Legislatures, *Hazardous Waste Management: A Survey of State Laws 1976-1979* (1980).

84. ALA. CODE § 22-30-12(c) (Supp. 1981).

85. ARK. STAT. ANN. §§ 82-4202, -4205 (Supp. 1981).

86. CAL. HEALTH & SAFETY CODE § 25100 (West Supp. 1980). *See* 57 Ops. Cal. Att'y Gen. 159 (1974).

87. Act of May 11, 1981, S.F. 420, § 8, 1981 Iowa Leg. Serv. 194 (West).

88. Act of Apr. 17, 1981, ch. 251, § 8, 1981 Kan. Sess. Laws 1036.

89. ARIZ. REV. STAT. ANN. § 36-2801 to -2805 (Supp. 1980).

90. KY. REV. STAT. §§ 224.855(5), .866 (1980).

91. LA. REV. STAT. ANN. § 30:1144(B) (West Supp. 1980).

92. NEB. REV. STAT. § 81-1521.02 (R.S. Cum. Supp. 1980).

93. DEL. CODE ANN. tit. 7, § 6307 (Cum. Supp. 1980).

94. GA. CODE ANN. § 43-2907 (Cum. Supp. 1981).

95. MO. ANN. STAT. § 260.375 (Vernon Int. Supp. 1981).

96. MISS. CODE ANN. § 17-17-27 (Cum. Supp. 1980).

97. N.M. STAT. ANN. § 74-7-4.2 (1981).

98. OKLA. STAT. ANN. tit. 63, § 2757 (West Supp. 1980-81).

99. S.C. CODE § 44-56-60 (Cum. Supp. 1980).

100. TENN. CODE ANN. § 53-6308 (Cum. Supp. 1981).

101. *E.g.*, N.Y. ENVTL. CONSERV. LAW § 27-1105 (McKinney 1981).

boards created in the 1970's,<sup>102</sup> and the review of sites selected by private and public entities. Responses to the problem of local land-use authority ranges from straight preemption to the use procedures that virtually guarantee that local communities may veto a facility of which they disapprove. At the outset it should be noted that state legislatures possess unlimited power to preempt local land-use regulations dealing with hazardous-waste facility siting. Local units of government possess no inherent powers,<sup>103</sup> and in non-home-rule states they are at the complete mercy of the state legislature. In home-rule states, local government power is limited to local as opposed to statewide matters,<sup>104</sup> but the provision of adequate hazardous-waste management sites is clearly a statewide problem and the appropriate subject of state legislation. Any argument to the contrary seems to have been disposed of by *City of Philadelphia v. New Jersey*,<sup>105</sup> discussed earlier. This section discusses the distinctive features of special hazardous-waste siting procedures that have evolved since 1979, the year that Michigan adopted the first hazardous-waste facility siting statute.

#### A. Hazardous-Waste Facility Plans or Inventories

RCRA requires that each state prepare an inventory of existing hazardous-waste sites, but there is no requirement that a state have a process for selecting acceptable sites.<sup>106</sup> Some states have chosen to go beyond RCRA and to require the preparation of a facility plan or inventory for new sites. For example, Michigan requires the preparation of a plan that provides an inventory of existing facilities and "a projection or determination of future hazardous waste management needs."<sup>107</sup> Maryland distinguishes more sharply between an inventory and a plan<sup>108</sup> because that state's siting legislation contemplates state construction of facilities. The Maryland Environmental Service (the state's agency for sewer and other environmental-management-facility construction)

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102. See Final Report of the Special Committee on Environmental Law, Development and the Environment: Legal Reforms to Facilitate Industrial Site Selection (1973).

103. *Hunter v. City of Pittsburgh*, 297 U.S. 161 (1907).

104. *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977).

105. 437 U.S. 617 (1978).

106. 42 U.S.C. § 6933 (1980).

107. MICH. COMP. LAWS § 299.509(3)(c) (Supp. 1980).

108. MD. NAT. RES. CODE ANN. § 3-710 (Cum. Supp. 1980).

must prepare an inventory of sites suitable for facilities<sup>109</sup> constructed and run by the state. The plan is prepared by the environmental regulatory agency.

Preparation of a statewide inventory or plan is one of those sensible ideas that may not work because the final product cannot perform its intended function. Ideally, technical criteria can be applied to screen out undesirable sites and to select desirable sites, and relevant concerns can be addressed at the stage where the consideration of alternatives is still feasible. But, ironically, the better the plan or inventory, the less effective it may be in the end. If specific sites are identified as suitable, as the National Governor's Association has noted, the plan or inventory "may trigger vigorous local opposition at a time when there is little mobilized force to counteract the opposition. This opposition force can . . . result in the loss of sites before their merits are fully explored or before meaningful and, perhaps, effective mitigations can be offered."<sup>110</sup> Michigan tries to deal with this problem by requiring that the plan provide for "a reasonable geographic distribution of disposal facilities"<sup>111</sup> within the state and that only "general locations"<sup>112</sup> need be specified. Minnesota's approach to the diversity and alternatives issue is more direct. The inventory must include at least three sites each for a commercial chemical processing facility, a commercial incinerator, and a commercial transfer and storage facility.<sup>113</sup>

If mandated plans are to be effective, they must be specific and they must be followed. The dynamics of the planning process generally lead planners to hedge their bets so that final plans seldom delineate hard recommendations for specific pieces of lands. In these situations, it is difficult to follow a plan because a wide range of decisions are consistent with it. Hazardous-waste-facility plans have a simpler function compared with general land-use plans because the former must locate only one use and the technical criteria are more precise, but it will still be necessary to define the relationship between the plan and the permit, if the plan is to be taken seriously. Some states require plans but do not specify

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109. *Id.*

110. National Governor's Association, *Siting Hazardous Waste Facilities: Critical Siting Issues—State Roles 7* (undated memorandum on file with author).

111. MICH. COMP. LAWS ANN. § 299.509(2)(a)-509(3)(c) (Supp. 1980).

112. MICH. COMP. LAWS ANN. § 299.515 (Supp. 1980).

113. MINN. STAT. ANN. § 115A.09 (Supp. 1981).

the relationship between the plan and subsequent permits.<sup>114</sup> Michigan has borrowed the land-use controls concept of consistency with an adopted plan, and thus in theory the plan should control the permit stage.<sup>115</sup> In recent years some courts and legislatures have bought the planners' arguments that land-use controls should be subordinated to planning, but the evidence to date suggests that mandated consistency between planning and land-use controls will not increase the quality of plans and the weight given to them.<sup>116</sup> No consensus has developed about what consistency means so the judicial implementation boils down to a general and vague reasonableness test for specific rezonings. Minnesota has attempted to avoid the problems of mandating consistency by using the planning process not to make a final selection of sites but to identify those sites that will be subjected to intensive evaluation with substantial public participation.<sup>117</sup> Utah, on the other hand, has attempted to bind operators and the public to the plan by making it costly for an operator to deviate from the plan. The state's 1981 siting statute provides:

After adoption of the final plan, an applicant for approval of a plan to construct and operate a hazardous waste treatment, storage, and disposal facility who seeks protection under this act shall select a site contained on the final site plan. Nothing in this act, however, shall be construed to prohibit the construction and operation of an approved hazardous waste treatment, storage, and disposal facility at a site which is not included within the final site plan, but such a facility is not entitled to the protections afforded under this act.<sup>118</sup>

## B. Composition of the Siting Board

Siting boards, and in some states advisory boards to assist in the preparation of the plan or inventory, are generally a mix of interested and presumptively neutral parties. Interested parties predominate in many states, although those representing generators, transporters and facility operators are the minority.<sup>119</sup> One

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114. *E.g.*, FLA. STAT. ANN. § 403.729(5) (Supp. 1981); GA. CODE ANN. § 43-2906(b) (Supp. 1980).

115. MICH. COMP. LAWS ANN. § 299.516 (Supp. 1980).

116. The cases and arguments pro and con for mandated subordination of regulation to planning are reviewed in J. DiMENTO, *THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* (1980). *See also* Mandelker & Nelter, *A New Role for the Comprehensive Plan*, 332 LAND USE L. & ZONING DIG. 5 (Sept. 1981).

117. *See infra* notes 143-63.

118. UTAH CODE ANN. § 26-14(a)-6(6) (Interim Supp. 1981).

119. *See, e.g.*, MICH. COMP. LAWS ANN. § 299.508 (Supp. 1980).

pattern is to select a board composed of members of the scientific community, generally hydrologists and geologists, industry representatives, state and local officials, and token members of the general public.<sup>120</sup> Massachusetts departs from this model by creating a twenty-one-person board composed of state officials, a "representative of the public knowledgeable in environmental affairs," and six general-public members.<sup>121</sup> Industry officials are expressly excluded from the council.

Siting boards that are composed of interested parties—both for and against—might be vulnerable to the challenge that they deny applicants and the general public due process of law because there is a risk that contested issues have been prejudged. In California the public due process rights to a fair process of decision have been recognized in a case holding that a forestry board partially charged with environmental regulation but dominated by industry representatives was an invalid delegation of legislative power to private parties.<sup>122</sup> However, it is unlikely that courts will conclude that the very structure of the siting boards denies due process to applicants or to the public at large. The United States Supreme Court has indicated that regulatory officials are presumed to act fairly.<sup>123</sup> Furthermore, there are enough diverse interests represented on boards drawn from categorically interested groups to insure that diverse view points will be heard and thus there is a low risk that the issues have been prejudged.

Courts will probably follow the lead of the Maine supreme court and reject a challenge based on "compositional" unfairness as opposed to "prejudgment concerning issues of fact in a particular case."<sup>124</sup> *In Re Maine Clean Fuels, Inc.*<sup>125</sup> considered a challenge to a decision of the Maine Environmental Improvement Commission (EIC) denying an approval of a proposed petroleum refinery on Penobscot Bay. The disappointed refinery operator argued that the composition of the EIC was biased because it was too pro-environmental, but the court's reasons for rejecting com-

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120. *See, e.g.*, MD. NAT. RES. CODE ANN. § 3-703(b) (Supp. 1980).

121. MASS. ANN. LAWS ch. 21D, § 4(13) (Law. Co-op. Supp. 1981).

122. *Bayside Timber Co. v. Bd. of Supervisors*, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1971).

123. *United States v. Morgan*, 313 U.S. 409 (1941); *Withrow v. Larkin*, 421 U.S. 35 (1975).

124. *N.H. Milk Dealers' Ass'n v. N.H. Milk Control Bd.*, 107 N.H. 335, 338, 222 A.2d 194, 198 (1966).

125. 310 A.2d 736 (Me. 1973).

positional unfairness apply equally to a challenge that a board with waste-management representatives is structurally unfair:

The composition of the EIC is necessarily broadly based because we deem the legislature found it reasonable that many factors would necessarily have to be considered in the regulating the location of any development. . . . It seems clear to us that the legislature considered a variety of interests which it felt could best make the important decisions delegated to this commission. Its conclusion that the five types of interests delineated in the statute could best serve the public is completely reasonable.<sup>126</sup>

If, of course, an applicant or a member of the general public with standing to raise the issue can prove that the questions regarding a specific facility were prejudged then the court would invalidate the decision and try to find a remedy that would insure a fair reconsideration of the controversy.

### C. To Preempt or Not to Preempt?

States have taken a wide variety of approaches to the role of local land-use controls, and the obvious reason for the differences among the states is the strength of the local units of government in the state legislature. Five basic approaches have emerged. These are: (1) straight state preemption; (2) state preemption of local vetoes upon state review and an extraordinary majority of the siting authority; (3) state preemption after extensive local involvement; (4) straight preservation of local veto authority; and (5) a requirement that the operator and the local community negotiate an agreement that offers rules to the community with arbitration as a last resort (a model much favored by consultants and others who find the adversary process too crude).

Maryland and Michigan have made the cleanest opposite choices. Maryland's legislation states that local units of government are given sufficient protection through the state siting-review process and preempts all local land-use controls.<sup>127</sup> Similar legislation exists in Ohio<sup>128</sup> and Utah.<sup>129</sup> In Michigan the power of local governments was sufficient to amend the siting act the year

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126. *Id.* at 750. The court reiterated the familiar principle that "a state legislature has the right, absent some unique constitutional prohibition, to determine the qualifications of those who are appointed to hold administrative offices." Maine boards composed of directly interested regulated parties as well as public members were cited as examples of the legislature's power.

127. MD. NAT. RES. CODE ANN. § 3-705(d) (Supp. 1980).

128. OHIO REV. CODE ANN. § 3734.05(D)(3) (Page Supp. 1980).

129. UTAH CODE ANN. § 26-14a-8 (Supp. 1981).

after it was passed to preserve local land-use authority, thereby legislating a double veto system.<sup>130</sup> New York requires the siting board to deny an application for site approval if the site is inconsistent with local zoning in force on the date of the application.<sup>131</sup>

Connecticut and Florida give local communities the initial move, but provide for state review and preemption. In Connecticut a two-thirds vote of the siting board is necessary to override a local veto.<sup>132</sup> In Florida local governments have ninety days to veto a proposed site, subject to a three-stage appeal process. First, the disappointed operator must apply for a local variance; if the variance is denied he goes to the appropriate regional planning council which may recommend that the Governor and Cabinet approve or deny a variance.<sup>133</sup> To recommend a variance the regional planning council must make five findings including a determination that the facility will not have a significant adverse impact on the environment and natural resources of the region. The Governor and Cabinet have the authority to consider a wide range of relevant factors including the need for the facility and alternative sites. The discretion to issue a variance is severely limited:

The Governor and Cabinet may grant a variance from local ordinances, regulations, or plans only if the permit has been issued by the department and if they find that there is a clear and convincing need for the facility. A clear and convincing need for a facility is established if the proposed method of storage, treatment, or disposal of the hazardous waste to be handled at the proposed facility is the most feasible method and if it seems probable that the proposed or existing facility will be more advantageous economically to generators of hazardous waste at the proposed site than at possible alternative sites.<sup>134</sup>

Pennsylvania's override procedure is less cumbersome, but the

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130. MICH. COMP. LAWS § 299.516 *as amended by* Pub. Acts 1980, No. 301 (MICH. STAT. ANN. (Current Legis.) at 80:1135 (1980)).

131. N.Y. ENVTL. CONSERV. LAW § 27-1105(b)(2)(f) (McKinney 1981).

132. CONN. GEN. STAT. ANN. § 22a-124 (West Supp. 1980).

133. FLA. STAT. ANN. § 403.723. (West Supp. 1980).

134. *Id.* § 403.723(7)(c). Executive involvement in specific land use disputes is not unknown in Florida. A full discussion of Florida's land-use planning legislation is beyond the scope of this article, but it is important to note that the state has pioneered in the development of areas of critical environmental concern and that the governor and cabinet constitute the Florida Land and Water Adjudicatory Commission for the purpose of reviewing local critical area designations. FLA. STAT. ANN. § 380.031(1)-.05(1)(b) (West 1977). See generally Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code*, 18 URB. L. ANN. 3 (1980).

state is equally exposed to political liability if it decides to reverse a local veto. Local governments may recommend denial of a facility permit because they do not want the land use. The state may refuse to follow the local unit's recommendation, but if it does, a "written justification" must follow the decision.<sup>135</sup> Similar legislation was passed in Illinois in late 1981.<sup>136</sup>

A variant of the Florida and Pennsylvania preemption approaches that is somewhat less favorable to local units of government may be found in Indiana's statute. In 1981 the state created a Solid Waste Facility Site Approval Authority that consists of five permanent statewide members and four local ad hoc members chosen from the county and closest town where the facility is proposed.<sup>137</sup> The authority's function is to issue certificates of environmental compatibility.<sup>138</sup> These certificates are issued after local authorities and planning boards are given notice of a proposed facility and a formal public speechmaking hearing is held. However, after these steps, all local land-use authority is bluntly preempted: "The certificate granted under this chapter preempts any local government zoning or other land use regulations, law or ordinance, and the person obtaining this certificate shall not be required to apply for any approval by any regional, county, city, or town zoning board or authority."<sup>139</sup> But, if one examines other

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135. PA. STAT. ANN. tit. 35, § 6018.504 (Purdon Supp. 1981-82).

136. SB 172, re-enrolled (to be codified as ILL. REV. STAT. ch. 111½, paras. 1003, 1039.1 & 1040.1), provides for state preemption of local vetoes. ILL. REV. STAT. ch. 111½, para. 1003(t) allows for state preemption of local denials of a "Regional Pollution Control Facility". This is "any waste storage site, sanitary landfill, waste disposal site, waste transfer station or waste incinerator that exceeds or extends over the boundaries of any local general purpose unit of government." Facilities located within a general purpose unit of government and intended to serve only that government and on-site waste management facilities are not regional pollution control facilities. ILL. REV. STAT. ch. 111½, para. 1039.1 allows city or county legislative bodies to approve or disapprove the location of a regional pollution control facility pursuant to six criteria. In addition to the usual land-use compatibility and safety standards, the unit of local government must find that "the facility is necessary to accommodate the waste needs of the area it is intended to serve." Local vetoes may be appealed to the Pollution Control Board (PCB) by either the facility operator or a third party who participated in the local legislative body hearing *and* who will be adversely affected by the facility. No new evidence may be presented to the PCB. There are no standards to guide the state board in its decision to override the local veto other than that they must consider the written decision of the local unit of government that denied the facility the necessary permit to operate and the reasons offered for the denial. ILL. REV. STAT. ch. 111½, para. 1040.1. As is usual in Illinois, the legislation does not apply to Cook County or the city of Chicago.

137. IND. CODE 13-7-8.6-3 (1981).

138. IND. CODE 13-7-8.6-5 (1981).

139. IND. CODE 13-7-8.6-13(a) (1981).

sections of the act, there are at least two specific duties imposed upon the Authority to give substantial weight to local concerns. It must consider

the impact on the county, town, or city in terms of the health, safety, cost, and consistency with local planning and existing development. To this end, the authority shall consider local ordinances, permits, or other legal requirements and their potential relationship to the proposed facility;<sup>140</sup>

The authority may mitigate specific concerns and objections to the facility by attaching conditions and limitations to the certificate for the facility

The authority shall, to the fullest extent practicable, integrate by stipulation the provisions of local ordinances, permits, or requirements in making a determination granting a certificate.<sup>141</sup>

These duties to give weight to local interests become significant when they are combined with the Authority's duty to give a written explanation for its decision and the Indiana doctrine that due process guarantees review of administrative decisions regardless of whether a statutory basis exists.<sup>142</sup> Preemption in Indiana is possible, but it must be fully justified to avoid a reversal in court.

Minnesota is an example of the third preemption model. The state has enacted an elaborate two-tier siting process that can serve as a model of both industry and citizen representation and of comprehensive consideration of alternative locations, but that can also be a prescription for the siting of no facilities. A waste-management board<sup>143</sup> is created to prepare plans,<sup>144</sup> reports,<sup>145</sup> and "preferred" site inventories,<sup>146</sup> assisted by a broad-based hazardous-waste advisory council.<sup>147</sup> The Board's specific duty is to select six "candidate" sites, each in a different county, across the state.<sup>148</sup> Local communities are entitled to an "early warning" that a site in their area has been selected as a candidate site.<sup>149</sup> This technique is borrowed from the de-institutionalization move-

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140. IND. CODE 13-7-8.6-10(b)(4) (1981).

141. IND. CODE 13-7-8.6-12 (1981).

142. *Salk v. Weinraub*, — Ind. —, 390 N.E.2d 995 (1979).

143. MINN. STAT. ANN. § 115A.0141 (West Supp. 1981).

144. *Id.* § 115A.11.

145. *Id.* § 115A.08.

146. *Id.* § 115A.09.

147. *Id.* § 115A.12.

148. *Id.* § 115A.21.

149. *Id.* § 115A.22(5).

ment and is a response to community resistance to acceptance of institutions for the socially undesirable. For each location selected as a candidate site, a local project review committee, charged with informing local interests and recording "local attitudes and concerns", is formed.<sup>150</sup> After a further screen, certificates of need are issued for a sufficient number of sites to take care of the state's needs after a finding that "waste reduction, separation, pretreatment, processing and resource recovery are not feasible and prudent alternatives."<sup>151</sup> A certificate is conclusive on the issue of need but nothing else.<sup>152</sup> An environmental impact statement (EIS) must be prepared and a license issued before a site can operate, and there is no guarantee that a certified site will be allowed to operate because the state is required to approve only one site in the state.<sup>153</sup> The EIS program is begun by the disclosure of documents revealing the proposed contents of the EIS,<sup>154</sup> which may only be issued "following diligent efforts to involve the public in determining the objective and content of the environmental impact statement."<sup>155</sup>

After more hearings,<sup>156</sup> and notices of intent to issue permits, the board decides whether to issue a permit for the site.<sup>157</sup> Local governments are entitled to six additional representatives on the siting board but the quid pro quo is state preemption of local zoning.<sup>158</sup> They cannot bar the entry of a facility, but they can impose reasonable "construction, inspection, operating, monitoring, and maintenance" conditions.<sup>159</sup> A reasonable condition is one not reversed by the board.<sup>160</sup>

If the board considers the decision politically too hot, the board has the discretion to buck it to a state legislative commission on hazardous waste. This commission may suspend the proceedings to conduct a "pre-intervention assessment" to determine if there are substantive issues not considered in the formal proceedings and if mediation might work.<sup>161</sup> If the intervenor reports that one

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150. *Id.* § 115A.22(2), (5).

151. *Id.* § 115A.24.

152. *Id.* § 115A.25(1).

153. *Id.* § 115A.26.

154. *Id.* § 115A.25(2).

155. *Id.* § 115A.25(3).

156. *Id.* § 115A.27.

157. *Id.* § 115A.28.

158. *Id.* § 115A.05(3).

159. *Id.* § 115A.28(2).

160. *Id.* § 115A.28(3).

161. *Id.* § 115A.29(1).

of these conditions exists, the proceedings can be suspended for another ninety days. *Both* the commission and the intervenor can recommend a proposed agreement among the parties.<sup>162</sup> If the board can implement the agreement, presumably a final permit will issue, but if the intervention process produces recommendations beyond the competence of the board, the whole mess goes to the legislature for resolution.<sup>163</sup>

Massachusetts has also enacted a two-tier siting process. Although the powers of local communities appear to be quite strong on paper, the statute creates more pressures on the state's cities to accept a facility.<sup>164</sup> Basically, Massachusetts relies on state and local siting-council review supplemented by developer bribes to the community. The key permission under the Massachusetts procedure is not state siting-council approval, although such approval is required, but rather a siting agreement negotiated between the operator and the second-tier siting authority—the local assessment committee formed after an operator proposes a facility.<sup>165</sup> Both “host” and abutting community officials are represented on the local committee, and the statute contemplates substantial “bribes” both to the “host” and abutting communities, for the agreement includes, *inter alia*, the following mandatory and optional conditions:

(4) the services to be provided the developer by the host community;

(5) the compensation, services, and special benefits that will be provided to the host community by the developer, and the timing and conditions of their provision;

(6) the services and benefits to be provided to the host community by agencies of state government, and the timing and condition of their provision;

(7) any provisions for tax prepayments or accelerated payments, or for payments in lieu of taxes;

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162. *Id.* § 115A.29(2).

163. *Id.* § 115A.29(3).

164. After this article was written, the first reported test of the Massachusetts law cast doubt on this statement. IT Corporation of Wilmington, Delaware proposed to construct an advanced-technology facility in Westford, Massachusetts, one of the high-technology towns on the northwest rim of Boston, obtained Council approval, but then the host community succeeded in blocking the site. The law prohibits the community from rezoning the site after Council approval is given, but the town went ahead with plans to rezone the site, a quarry, for residential use. After a heated meeting attended by 3,000 of the town's 14,500 citizens, the quarry owner withdrew his plan to sell the site to IT Corporation. *N.Y. Times*, October 17, 1981, at 1, col. 5.

165. MASS. ANN. LAWS ch. 21D, § 5 (Law. Co-op. Supp. 1981).

(8) provisions for renegotiation of any of the term, conditions of provisions of the siting agreement, or of the entire agreement;

(9) provisions for resolving any disagreements in the construction and interpretation of the siting agreement that may arise between the parties; and

(10) appendices of the compensation to be paid abutting communities established pursuant to the provisions of section fourteen.

The siting agreement may also include, but shall not be limited to, the following:

(1) provisions for direct monetary payments from the developer to the host community in addition to payments for taxes and special services and compensation for demonstrable adverse impacts;

(2) provisions to assure the health, safety, comfort, convenience, and social and economic security of the host community and its citizens. . . .<sup>166</sup>

If the local assessment committee and the developer cannot negotiate an agreement, they may ask the state siting council to find that an impasse has occurred. If the council agrees, the issues may be referred to binding arbitration,<sup>167</sup> either before a single arbitrator or a three-person panel.

#### D. Common Law and Statutory Remedies Against an Improperly Operated Closed Site

Approval of a site does not guarantee the continued safe operation of the site, and thus regulatory approval may not quell community opposition and common-law based lawsuits. All states have agencies with post-approval enforcement powers. Newer statutes capitalize on the expansion of the concept of imminent irreparable harm and give the agency the power to enjoin facilities when operating practices or an episode causes public health risks.<sup>168</sup> States also have the power to implement specific clean-up procedures.<sup>169</sup> In the future, efforts to prevent spills and other hazards from creating long term damage or risks will be coordinated with the EPA's administration of Superfund.<sup>170</sup> Not surprisingly, statutes granting broad post-approval enforcement powers do not deal with the problem of injunction actions by

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166. *Id.* § 12.

167. *Id.* § 15.

168. *See, e.g.*, WIS. STAT. ANN. § 144.72 (West Supp. 1981).

169. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 27-0916 (McKinney 1981); TENN. CODE ANN. § 53-6308(c)(6) (Supp. 1981).

170. *See supra* note 12.

nearby landowners or "host" communities, and the possibility of successful suits has increased as a result of the Illinois Supreme Court's decision in *Village of Wilsonville v. SCA Services*,<sup>171</sup> discussed earlier.

Only one state has expressly foreclosed a *Wilsonville* result by limiting landowners' adversely affected by the operation of the facility to inverse condemnation actions and barring all other injunction suits. Utah's statute provides:

(1) Before construction of a hazardous waste management facility, but in no case later than nine months after approval of a plan for a hazardous waste treatment, storage, or disposal facility, any owner or user of property adversely affected by approval may bring an action in a district court of competent jurisdiction against the owner of the proposed facility. If the court determines that the planned construction and operation of the hazardous waste management facility will result in the devaluation of the plaintiff's property or will otherwise interfere with the plaintiff's rights in the property, it shall order the owners to compensate the plaintiff in an amount equal to the value of the plaintiff's loss.

(2) The remedy provided in subsection (1) of this section is the exclusive remedy for owners or users aggrieved by the proposed construction and operation of a hazardous waste treatment, disposal or storage facility, and no court has jurisdiction to enjoin the construction or operation of any facility located at a site included in the siting plan adopted by the committee.

(3) Nothing in this act shall prevent an owner or user of property aggrieved by the construction and operation of a facility from seeking damages that result from a subsequent modification of the design or operation of a facility but such damages are limited to the incremental damage that results from the modification. Any action for such damages shall be brought within nine months after the plans for modification of the design or operation of the facility are approved.

(4) For the purpose of assessing damages, the value of the rights affected is fixed at the date the facility plan is approved and the actual value of the right at that date is the basis for the determination of the amount of damage suffered, and no improvements to the property subsequent to the date of approval of the plans shall be included in the assessment of damages. Similarly, for any subsequent modification of a facility, value is fixed at the date of approval of the amended facility plan.<sup>172</sup>

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171. 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

172. UTAH CODE ANN. § 26-14a-7 (Supp. 1981). *But see* Note, *Hazardous Wastes: Preserving the Nuisance Remedy*, 33 STAN. L. REV. 675, 690 (1981), which supports

Utah's solution is controversial because landowners rights are sharply reduced, but barring injunctive relief reenforces the integrity of the entire siting process. A landowner has a constitutional right to some form of nuisance remedy, but the Supreme Court has made it clear that a property owner has no constitutional right to any particular remedy so long as the available remedy does not deny him due process.<sup>173</sup> It would seem to be well within the legislature's constitutional discretion to decide that allowing private suits for injunctive relief thwarts the public interest in obtaining sufficient disposal capacity in the state, that the planning and permit process adequately protects the public against unreasonable risk and that landowners, the most obviously adversely affected parties, are adequately compensated if they can obtain damages for demonstrable injuries. Cities, of course, have no constitutional rights against the state, so the state may provide them with whatever remedies to protect the health of their citizens that it chooses.<sup>174</sup> It is significant that the Supreme Court has recently endorsed inverse condemnation as a remedy superior to specific relief in many cases involving damages from land use regulation.<sup>175</sup>

#### CONCLUSION

State hazardous-waste siting statutes represent a significant effort on the part of states to accommodate management approaches to hazardous-wastes treatment, disposal and storage and public opposition to any risk exposure. Each process now in place must be viewed as an experiment because there is no consensus that the siting problem is as urgent as many have assumed or that any mix of technical expertise and public participation will produce decisions that are widely accepted as legitimate. But, if one accepts the assumption that there is a need for modern off-site treatment, disposal and storage facilities that is not currently being met by the private sector, it is clear that any siting process must be strong enough to do the job. At a minimum a statewide body must have the power to preempt local land-use regulations and to reach an expeditious decision after relevant concerns are heard. It may be that this first generation of statutes will be inadequate to meet the

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the retention of full common-law remedies because "courts can offer . . . the public perception of legitimacy, a quality sorely lacking in hazardous waste regulation."

173. *Duke Power Co. v. Carolina Eenvt. Study Group*, 438 U.S. 59 (1978).

174. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

175. *San Diego Gas & Elec. Co. v. City of San Diego*, 101 S. Ct. 345 (1981).

need for facilities and that even stronger state agencies must be created. One model currently being discussed is a regional or even inter-state agency with the power of eminent domain. Or it may be that "public understanding and acceptance of waste management facilities may preclude the need for such strong state authority."<sup>176</sup> It will be necessary to monitor the efforts of the agencies now trying to site facilities to determine just how effective the current statutes will prove to be.

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176. Final Report of the Second Keystone Workshop on Siting Nonradioactive Hazardous Waste Management Facilities 11 (Feb. 1981). Giving private entities the power of eminent domain may still not solve all local opposition problems. *Cf.* *Earth Management, Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 445 (1981) (condemnation of proposed hazardous-waste-facility site for a park void because the power of eminent domain was exercised in bad faith.)

