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A. Dan Tarlock

IIT Chicago-Kent College of Law, dtarlock@kentlaw.iit.edu

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Siting New or Expanded Treatment, Storage, or Disposal Facilities: The Pigs in the Parlors of the 1980s

Community and industry efforts to site new treatment, storage, or disposal (TSD) facilities for hazardous wastes or to expand existing facilities have become increasingly controversial, and the controversies show no signs of abating. The nub of the problem is that few communities want a new or expanded TSD facility because people are not convinced that such facilities are safe. Opposition is widespread across the country and cuts across traditional economic and social classifications. The reason for the opposition is largely fear, based in part on past management practices, that the site will release chemicals, mainly into aquifers, that pose acute and long-term chronic risks to human health.¹ A 1982 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 . . . may be the most serious obstacle to successful siting of new facilities."² Public fear of TSD facilities has significant implications for siting processes because the fear—justified or not—removes the siting issue from the realm of a purely technical problem into the institutional bog of risk-benefit analysis.³

In the past five or six years the siting of TSD facilities has emerged as a discrete legal problem. Historically, the regulation of TSD facilities was a local land use function. A TSD facility was just another industrial use. Some zoning ordinances allow facilities to locate in an industrial zone as a matter of right, but most modern ordinances make all TSD facilities special exceptions or conditional uses or subject them to similar site evaluation re-

*Professor of Law, IIT Chicago-Kent School of Law, Chicago, Illinois.

¹See S. EPSTEIN, L. BROWN, and C. POPE, HAZARDOUS WASTE IN AMERICA 301 (1982).

²KEYSTONE CENTER, FINAL REPORT OF THE FIRST KEYSTONE WORKSHOP ON SITING NON-RADIOACTIVE HAZARDOUS WASTE MANAGEMENT FACILITIES 21 (Sept. 1980).

³See Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 WIS. L. REV. 83 for a lucid presentation of the argument that fear of possible future adverse consequences is an appropriate factor to be taken into account in regulatory and common law decisions.

quirements.⁴ In 1978 Michigan passed special siting legislation for TSD facilities,⁵ and most of the major industrial states have now passed some form of siting legislation. Indeed, the first generation of statutes is already undergoing revision.

I. TSD SITING OPPOSITION: AN UNFORESEEN PROBLEM WITH THE RESOURCE CONSERVATION AND RECOVERY ACT

Special siting legislation was thought necessary because Congress failed to anticipate the intensity of public opposition to new and expanded TSD facilities when it passed the Resource Conservation and Recovery Act of 1976 (RCRA).⁶ RCRA and subsequent Environmental Protection Agency (EPA) regulations seek to minimize the risks associated with hazardous waste management in several ways. The RCRA requires (1) identifying and listing hazardous wastes; (2) tracking wastes from generation to ultimate disposition; and (3) bringing existing operating TSD facilities up to minimum safety standards and then imposing progressively higher levels of safety standards on them. It imposes the most stringent design and operation safety standards on new or expanded TSD facilities. Fourthly, the act requires that operators properly maintain a facility after it is closed. Those statutory objectives are but methods of achieving the overall objective: the safe management of hazardous wastes.⁷ Unfortunately, RCRA has not achieved that objective, and its current structure may even frustrate the objective.

The implementation of RCRA has been plagued with many problems. The most important short-range ones are the delay in implementing the regulations and the change in regulatory philosophies caused by the switch in national administrators in 1980. The administration of RCRA between 1980 and 1982 intensified doubts about the level of safety promised by the regulations.⁸ The stop and start administration of RCRA has affected the siting problem in opposite ways. Some have suggested that the uncertainty over the level of design and performance standards that will be imposed on existing and new facilities has led to a delay in plans for ambitious off-site TSD facilities, and there is a pent-up demand for these facilities. But others have suggested that the administration of RCRA has decreased the need for new TSD facilities because industries have decided to opt out of the regula-

⁴See, e.g., *State ex rel. SCA Chemical Waste Services v. Koinsberg*, 636 S.W.2d 430 (Tenn. 1982) (county may pass an interim ordinance that requires a special permit for a TSD facility).

⁵MICH. COMP. LAWS § 299.501-526.

⁶42 U.S.C. §§ 6901-87 (1976 and Supp. IV 1980).

⁷See Deutsch, Tarlock, and Robbins, *An Analysis of Regulations Under the Resource Conservation and Recovery Act*, 25 J. URBAN AND CONTEMP. L. 145 (1983).

⁸See OFFICE OF TECHNOLOGY ASSESSMENT, *TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL* 270 (1983).

tory system by in-plant waste stream modifications and resource recovery.⁹

Long- rather than short-run problems with RCRA may create the most difficulty for those trying to site new TSD facilities. RCRA contains a structural flaw that has intensified public opposition to new or expanded TSD facilities. The act seeks to eliminate unsafe practices such as midnight dumping and to channel all waste streams into federal or state permitted facilities; it is not a technology-forcing statute to the same extent as the Clean Air and Clean Water Acts. RCRA allows a waste manager to choose among all available waste management options so long as federal minimum standards are met. In its present form RCRA does not require front-end modifications of waste streams to reduce the overall levels of wastes or provide incentives to choose nonlandfill management options. Amendments to RCRA proposed in 1983-84 would have required pretreatment for many wastes, but Congress has not yet changed the direction of national hazardous waste policy. At the present time cost considerations usually dictate the choice of land or deep well injection disposal strategies, compared to the more costly but environmentally preferable options such as incineration, waste recovery, or pretreatment. RCRA thus encourages the use of the management option most opposed by communities, and the EPA's regulations will not eliminate public opposition. For example, a recent Office of Technology Assessment study points out some of the problems with the groundwater monitoring requirements for land disposal facilities:

The monitoring requirements for landfills are severely limited in scope. With the exemption of land treatment facilities, primary emphasis is given to groundwater monitoring, and that requirement can be waived under some circumstances. Testing of air, soils, vegetation, and other organisms for possible contamination is not required.

In general, the detection monitoring requirements at land disposal facilities may not serve as a reliable and effective early warning of environmental contamination. Significant contamination can occur before statistically significant changes in water quality can be detected. Some industry commenters have suggested that the EPA-suggested statistical method used to determine changes in groundwater quality may tend to give a very high number of false positives (indicating contamination where none exists).¹⁰

Public opposition to new or expanded TSD sites may frustrate the accomplishment of RCRA's basic objective (to provide an adequate number

⁹In addition to uncertainties about the direction of RCRA implementation, an industry-citizens forum in New England also noted the following disincentive to the construction of large-scale off-site TSD facilities:

Major uncertainties intimidate most investors. The volume and kind of waste to be treated over time at any centrally located site is very hard to predict. This difficulty is intensified by the growing tendency of large generators to treat their own wastes on-site which may leave insufficient volumes from a large number of smaller generators to be treated at central locations. Additional uncertainty arises from the imposition of increasingly more stringent pre-treatment regulations and requirements for reduction at the source.

NEW ENGLAND HAZARDOUS WASTE SITING CONGRESS, TOWARD A SOLUTION 13 (1984).

¹⁰*Id.* at 376-77.

of safe facilities) primarily because siting is either a state or local responsibility. Therefore, control over the implementation of RCRA is shared between experts and nonexperts in a way not contemplated by Congress. RCRA tells TSD facility operators to obtain permits for new or expanded facilities, but it leaves the site selection process to the states on the assumption that federal and state programs would provide adequate disposal capacity. The Supreme Court has held that RCRA does not preempt state or local siting controls,¹¹ so states can control the availability of disposal sites. The only qualification on state authority is that the site selection process not discriminate against interstate commerce.¹² In the late 1970s and early 1980s it was widely thought that RCRA permit requirements¹³ would exacerbate the search for TSD sites. Many existing facilities would have to be phased out because they could not meet RCRA standards, a concern which may not materialize.

II. STATES ASSUME CONTROL OVER THE SITING PROCESS

RCRA requires states that wish to administer the program to adopt qualified state programs, but many states have gone beyond RCRA and enacted legislation to control the site selection and approval process. These statutes subject a facility to a screening process above the federal or state RCRA permit. The statutes are generally regulatory statutes because they attempt to distinguish between good and bad sites. Some statutes allow the state to impose more stringent controls on sites than those required by the federal government and to establish a preference list of management techniques biased toward nonland disposal options.¹⁴ A few statutes and administrative practices drift toward treating TSD facilities as public utilities. States use the siting process to inquire into the need for the facility and thus assume a public utility approach.

State siting statutes have attempted to reconcile two competing interests that are at stake in every siting conflict. First, the statutes attempt to promote continued industrial growth and its attendant benefits by procedures that assure the availability of an adequate number of TSD sites. Second, they balance the state interest in industrial growth with the equally compelling interest in public health protection by recognizing that, because the siting of a TSD facility is an exercise in risk assessment, absolute safety cannot be guaranteed. Most engineers and siting consultants argue that the technical competence exists to make all facilities secure, but many members of the public agree with the Sierra Club's assessment of a secure landfill:

¹¹Philadelphia v. New Jersey, 437 U.S. 617, n.4 (1978).

¹²*Id.*

¹³See generally Deutsch, Tarlock, and Robbins, *An Analysis of Regulations Under the Resource Conservation and Recovery Act*, *supra* note 7.

¹⁴11. REV. STAT. tit. 111½ § 1039(b).

It is questionable whether any landfill, however ideally constructed and monitored, can ever be truly "secure," except on a short-term basis. Sooner or later, toxic leachate will escape and contaminate subsurface soils. However, while landfills continue to be used, they can be made less insecure or more secure. Landfills are claimed to be "secure" when designed to prevent contamination of surface- and groundwaters and constructed to be impervious to external sources of water and to prevent accidental leakage of toxic leachate.¹⁵

Because all safety judgments about the risks of land disposal techniques are relative, the question becomes, how can the public be induced to accept such a relative safety judgment? The problem is hard, perhaps impossible, to solve because the state has a greater interest in trading safety considerations to further industrial growth compared to local residents near the site. Local residents are most directly exposed to the risks of the site, and a TSD facility is a capital-intensive operation that does not offer much of a tax or employment bonanza to a local community. Thus, there is little economic incentive for local communities to accept a new or expanded TSD facility.

A. General Land Use Perspectives

State siting statutes must be interpreted against a backdrop of land use control doctrines that seek to curb local parochialism because that is what most of those kinds of statutes attempt to do. 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.¹⁶ As a result, it will be difficult for courts to develop an effective law of local duties which would require municipalities to consider extralocal interests. There are a few doctrines in the common law of zoning that mandate that communities prefer regional over local interests.¹⁷ Courts have intervened to curb local parochialism when (1) lower units of government try to prevent the entry of higher ones; (2) federal constitutional values have been infringed; (3) communities have ignored constitutional or statutory interests as well as in instances where courts have thought that a local action was inconsistent with the fundamental purpose of land use controls.

The original theory of zoning was that each community would function as a Noah's Ark by using its zoning powers to assign a full range of uses to appropriate areas of the community. Exclusion of a use was thus inconsistent with the basic theory of zoning. But, as Richard Babcock pointed out in his book, *The Zoning Game*, exclusion has historically often been the name

¹⁵S. EPSTEIN, L. BROWN, and C. POPE, *HAZARDOUS WASTE IN AMERICA* 336 (1982).

¹⁶*Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978). *Cf.*, *Trimont Land Co. v. Truckee Sanitary District*, 193 Cal. Rptr. (D. Ct. App. 1983) (sanitary district cannot reserve capacity for outsiders when insiders need service).

¹⁷*See, e.g.*, *Borough of Cresskill v. Borough of Dumont*, 15 N.J.2d 238, 104 A.2d 441 (1954).

of the game in local zoning. "The resident of suburbia is concerned not with *what* but within whom."¹⁸ In the past two decades exclusion became a more pervasive function of local land use controls. Communities have used their land use powers to exclude entire social groups through density and related controls. In addition to wholesale social and economic exclusion, communities have targeted certain uses—locally undesirable land uses (LULUs)—such as half-way houses, transition living centers, adult entertainment centers, and now TSD facilities for exclusion.

What relevant law exists to curb local parochialism must be drawn from two related lines of cases. The first deals with the question of whether an "intruder" governmental unit or licensed private entity wishing to enter a community that has prohibited the activity by its zoning ordinance is immune from the host community's land use controls. The second line comes from scattered precedents that impose some duty on a community to take regional or statewide interests into account in their land use policies.

B. *Immunity from Local Land Use Controls*

1. TRADITIONAL IMMUNITY DOCTRINES

Traditionally, an "intruder" use's immunity from local land use controls was determined by a series of abstract tests that focused on the grant of the power of eminent domain, whether the function was governmental or proprietary, and the rank of the intruder in the hierarchy of governmental units.¹⁹ In the last decade many 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. Recent decisions have replaced the abstract tests with a more functional balancing approach, but balancing means different things to different jurisdictions. Both lines of cases are, in effect, preemption cases, but they differ from the usual local government preemption cases because the courts substitute judicially determined factors for the usual inquiry into legislative intent.

One line of cases, stemming from a landmark 1972 New Jersey case,²⁰ balances several 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

¹⁸R. BABCOCK, *THE ZONING GAME* 31 (1966).

¹⁹D. MANDELKER, D. NETSCH, and P. SALISICH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 159 (1983).

²⁰*Rutgers, State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972).

the host's existing land use patterns or, one would assume, by the exposure of the public to unreasonable risks.

A second line of balancing cases, from Florida, places a burden on the intruder to show that the host community acted unreasonably in applying its zoning ordinance.²¹ 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 not 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."²²

2. CONSTITUTIONAL IMMUNITY DOCTRINES

In recent years courts have become very active in policing community attempts to exclude LULUs using constitutionally based theories that result in judicial preemption. Constitutionally based cases have a somewhat limited application to the siting of TSD facilities. Much of the new law of preemption is based on the theory that the use is preferred because First Amendment values have been infringed. For example, adult entertainment businesses show or sell material presumptively protected by the First Amendment. The Supreme Court has held that a community may use its land use powers to scatter these uses throughout the community to protect the public from the evil of overexposure,²³ but a community must grant access within the community to the demand for adult entertainment. A number of communities did not take this part of *American Mini Theaters* seriously, and a number of adult entertainment ordinances or administrative practices have been struck down as exclusionary.²⁴ By contrast, a use that is not protected by the First Amendment, a TSD facility for example, may not demand unlimited (but regulated) entry.²⁵

Preemption Immunity Doctrines' line of LULU standard preemption cases does have more applicability for TSD facilities, although the analogy cannot be pushed too far. As a result of the movement to deinstitutionalize, patients formerly isolated in state institutions have been spread throughout communities in an attempt to integrate them into normal society. Communities have often vigorously opposed this integration, and courts have become increasingly active in curbing local attempts to exclude these facilities on the theory that important state policies are being frustrated. Although

²¹*Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 332 So. 2d 571 (Fla. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

²²332 So. 2d at 578-79.

²³*American Mini Theaters v. Young*, 427 U.S. 50 (1976).

²⁴*See, e.g., Basiardanes v. Galveston*, 682 F.2d 1203 (5th Cir. 1982).

²⁵*See, e.g., Marshfield Family Skateland v. Marshfield*, 450 N.E.2d 605 (Mass. 1983) (video games not protected by the First Amendment). *See generally* Ziegler, *Trouble in Outer Galactica: The Police Power, Zoning, and Coin-Operated Video Games*, 34 SYRACUSE L. REV. 453 (1983).

the Supreme Court has refused to override local zoning decisions that discriminate against nontraditional associational groupings, many state courts have implicitly held that some traditional groups, such as foster families, are constitutionally protected.²⁶ The basis for judicial intervention has become clearer as states have entered the area. Courts have found that state regulation is evidence of a legislative intent to preempt local land use controls over such facilities.²⁷

C. Communities' Duties to Consider Regional Interests

If an intruder use is not granted immunity, it may still be able to claim entry under the ad hoc judicial doctrines developed in the late 1960s and 1970s to combat so-called exclusionary zoning. Two leading cases from New Jersey²⁸ hold that exclusionary ordinances are unconstitutional under state law, but the decisions are limited to low and moderate income housing. To a limited extent judicial activism to force communities to admit new TSD facilities has been bolstered by the Supreme Court's decision of *City of Philadelphia v. New Jersey*,²⁹ which held that a state ban on the import of wastes generated out-of-state violates the commerce clause. *City of Philadelphia* thus suggests that states have an affirmative duty to accept a fair share of hazardous waste TSD facilities.

State courts have also invalidated exclusionary ordinance on a theory that exclusionary zoning is *ultra vires* because the essence of zoning is the division of territory among different land uses. This second line of cases is more applicable to hazardous waste siting decisions, as illustrated by the Pennsylvania cases that shift the burden of justification for an exclusion to the excluding community.³⁰ The Pennsylvania cases can be explained on the ground that the state remained hostile to zoning long after most states accorded local ordinances a presumption of validity, and the state's anti-exclusionary rules illustrate little more than the continued skepticism of the benefits of zoning.

Although Pennsylvania has excepted noxious uses from its anti-exclusionary doctrine, at least one community has been forced to accept a haz-

²⁶Costley v. Carmomin House, 313 N.W.2d 21 (Minn. 1982).

²⁷See, e.g., Brandon Township v. North-Oakland Residential Services, 312 N.W.2d 238 (Mich. App. 1982) and Northern New Hampshire Mental Health Housing, Inc. v. Town of Conway, 435 A.2d 136 (N.H. 1981). Courts have not yet made the connection between the deinstitutionalization and TSD facilities. If they do, it is possible that they might conclude that the state interest in promoting deinstitutionalization is greater because the risks to which the public are exposed are lower. However, states have applied the same preemption analysis to local attempts to exclude TSD facilities.

²⁸Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 191, 336 A.2d 713 (1975), *appeal dismissed and denied*, 423 U.S. 580 (1975) and Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 399 (1983).

²⁹437 U.S. 617 (1978).

³⁰See, e.g., Beaver Gasoline Co. v. Zoning Hearing Bd., 445 Pa. 571, 285 A.2d 501 (1971).

ardous waste facility. In reversing the local zoning hearing board's decision to exclude the facility, the court made a rather incredible 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."³¹ Local vetoes are now, however, preempted in Pennsylvania.

Anti-exclusionary zoning doctrines usually are premised on the theory that local communities must prefer regional to local interests, but judicial regionalism can be a two-way street. One exclusionary zoning case illustrates the potential for the standard anti-exclusion argument that communities have a duty to accept a fair share of TSD facilities while another illustrates the potential for a community to argue that the location of facilities elsewhere in the region has already fulfilled that duty. In *Associated Home Builders v. City of Livermore*³² the California Supreme Court suggested that substantive due process requires cities to justify growth control ordinances likely to be exclusionary. Ordinances "must have a real and substantial relationship to the public welfare. . . ."³³ This could be a basis for a court to conclude that a community's decision to exclude a TSD facility to protect itself against risks was based on insufficient evidence. However, the state of Washington gave California's regionalism theory an interesting and reverse twist. A 1978 Washington case suggests that a community may have a duty to exclude a use which is environmentally detrimental from a regional perspective. In *Save a Valuable Environment (SAVE) v. City of Bothell*³⁴ the state's supreme court 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." 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."³⁵

³¹General Battery Corp. v. Zoning Hearing Bd., 29 Pa. Commw. 498, 371 A.2d 1030, 1032 (1977). *But cf.* Bass River Associates v. Mayor of Bass River Township, 573 F.Supp. 205 (D.N.J. 1983) (community may exclude marina because of "gray water" pollution problems).

³²18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

³³557 P.2d at 489.

³⁴89 Wash. 2d 862, 576 P.2d 401 (1978).

³⁵576 P.2d at 404.

III. STATE PREEMPTION OF LOCAL CONTROL OVER THE SITING OF TSD FACILITIES

The central legal issue that must be resolved in designing a siting statute is preemption. If local communities retain control over siting, there is a high risk that no new major TSD facilities can be sited. In a few states the presumption issue has been decided by the courts on the basis of RCRA and the state's qualifying legislation. The issues are whether the legislature intended that state regulation would be exclusive or whether the statute is so comprehensive and pervasive to support a conclusion, especially in light of the nature of the regulated subject matter, that the state intended to occupy the field. In *Stablex Corp. v. Town of Hooksett*³⁶ the New Hampshire Supreme Court applied these criteria to hold that New Hampshire's statute preempted local authority to deny a TSD facility site approval because "the options offered by the federal government in the Resource Conservation and Recovery Act of 1976 devised a comprehensive and detailed program of statewide regulation, which on its face must be viewed as preempting any local actions having . . . the effect of frustrating it."³⁷

A. Authority to Preempt

Implied preemption decisions will be comparatively uncommon because most states, especially the major industrial ones, have chosen to resolve the issue legislatively. Once the state preempts, the authority to preempt will be challenged. In nonhome rule states, there is no question of the state's power to preempt because local units of government lack any inherent powers of sovereignty and are subject to complete control by state legislatures.³⁸ In home rule states opponents of state preemption will argue that the preemption conflicts with constitutional or statutory grants of home rule. A city or county's home rule powers do not extend to matters of exclusive statewide concern³⁹ or where regulation must be shared between the state and units of local government. Hazardous waste facility siting falls into this latter category. As a Michigan court said in holding that the state's 1978 siting act preempted local controls:

[T]he safe management and disposal of hazardous wastes is clearly an area which demands uniform, statewide treatment. At present, the state is confronted with a crisis as to where to properly dispose of hazardous wastes. Previously, much of the waste was dumped illegally or improperly stored in barrels, both of which caused severe environmental damage. Michigan is extremely limited in the number of facilities that handle this waste properly. This is due partly because no community wants a hazardous waste facility in its vicinity. Thus,

³⁶456 A.2d 94 (N.H. 1982).

³⁷456 A.2d at 100.

³⁸*Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

³⁹*See, e.g., Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d, 1278 (1982).

local interests strongly want to retain their control. However, the same reasoning easily justifies state control. The Legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state. The Legislature, instead, gave the power to a centralized decision-maker who could act uniformly and provide the most effective means of regulating hazardous wastes.⁴⁰

At least one jurisdiction also has reached the preemption result through the federal Commerce Clause.⁴¹

Once a state decides to preempt local authority, the issue is how. There is a variety of choices ranging from a total preemption of local authority to preemption procedures and standards that give substantial but not conclusive weight to local interests. Straight preemption has the advantage of cleanly resolving the legal issue as well as clearly locating the locus of decision. But straight preemption may be too crude a legal solution because it slights legitimate local interests and intensifies local political opposition. The basic rationale for state preemption of local land use authority is the need to prevent parochial interests from frustrating statewide ones. There is a high risk that local units of government will opt for a zero-risk siting strategy because that is what their citizens want. In contrast, state hazardous waste management policies will be based on principles of risk minimization rather than elimination and fair risk distribution within the state. State decisions will include a risk-benefit analysis, and states have a comparative advantage over local governments in assembling and assessing the information needed to make risk-benefit safety judgments. Local units of government that have the power to site facilities may shift the cost of information assembly to applicants and hire experts to assess the evidence. In general, however, the comparative advantage argument holds. But this preemption argument does not extend to the elimination of local voices. State efforts to distribute the risks of TSD facilities must to some extent be constrained by local concerns. In fact, the less effective the local voice is, the more politically vulnerable and generally unfair the entire siting process becomes.⁴²

B. *Methods of Preemption*

Six basic approaches to preemption have emerged. These are (1) straight state preemption; (2) straight preservation of local veto authority; (3) partial preemption; (4) state preemption of local vetoes upon state review and

⁴⁰*Township of Cascade v. Cascade Resource Recovery, Inc.*, 118 Mich. App. 580, 325 N.W.2d 500 (1982). *See also* *Livonia v. Dep't of Social Services*, 333 N.W.3d 151 (Mich. App. 1983); *Glennon Heights, Inc. v. Central Bank and Trust*, 658 P.2d 872 (Colo. 1983) and *Wambat Realty Corp. v. State*, 362 N.E.2d 581 (N.Y. 1977).

⁴¹*Browning-Ferris, Inc. v. Anne Arundel County*, 428 A.2d 269 (Md. 1981).

⁴²*See* Note, 1984 UTAH L. REV. ____ which criticizes Utah's siting statute, based on a statute drafted by this author, for the failure to give sufficient weight to local interests.

an extraordinary majority of the state siting authority; (5) state preemption after extensive local involvement and enhanced public participation; and (6) a requirement that the operator and the local community negotiate an agreement that offers bribes to the community sometimes with mediation and arbitration as a last resort—a model much favored by consultants and others who find the adversary process too crude.

These categories are somewhat arbitrary because there are subtle variations among the states. Nonetheless, survey of these approaches is useful to compare the possibilities and to determine the optimum balance between state and local interests. The main lesson that emerges from this survey is that most states have avoided up or down preemption choices and have sought preemption that accords the maximum possible local voice consistent with the objective of preemption—avoidance of local parochialism.

1. OPPOSING CHOICES: STRAIGHT PREEMPTION OR EXCLUSIVE LOCAL AUTHORITY

Maryland and Kentucky have made the cleanest opposite choices. Maryland's legislation⁴³ rests on the assumption that local units of government are given sufficient protection through the state siting review process and preempts all local land use controls. Similar legislation exists in Ohio⁴⁴ and Utah.⁴⁵ Strong local powers were confirmed in Kentucky.⁴⁶ Louisiana's statute⁴⁷ reversed a state supreme court opinion holding that the state had exclusive jurisdiction over hazardous wastes⁴⁸ and is limited to "local body authority over siting of facilities pursuant to any general land use planning, zoning or solid waste disposal ordinances." In Michigan, on the other hand, the power of local governments was sufficient to amend the siting act the year after it was passed to preserve local land use authority and to legislate a double veto system over existing but not new facilities.⁴⁹

2. PARTIAL PREEMPTION

Some states limit the power of local communities to regulate facilities or to zoning in place at the time of a TSD facility application. California's legislation limits local communities' power to regulate existing but not new

⁴³MD. NAT. RES. CODE ANN. § 3-705(d).

⁴⁴OHIO REV. CODE § 3734.05(D).

⁴⁵UTAH CODE ANN. § 26-14a-8.

⁴⁶K.R.S. 224.855(5). OAG 81-189 states that a county fiscal court (the legislative and administrative body) may without a planning and zoning commission pass an ordinance banning landfills, TSD facilities, incinerators, and disposal plants even when the proposals meet all state requirements.

⁴⁷LA. REV. STAT. § 30:1136(c).

⁴⁸State v. Rollins Environmental Service of Louisiana, Inc., 298 So. 2d 1122 (La. 1981).

⁴⁹See MICH. COMP. LAWS ANN. § 299-516. Township of Cascade v. Cascade Resource Recovery, Inc., 118 Mich. App. 580, 325 N.W.2d 500, 505 (1982) (decided after the amendment, held that the original version of the Act preempted local controls but refused to apply the statute retroactively).

facilities. The statute starts off with a general preemption disclaimer,⁵⁰ but subsequent sections protect existing facilities and facilities operating under existing conditional use permits from changes in local zoning:

Notwithstanding any provision of law to the contrary, except as provided in Section 25149.5 or 25181 of this code or Section 731 of the Code of Civil Procedure, no city, county, whether chartered or general law, or district may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit relating to an existing hazardous waste facility so as to prohibit or unreasonably regulate the disposal, treatment, or recovery of resources from hazardous waste or a mix of hazardous and solid wastes at that facility, unless after public notice and hearing the director determines that the operation of the facility may present an imminent and substantial endangerment to health and the environment. However, nothing in this section shall authorize an operator of that facility to violate any term or condition of a local land use permit or any other provision of law not in conflict with this section.⁵¹

...

(a) No city, county, or city and county, whether general law or chartered, which has issued a conditional use permit for a hazardous waste facility shall thereafter adopt an ordinance, rule, or regulation, or issue or amend any permit, which adoption, issuance, or amendment imposes additional restrictions on the types of hazardous waste which previously have been authorized to be accepted for disposal, treatment, or storage under the terms and conditions of any previously issued conditional use permit for that facility.⁵²

Statutes that recognize vested rights reward communities that have the foresight to exclude TSD facilities before one demands entry, as New York's siting law illustrates. The siting board must deny an application for site approval if the site is inconsistent with local zoning in force on the date of the application.⁵³

The California Hazardous Waste Management Council is considering legislation to override local vetoes of new, offsite, multiuser facilities:

In October 1983, the Council developed specific criteria for evaluating the merits of an appeal. However, these criteria are "for discussion purposes only" and have not been endorsed by the Council. The criteria include statewide/regional need for the facility, whether the project employs best available technology, whether it will improve upon existing methods of handling or disposing of wastes which would be brought to the facility, the basis of local opposition or concern, and the ability of the project proponent to mitigate these concerns, as well as any significant environmental impacts of the facility which might adversely affect community health or safety. The composition of the appeals body has not been finally decided, although the council has proposed a seven-member body consisting of four members of local government and three members of state government, including the chairman of the Air Resources Board, the chairman of SWRCB and the director of DOHS.⁵⁴

⁵⁰CAL. HEALTH AND SAFETY CODE § 25147.

⁵¹*Id.*

⁵²*Id.* § 25149.1

⁵³N.Y. ENVTL. CONSERV. LAW § 21-1107.

⁵⁴AMERICAN BAR ASSOCIATION, NATURAL RESOURCES LAW NEWSLETTER 8-9 (Winter, 1984).

3. PREEMPTION AFTER STATE ADMINISTRATIVE REVIEW

Connecticut and Florida permit local communities to make initial decisions, but provide for extensive state review and with preemption as a last resort. These procedures weight the decision toward the local veto because the burden shifts to the proponent of the TSD facility to show that a community has acted unreasonably. In Connecticut a two-thirds vote of the siting board is necessary to override a local veto.⁵⁵ In Florida local governments have ninety days to veto a proposed site, subject to a three-stage appeal process.⁵⁶ 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 the variance. 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, but the discretion to issue a variance is severely limited.⁵⁷

Pennsylvania's override procedure is less cumbersome, but state officials are equally exposed to political liability if a local veto is reversed. The state may refuse to follow a local government's recommendation to deny a facility permit, but if it does, a written justification must accompany the decision.⁵⁸ Two recent cases from Pennsylvania return to local communities some of the ability to influence the siting of a TSD facility taken away by the legislature. *Susquehanna County v. Department of Environmental Resources*,⁵⁹ and *Franklin Township v. Commonwealth*,⁶⁰ hold that units of local government have standing to challenge both the issuance and enforcement of hazardous waste facility permits. Pennsylvania follows a four-part test for standing that includes determining whether a plaintiff possesses a substantial interest in the subject matter of the litigation. On this issue the *Franklin Township* court observed:

Aesthetic and environmental well-being are important aspects of the quality of life in our society, and a key role of local government is to promote and protect life's quality for all of its inhabitants. Recent events are replete with ecological horrors that have damaged the environment and threatened plant, animal and human life. We need only be reminded of the "Love Canal" tragedy and many like situations faced by communities and local governments across the country to recognize the substantial local concerns.⁶¹

⁵⁵CONN. GEN. STAT. ANN. § 228-124.

⁵⁶FLA. STAT. ANN. § 403.723 (1)-(4).

⁵⁷*Id.* § 403.723 (7)(c). Florida has had considerable experience with executive land use decisionmaking. See Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code*, 18 URBAN LAW. ANN. 3 (1980).

⁵⁸PA. STAT. ANN. tit. 35, § 6018.504.

⁵⁹458 A.2d 718 (Pa. 1983).

⁶⁰452 A.2d 718 (Pa. 1982).

⁶¹*Id.* at 720.

Illinois has opted for a system of concurrent state and local vetoes of new TSD facilities with state administrative review that is even more favorable to local interests. The "not in my backyard syndrome" is strong in the state where "turf protection" has real meaning. Illinois requires both state and local approval of all new regional pollution control facilities. A regional pollution control facility is any waste management site that serves an area that extends beyond the boundaries of the local unit of government. The statute contains six criteria. Denials are reviewable by the Pollution Control Board, a state administrative agency that hears appeals from decisions of the Illinois Environmental Protection Agency, which is charged with implementing and enforcing state environmental policy.⁶² A recent survey of pending decisions found that local governments have approved twenty-three nonhazardous regional pollution control facilities and three hazardous waste facilities. Local governments have vetoed seven nonhazardous facilities and three hazardous facilities. Two of the three local approvals were in industrial areas of Cook County, and the third was for an incinerator-storage facility that accepted both nonhazardous and hazardous wastes.⁶³ Various appeals are working their way through the administrative and judicial systems. It is, therefore, too early to tell how the Illinois approach is working, but preliminary indications are that the concurrent veto scheme will make it difficult and costly to site new TSD facilities.

Preemption in Florida, Illinois, and Pennsylvania gives considerable weight to local objections, but in other states local units of government have not fared quite so well with preemption. Indiana created a solid waste facility site approval authority in 1981 that consists of five permanent statewide members and four local ad hoc members chosen from the county and town closest to the proposed facility site. The authority's function is to issue certificates of environmental compatibility; these certificates are issued after local authorities and planning boards are given notice of a proposed facility and a formal public hearing is held. After these steps, all local land use authority is preempted, subject to a duty on the part of the authority to consider local plans and ordinances and, "to the fullest extent practicable," integrate local ordinances into state certificates.⁶⁴ The authority has a duty to provide a written explanation for its decision. In Indiana due process guarantees a review of all administrative decisions regardless of whether a statutory basis exists.⁶⁵ Thus, while preemption in Indiana is complete, preemption must be justified to avoid a reversal in court. This provides a limited avenue for local appeals because proving that the authority's risk assessment is arbitrary and capricious will be difficult.

⁶²ILL. REV. STAT. ch. 111½, § 1001 *et. seq.*

⁶³ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PROGRESS Vol. VIII No. 6 (Special Edition), October, 1983.

⁶⁴I.C. §§ 13-7-8.6, 13-7-13.

⁶⁵*Salk v. Weinraub*, 390 N.E.2d 995 (Ind. 1979).

4. PREEMPTION WITH ENHANCED PUBLIC PARTICIPATION

Minnesota and New Jersey have completely preempted local land use controls but have attempted to reduce preemption's sting by giving local community members of the public adequate opportunity for input in a multi-step siting process. Minnesota has established an elaborate two-tier siting process that can serve as a model of both industry and citizen representation, but can also serve as a prescription for excluding waste facility sites. A waste management board prepares plans, reports, and preferred⁶⁶ site inventories with the assistance of a broad-based hazardous waste advisory council.⁶⁷ The board's specific duty is to select four candidate sites across the state, each in a different county,⁶⁸ and to issue certificates of need. Local communities are entitled to an early warning that a site in their area has been selected as a candidate site. Localities cannot bar the entry of a facility, but they can impose reasonable "construction, inspection, operating, monitoring, and maintenance" conditions.⁶⁹ It appears that a reasonable condition is any one not reversed by the board. Public participation goes on, including the EIS process,⁷⁰ and after all the normal processes are exhausted, the legislature may intervene in the site selection process if, *inter alia*, a legislative commission finds that there are substantive issues that were not concluded during the administrative certification process.⁷¹

New Jersey's more technically oriented siting statute⁷² also tries to enhance the weight given local concerns. The Department of Environmental Protection must first adopt technical siting criteria. The Department then prepares and adopts a plan that includes a determination of needed TSD facilities and designates new sites based on the projected state needs.⁷³ State grants are available to affected municipalities to conduct site availability and safety studies. An adjudicatory hearing is held after the study is completed and prior to the inclusion of the site on a list of recommended sites.⁷⁴ When an applicant applies for a state permit, the affected local community has the right to review the application and to receive funds from the applicant to finance the review.

Minnesota and New Jersey are pioneering with the application of the public utility model to siting decisions. Both states require that the siting authority make an independent determination of the need for the facility, rather than rely on the applicant's market projections as many other states do. The determination of need can be stringent. Minnesota requires that the

⁶⁶MINN. STAT. ANN. § 115A.09.

⁶⁷*Id.* at §115A.11-.12.

⁶⁸*Id.* at 115A.21.

⁶⁹*Id.* at § 115A.27(3).

⁷⁰*Id.* at § 115A.25.

⁷¹*Id.* at § 115A.2.

⁷²N.J. STAT. ANN. tit. 13, § 13:1E-49 *et. seq.*

⁷³*Id.* at § 13:1E-58(b)(4).

⁷⁴*Id.* at §13:1E-59.

siting board consider the economic feasibility of the site "including proximity to concentrations of generators of the types of hazardous wastes likely to be proposed and permitted for disposal, . . ."⁷⁵ and no certificates of need for the facility can be issued until the board determines "that there are no feasible and prudent alternatives including waste reduction, separation, pretreatment, processing and waste recovery. . . ."⁷⁶

New Jersey's act contains a similar technology-forcing handle.⁷⁷ Administrative determinations of need are difficult to make and are subject to great error as the sad tale of recent energy demand scenarios illustrates. But, if the agency can pull off an accurate need projection, siting facilities should be easier since lack of understanding of the need for a new TSD facility has been repeatedly cited as a major reason for public resistance.

C. Preemption with Negotiated Bribes

Massachusetts also has enacted a two-tier siting process that contains a limited preemption procedure but primarily relies on the promotion of community acceptance of these facilities to site TSD facilities. Massachusetts state and local site review councils are supplemented by developer bribes to the community. Rhode Island has adopted a similar approach.⁷⁸ Although on paper the regulatory authority of local communities appears to be quite strong, the statute creates substantial pressure on the state's towns to accept a facility. The key permission under the Massachusetts procedure is not approval by the state siting council, 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. The officials of both host and abutting communities are represented on the local committee, and the statute contemplates substantial "bribes" for both, such as services and transfer payments and operating condition. For example, transportation routes and hours, as well as waste classes, might be negotiated. 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 before either a single arbitrator or a three-person panel.⁷⁹

The success of bribes as an alternative to regulatory mechanisms that address the preemption issue and as a way to head the "not in my backyard" syndrome is not assured. Cities would seem immune to bribery on this issue because the risks are unquantifiable and no substantial economic return is immediately forthcoming. As the authors of a study of the Massa-

⁷⁵MINN. STAT. ANN. § 115A.20(a).

⁷⁶*Id.* § 115A.24.

⁷⁷N.J. STAT. ANN. tit. 13, §§ 13:1E-58(b)(7) and 13:E-61(b)(1).

⁷⁸R.I. GEN. LAWS § 197-5.

⁷⁹MASS. ANN. LAWS. ch. 2110 § 15.

chusetts law concluded: "Whether the combined efforts of the educational campaign and incentives offered through the negotiation process are sufficient to overcome local opposition remains to be seen."⁸⁰

Massachusetts deals with local zoning by precluding a community from amending its zoning laws after an applicant has filed a notice of intent with the Hazardous Waste Facility Site Safety Council.⁸¹ The state supreme court has held that the statute does not violate the constitution's home rule amendment.⁸²

D. Nuisance Actions: An End Run Around Preemption

Siting statutes, with one exception, only preempt local land use controls. Both private parties and local units of government with standing remain free to challenge TSD facilities as a nuisance or to bring tort action for injuries caused by the facility. Legislative approval of an activity is generally not a defense to a common-law nuisance action or tort actions brought by injured parties. The apparent justification for this long-standing doctrine is a judicial conclusion that the legislature did not consider all possible adverse effects of an activity.⁸³ Historically, it is difficult to enjoin an activity in advance of its operation and to convince a court that the balance of equities favors injunctive relief over money damages. These barriers have been overcome in recent suits against TSD facilities, and courts may be influenced by the line of cases holding that strict liability is the appropriate standard to apply to abandoned facilities.⁸⁴

Most new land uses cannot be enjoined in advance of operation because plaintiffs will be unable to show that the proposed use will cause imminent irreparable injury.⁸⁵ 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 preconstruction injunction suits. There is an almost conclusive presumption that the balance of equities lies with the public interest in the operation of the facility.⁸⁶

⁸⁰Bacow and Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 303-4 (1982). See also M. O'HARE, L. BACOW, AND D. SANDERSON, *FACILITY SITING AND PUBLIC OPPOSITION* (1983).

⁸¹MASS. ANN. LAWS ch. 21D § 12.

⁸²*Town of Warren v. Hazardous Waste Facility Site Safety Council*, ____ N.E. 2d ____ (Mass. 1984). For an extensive analysis of the Massachusetts law of home rule in support of the conclusion that the siting act does not violate the home rule powers of Massachusetts municipalities, see Provost, *The Massachusetts Hazardous Waste Facility Siting Act: What Impact on Municipal Power to Exclude and Regulate?*, 10 B.C. ENVTL. AFFAIRS L. REV. 715 (1983).

⁸³See, e.g., *Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes*, 449 A.2d 472 (N.J. 1982).

⁸⁴*New Jersey v. Vetron*, 94 N.J. 254, 483 A.2d 893 (1983).

⁸⁵*Green v. Castle Concrete Co.*, 181 Colo. 309, 509 P.2d 588 (1973).

⁸⁶See *Brent v. City of Detroit*, 27 Mich. App. 628, 183 N.W.2d 908 (1970).

These doctrines are still good law, but in recent years courts have begun to accept a showing of risk rather than demanding proof of cause in fact, and the doctrine of imminent irreparable injury has begun to change accordingly.⁸⁷ The initial decisions related to legislative and administrative discretion to protect the public from proven health risks such as cancer. Now it appears that courts may be willing to lower the quantum of proof necessary to prove future harm in actions for injunctive relief.

The widely noted Illinois Supreme Court decision, *Village of Wiltonville v. SCA Services, Inc.*,⁸⁸ illustrates the developing law of equitable risk-benefit analysis. The village sued to require the removal of a hazardous waste landfill that had been approved by federal and state agencies. 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. The trial court, however, 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. 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 certain and extreme future harm." The court's reasoning will create some confusion because the opinion is less conceptually clear than the appellate court's. 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. Nevertheless, the court's summary of the evidence and of 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.⁸⁹

A 1982 Rhode Island case enjoined a hazardous waste dump with no

⁸⁷See Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty, and Emotional Distress*, 1980 WIS. L. REV. 83.

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

⁸⁹426 N.E.2d at 836-37.

mention of the balance of equities doctrine.⁹⁰ In 1977 “an enormous explosion erupted into fifty floor flames in a trench” on the site, and the court concluded that the evidence showed that “defendant’s dumping operations have already caused substantial damage to defendants’ neighbors and threaten to cause incalculable damage to the general public.”⁹¹ The decision may signal holding that injunctive relief is the preferred remedy when hazardous wastes are involved because of the inability to express monetarily private and public losses.

The specter of *Wilsonville* suits has led at least one state to preempt injunctive actions.⁹² Utah’s attempt to reinforce the integrity of the siting process has generated controversy because landowners’ rights are sharply reduced. However, while a landowner does have a constitutional right to some form of nuisance remedy, 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.⁹³ It would seem to be well within a legislature’s 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 obvious parties adversely affected, are adequately compensated if they can obtain damages for demonstrable injuries.⁹⁴ Finally, it is significant that the Court has recently endorsed inverse condemnation as a remedy superior to specific relief in many cases involving damages from land use regulation.⁹⁵

IV. BEYOND PREEMPTION

Preemption will be generally only politically defensible in the context of a comprehensive siting process. In brief, a siting process singles out a use, TSD facilities, for intense scrutiny to consider all possible adverse effects. The basis for the process is the efforts of local communities to designate “sensitive uses” such as schools and churches as special exceptions or conditional uses to subject them to extra scrutiny and to impose operating conditions on them. The theory of special land uses was carried to the state level in the 1970s with the enactment of power plant and industrial facilities statutes to deal with environmentally sensitive uses with a regional or statewide

⁹⁰Wood v. Picillo, 443 A.2d 1244 (R.I. 1982).

⁹¹443 A.2d at 1245 and 1248.

⁹²See UTAH CODE ANN. 26-14a-7.

⁹³Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978). See also Blakeley v. Gorin, 365 Mass. 590, 313 N.E.2d 903 (1974).

⁹⁴Cities, of course, have no constitutional rights against the state, so the state may provide them with whatever remedies it chooses to protect the health of their citizens. Trenton v. New Jersey, 262 U.S. 182 (1923).

⁹⁵San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981).

impact. TSD facility legislation is the latest in the long line of statutes that ultimately make any land use of importance a special use.

Effective public participation is crucial to establishing the legitimacy of a TSD facility. If, as many observers of siting conflicts argue, a siting controversy is not a zero sum game, then it should be possible for a facility operator to convince a community that a well-chosen site will be safe. To carry this burden, which has been politically imposed on facility proponents, substantial information exchange as well as more formal agreements will be necessary. The paradox of public participation is that a proposed facility excites much public involvement but members of the public do not feel that they are full participants in the decision. States are experimenting with a variety of procedures to respond to this dilemma. The three most popular strategies surveyed in this and succeeding sections are enhanced public participation, negotiated bribes, and the use of industry-government-community forums to facilitate consensus on a site.

Siting processes generally have three components. The first is the delegation of expanded discretion to a decisionmaker, usually a bomber crew siting council. The second is an expanded opportunity for public input beyond a formal, speechmaking hearing. The third is an optional or, as is increasingly the case, a mandatory planning process. The three components are all products of the environmental decade and attempt to balance environmental against developmental values, but they contain mutually incompatible elements. For example, the delegation of expanded discretion to a body assumes that siting issues are primarily technical and thus rational. If "good experts" study all aspects of a problem, an acceptable solution can be found. Requirements for expanded public participation and the placement of lay members on councils assume the opposite, that siting is not a technical and rational process but something else.

The word "political" is used increasingly to describe a solution that is not bounded by pre-established standards of validity. This, however, is a misuse of the term. What is important is that the goal of participants in a nonrational process designated to maximize effective public participation may not be to reach a solution but merely to prevent any action from being undertaken. Planning tries to bridge the gap between expertise and opposition.⁹⁶ It is not surprising that TSD facility siting statutes often contain a mix of rationally and irrationally based standards and processes because they are products of the political process. It is important to distinguish between them to determine who is likely to benefit from a given process and thus the likely effect of the process on the ultimate ability of the state to site new and expanded TSD facilities.

⁹⁶See CONSERVATION FOUNDATION, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL AUDUBON SOCIETY, *SITING HAZARDOUS WASTE MANAGEMENT FACILITIES: A HANDBOOK* (1983) for an attempt to bridge this gap through public involvement and developer inclusion.

A. *Delegation of Expanded Discretion*

1. SITING AS A TECHNICAL PROBLEM: ENGINEERS v. THE PUBLIC

To an engineer all problems are design problems. If a TSD facility is unsafe, the reason must be that it was placed in a geologically unsuitable place or was incorrectly designed. Public opponents of TSD facilities are less likely to be persuaded that objective criteria exist to determine when a facility is safe. But, while public perceptions must be addressed, the fact remains that technical criteria are essential to evaluating site safety. Legislatures generally regard the siting process as primarily a technical issue.

There is a growing body of literature, mostly written by consulting firms, on siting criteria that has influenced the legislative design of siting processes.⁹⁷ After an inventory of an area's waste management needs is made, screening criteria are applied to the target sites. The purpose of the first screen or series of screens is to exclude certain sites from further consideration. These screens focus on such factors as terrain, the geological and hydrological conditions of the soil, the site's proximity to population concentrations and water supplies, and its potential for supporting higher land uses. There are, of course, some problems with the exclusion process. For example, an effort to exclude floodplains from the list of potential site locations is difficult in some regions, where the whole area has been classified as a floodplain. After the screens have excluded certain locations, an attempt is made to find sites that can physically support the facility and that will not excite too much public opposition.

The New Jersey statute⁹⁸ is a classic example of faith in the ability of technical siting standards to screen out unsafe sites. The state's Department of Environmental Protection is directed to adopt standards implemented by general and specific performance criteria. The statute calls for standards that "prevent any significant adverse environmental impact" and mandates specific siting prohibitions. Under the law TSD facilities are prohibited within

[(1) two thousand] feet of any structure which is routinely occupied by the same person or persons more than 12 hours per day, or by the same person or persons under the age of 18 for more than 2 hours per day, except that the commission may permit the location of a major hazardous waste facility less than 2,000 feet, but in no case less than 1,500 feet, from such structures upon showing that such a location would not present a substantial danger to the health, welfare, and safety of the persons occupying or inhabiting such structures;

(2) Any flood hazard areas . . . ;

(3) Any wetlands designated [pursuant to state law];

(4) Any area where the seasonal high water table rises to within 1 foot of

⁹⁷See Tarlock, *Anywhere but Here: An Introduction to State Control of Hazardous Waste Facility Location*, 2 U.C.L.A.J. ENVTL. LAW AND POLICY 1, 25 N. 77 (1982).

⁹⁸N.J. STAT. ANN. § 13:1E-57.

the surface, unless the seasonal high water table can be lowered to more than 1 foot below the surface by permanent drainage measures approved by the department; and

(5) Any area within a 20-mile radius of a nuclear fission power plant at which spent nuclear fuel rods are stored on-site.⁹⁹

Michigan's siting statute contains a typically inclusive list of technical and environmental factors that must be considered. These factors include the risk and impact of an accident during waste transport; the risk and impact of ground or surface water contamination by leaching or runoff; the risk of fires or explosions from improper storage or disposal; the impact on the affected municipality in terms of health, safety, cost, and consistency with planned and existing development; and the "nature of the probable environmental impact. . . ."¹⁰⁰

2. NONTECHNICAL CRITERIA

Public fear has created an atmosphere in which compliance with state and federal site selection and operational standards will not necessarily ensure community acceptance of a site. In this sense a modern TSD facility is more like a nuclear power plant than is its predecessor, an old sanitary landfill. The hard, if not impossible, question for regulators and TSD facility operators is how nontechnical, but keenly felt, factors can be rationally brought into the siting process.

The easiest method is to add them to the laundry list of other relevant criteria. For example, the Michigan legislature added the following catch-all obligation to the end of the list of factors noted earlier: "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. . . ."¹⁰¹ While Michigan's statute expresses the hope that technical measures will overcome public opposition, Kentucky's seems to have gone farthest in recognizing the legitimacy of nontechnical factors divorced from mitigation. The licensing agency there is required to consider "community perceptions and other psychic costs."¹⁰² It is hard to see how these additions to the laundry list of relevant factors meaningfully will constrain a siting authority's discretion, unless the record shows that community opposition was affirmatively ignored in the siting process.

⁹⁹*Id.* at § 13:1E-57 (a)(1).

¹⁰⁰MICH. COMP. LAWS ANN. § 299.520(7)-(8).

¹⁰¹*Id.* at § 299.520.

¹⁰²KY. REV. STAT. § 244.866(1)(c). The Supreme Court has endorsed the relevance of psychological costs under NEPA where there is a reasonably close causal connection between the change in environment and the effect. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 103 S.Ct. 1556 (1983).

B. *Enhanced Public Participation: The Search for Legitimacy*

The past two decades have been marked by a widespread public rejection of the legitimacy of our political institutions. Administrative agencies have suffered a large-scale slide in public confidence because the agencies were not able to solve the problem of lack of accountability. They were not able to convince the public that regardless of the lack of a constitutional basis to act the agencies were making the right decisions. Starting in the late 1960s, courts became sensitive to criticisms of the administrative process and moved aggressively to intervene in the administrative process to promote accountability. Two methods were used. The range of interests with standing to challenge and to intervene in administrative action was broadened to increase the representativeness of agencies. And accountability was fostered by more intensive "hard look" theories of judicial review that probed the record to determine if all factors deemed relevant by Congress were adequately considered.¹⁰³

The judicial move to make agency decisions legitimate by making them more representative paralleled a general governmental search, which became popular during the War on Poverty for ways to induce meaningful public participation in agency decisions. Meaningful public participation is somewhat inconsistent with the application of expertise to decisions and with expeditious decisionmaking and thus has often failed to build a consensus for tough decisions that sharply identify winners and losers. Nonetheless, the search for legitimacy through enhanced public participation goes on, and the full search agenda is illustrated by siting statutes.

Clearly an additional benefit of the "citizen committee" report would be a means of providing information back to the community at large. As an educational tool, this report has a distinct advantage in that it is produced by citizens selected from within the community and, therefore, should enjoy a greater measure of credibility than reports or recommendations developed from the outside.

A properly structured report would provide the reader with a clear definition of both the type and magnitude of the project impacts. By understanding the specific impacts of the project, the individual could make an informed decision on whether to oppose or approve of a given project.

This nonconfrontational fact-finding committee structure would, at the very least, provide a better understanding of community interests and concerns by the applicant and the permitting agencies. It would hopefully lead to better designed and more acceptable facilities. At its best, this process should promote an understanding within a community of the true potential impacts of a facility.¹⁰⁴

¹⁰³See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

¹⁰⁴THE KEYSTONE CENTER, *SITING WASTE MANAGEMENT FACILITIES IN THE GALVESTON BAY AREA: A NEW APPROACH* 30 (The Keystone Center 1983). The composition and mission of the Committee are described in more detail in THE KEYSTONE CENTER—PROCESS HANDBOOK, *A NEW APPROACH TO SITING HAZARDOUS WASTE MANAGEMENT FACILITIES* (Texas Dept. of Water Resources 1984).

Lawyers always have paid a great deal of attention to procedure, but they have viewed procedural legitimacy in very formal and narrow terms. Under the lawyer's traditional view, decisions are classified as either adjudicative or legislative. When the truth of evidentiary facts is at issue, an affected person generally is given the right to a trial-type hearing. If the issues are more ones of policy than fact, the right to be heard generally is limited to a speechmaking hearing. In recent years courts and legislatures have somewhat collapsed the adjudicative-legislative distinction and have experimented with a variety of hybrid procedures to promote greater fairness and legitimacy. The Supreme Court has not sanctioned the use of extraconstitutional or statutory procedures,¹⁰⁵ but legislatures have continued to be interested in the use of hybrid and enhanced procedures.

TSD facility siting legislation continues the legislative search for procedural fairness and ultimate legitimacy by moving beyond the classic adjudicative-legislative dichotomy and the recent hybrids and seeking "effective public participation." While some statutes continue the classic distinction and others deem certain formerly legislative decisions to be adjudicative, many of the most progressive statutes seek to create opportunities for enhanced public input as a means of assuring that equal weight is given to technical and nontechnical factors.

There are at least six models of public participation suitable for the siting of TSD facilities: (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 mediation and arbitration processes.

Minimum formal public participation describes a nonadjudicatory, or speechmaking, hearing, with or without a record. Formal due process is usually defined as an adjudicatory hearing. Some siting statutes require an adjudicatory hearing before a permit is granted¹⁰⁶ although an adjudicatory hearing may not be constitutionally required.¹⁰⁷ Parties who meet the jurisdiction's rules for standing or intervention may become formal parties to the proceeding. However, since the burden rests on the interested party to incur the costs of joining the proceedings, the presence of litigants opposing a permit often will depend on the existence and interest of a citizens' organization. This model is widely used, but the defects are obvious. Citizens seldom feel that such a hearing adequately involves them in the decision. In enhanced public participation the public is involved in the proceedings at relatively early stages of decisionmaking. This technique is being increasingly used in the consideration of environmental impact statements, for one ex-

¹⁰⁵*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

¹⁰⁶*People v. Pollution Control Board*, 446 N.E. 2d 915 (Ill. App. 1982).

¹⁰⁷*See, e.g.*, OHIO REV. STAT. ANN. § 3734.05(c)(3).

ample, and is required in the TSD facility siting statutes in Massachusetts¹⁰⁸ and Minnesota.¹⁰⁹ The salient features of enhanced public participation include targeted notice, advance distribution of relevant documents, and multiple hearings held in the locality of the proposed facility. Minnesota seeks to involve the public in the process prior to the regulatory decision by allowing public input into the planning and site identification process.

Direct electoral participation through the initiative and referendum process is perhaps the most favorable means of public participation for those who oppose a facility. There is no requirement that votes be cast rationally. The absence of voter rationality is a problem with any election, but the problem is magnified with single-issue, limited electorate elections. State courts, following the lead of the Supreme Court's decision in *City of Eastlake v. Forest City Enterprises, Inc.*,¹¹⁰ have generally sustained referendums on specific reasonings against due process challenges.¹¹¹ Of course, state siting legislation that preempts local land use controls also precludes the use of referenda. New Hampshire recently held that a local attempt to exclude a facility through a referendum election was preempted by state legislation.¹¹²

Interest representation has developed as a response to the adversary process, which many say focuses on the wrong issues. Since the mid-70s, 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 atmosphere. Two options currently being explored are mediation and arbitration. Mediation may involve either intervention by a competent (neutral or nonneutral) party before a situation becomes a focused conflict or an attempt to reach agreement among parties with well-defined adverse interests. It attempts to find a relevant negotiating group to approve a solution that may or may not be in the group's power to implement. Mediation is an evolving art that is highly dependent on the trust placed in the mediators by the participants. At the present time there are scattered case studies but no rules as to how the process should work.¹¹³

Arbitration is a more formal process in which the relevant parties voluntarily submit the dispute for a binding decision. Considerable effort is now being made to arbitrate disputes in which the many parties that are necessary

¹⁰⁸See MASS. GEN. LAWS ANN. ch. 21D.

¹⁰⁹See MINN. STAT. ANN. § 115A.11.

¹¹⁰426 U.S. 668 (1976).

¹¹¹See, e.g., *Florida Land Co. v. Winter Springs*, 427 So. 2d 170 (Fla. 1983) and *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981). Compare, however, California's approach which subjects referendums to judicial review. *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565 (1980), *opinion on remand*, 126 Cal. App. 3d, 178 Cal. Rptr. 723 (1982) (initiative was arbitrary because it was designed to benefit a small number of adjoining property owners rather than the "general public welfare").

¹¹²*Stablex Corp. v. Town of Hookset*, 122 N.H. 1091, 456 A.2d 94 (1982).

¹¹³See generally Susskind and Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFFAIRS L. REV. 311 (1980-1981); see also Watson and Danielson, *Environmental Mediation*, 15 NAT. RESOURCES LAW. 687 (1983); Wiener, *Is Arbitration an Answer?*, 15 NAT. RESOURCES LAW. 499 (1982); Cf., Edelman and Walline, *Developing a Cooperative Approach to Environmental Regulation*, 16 NAT. RESOURCES LAW. 489 (1983).

to a final resolution have no formal representative in the decisionmaking process.

Massachusetts was the first state to move beyond mere preemption to the negotiation approach to TSD facility siting. Under its law¹¹⁴ a developer may appeal to a state siting council for permission to construct a facility in an area locally zoned for industrial uses. If the council decides that the proposed facility is feasible, the host community is brought into the siting process and becomes eligible for state grants. An agreement is then negotiated between the operator and host community and is a necessary condition to construction of a TSD facility. If the parties cannot come to an agreement, the matter goes to binding arbitration. Abutting communities also may petition the state for developer-funded compensation if they demonstrate adverse effects from the facility. Rhode Island's law is similar.¹¹⁵

Wisconsin permits any host community to compel negotiation or arbitration (assisted by a mediator) by enacting a siting resolution.¹¹⁶ The local negotiating committee is composed of city and county officials. The only subjects that are statutorily excluded from negotiating are waivers of state standards and the need for the facility. Arbitration, on the other hand, is run by the state and is limited to final offers made by both sides in negotiation and to a list of seven subjects: compensation to persons sustaining substantial economic harm as a direct result of the facility; reimbursement of reasonable costs incurred by the local negotiating committee; screening and fencing of the facility; such operational concerns as noise, debris, odors, and hours of operation, but not design capacity; traffic; uses of the site after the facility is permanently closed; economically feasible methods of recycling or reducing the flow of wastes to the facility; and the applicability of preexisting local controls.

Wisconsin's statute not only pioneers a new approach to siting by using siting as a back-door approach to waste-stream reduction and resource recovery, but it also attempts to use the siting process to deal with a problem that is just beginning to be addressed at the state and federal level: compensation of those allegedly injured by exposure to toxic chemicals.¹¹⁷ A few states, California and Minnesota among them, have adopted legislation that provides for administrative compensation.

Environmental mediation is a new experiment. Unlike labor mediation and arbitration, the relevant issues have not been defined in a prior contract or collective bargaining agreement, so it is not certain that the parties can even set an agenda. Once this hurdle is overcome, however, environmental mediation raises many of the same issues that have been faced in labor law. Arbitration involving local government has been challenged as an invalid

¹¹⁴MASS. GEN. LAWS ANN. CH. 21D, § 12.

¹¹⁵See R.I. STAT. ANN. § 19-5.

¹¹⁶WIS. STAT. ANN. § 144.445.

¹¹⁷See generally Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Technical Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 117 (1983).

delegation of power to private parties, but the courts generally have upheld the procedure.¹¹⁸ An equally fundamental issue is who is bound by a decision? Although the Massachusetts statute speaks of binding arbitration, the reference is not accurate since TSD facility siting involves other permits that are open to challenge. In general, it seems unlikely that a negotiation-arbitration procedure can eliminate all possible third-party challenges to the TSD approval process. The courts may still have to define the range of arbitrable issues and the scope of judicial review, as well as resolve the various procedural due process and evidentiary issues that arbitration raises.

A perceptive analysis of the Massachusetts procedure argues that it represents a more sophisticated form of state control of local discretion.

What the Siting Act may in fact represent is not the repudiation of state override, but the transformation of override from its historically autocratic form to a more sophisticated and democratic form. Certainly, override was contemplated when the Siting Act was drafted. Earlier drafts of the bill contained explicit override provisions which were deleted before the bill's passage. The remaining mandatory arbitration provision may ultimately accomplish the same ends that override would. The difference is more than one of form and style, because it is based on local participation. Under traditional override, a state decision could be presented to an unwilling municipality as *fait accompli*. Assuming that hazardous waste disposal could have come under the necessary characterization as a public work (or public service corporation), the state could have created a statutory scheme in which it had the power to choose a site, take the site by eminent domain, and effectively exempt the project from all local land use control through the override provisions of a totally preemptive statutory scheme.¹¹⁹

An interesting example of an expanded public participation process is a consensus dialogue being conducted by the Keystone Center, based in Keystone, Colorado, for the Gulf Coast Waste Disposal Authority in the Galveston Bay Area of Texas. To diffuse a confrontation siting dispute, the center has formed a citizen's review committee that is to function as a means to allow a facility permit applicant to work with the public to allow early citizen input, to provide a forum to address nontechnical issues, to provide a more neutral forum for conflict identification and resolution, to feed reliable information to the community, and to provide a forum for the exchange of information among the applicant, regulators, and the public.

3. COMPREHENSIVE FACILITY SITE PLANNING

Another means of promoting community acceptance of a new TSD facility is through development of a comprehensive facility site plan to guide siting decisions. The plan identifies acceptable and nonacceptable sites prior to a specific decision. This allows a state to avoid intense controversies by eliminating the worst sites in advance. Planners have always argued that it is

¹¹⁸See, e.g., *Arlington v. Bd. of Conciliation & Arbitration*, 370 Mass. 769, 352 N.E.2d 914 (1976).

¹¹⁹Provost, note 82, *supra* at 761.

easier to respond to public concerns when all the options are actually open. As the Office of Technology Assessment has recently rather optimistically argued:

Most of the opposition to siting hazardous waste facilities has to do with sites for land disposal. In these cases, opposition may be less if it can be demonstrated convincingly that all options for waste management have been pursued (e.g., that waste reduction, recycling, and treatment facilities have been evaluated prior to the siting application). This close consideration of alternatives should be one of the requirements in a comprehensive waste management plan.¹²⁰

The RCRA requires each state to prepare an inventory of existing hazardous waste sites,¹²¹ but there is no requirement that a state devise a process for selecting acceptable future sites. Some states have chosen to go beyond RCRA and 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."¹²² The plan consists of data on the amounts and composition of hazardous wastes generated in the state, an inventory of all TSD facilities and projections of TSD needs for the future. In addition, the statute requires consideration of nonstorage and disposal options or, at the least, the most efficient storage and disposal options. The plan must include an "investigation and analysis of methods, incentives, or technologies for source reduction, reuse, recycling, or recovery of potentially hazardous waste and a strategy for encouraging the utilization or reduction of hazardous waste. An investigation and analysis of alternative methods for treatment and disposal of hazardous waste."¹²³

Maryland distinguishes more sharply between an inventory and a plan because that state's siting legislation contemplates state construction of facilities.¹²⁴ The Maryland Environmental Service, the state agency responsible for sewer and other environmental management facility construction, must prepare an inventory of sites suitable for TSD facilities. The plan is prepared by the state's Department of Natural Resources.

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 select desirable sites, and relevant nontechnical concerns can be addressed at a 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 a

¹²⁰OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES, AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE MANAGEMENT 256 (1983).

¹²¹42 U.S.C. § 6933 (1976 and Supp. IV 1980).

¹²²MICH. COMP. LAWS ANN. § 299.509(3)(c). New Jersey's 1981 siting statute makes the Major Hazardous Waste Facilities Plan the major referent for subsequent siting decisions. N.J. STAT. ANN. §§ 13:1E-58, 59.

¹²³MICH. COMP. LAWS ANN. § 299.509(3)(d) and (9).

¹²⁴MD. NAT. RES. CODE ANN. § 3-710.

report prepared by the National Governors' 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. The opposition force can [cause] loss of sites before their merits are fully explored or before meaningful and, perhaps, effective mitigations can be offered."¹²⁵

Michigan tries to deal with this problem by requiring that the plan provide for "a reasonable geographic distribution of disposal facilities" within the state,¹²⁶ and by allowing the specification of "general locations." Minnesota's approach to the geographic diversity and alternatives issues 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.¹²⁷

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 tracts of land. A vague plan has little value as a guide for decisionmaking since a wide range of decisions is consistent with it. Moreover, an effective siting plan must control the permitting decision. Some states have nullified the effectiveness of a site plan by failing to specify the relationship between the plan and subsequent permits. In this sense hazardous waste site plans are similar to comprehensive land use plans. In recent years some courts and legislatures have bought the planners' argument that land use controls should be subordinated to planning, but the evidence to date suggests that mandating consistency between planning and land use regulations will not increase the quality of plans or the weight given them.¹²⁸

Consistency does, however, make sense for TSD facility planning because it may be easier to enforce compliance with the mandates of the TSD facility site plan than with a comprehensive land use plan. The Michigan siting statute requires consistency with the site plan, so in theory the plan controls the permit approval stage. Minnesota, on the other hand, 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. Utah, while not requiring consistency, does encourage it by waiving statutory protections for operators who 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 [TSD] facility who seeks protection under

¹²⁵National Governors Ass'n, *Siting Hazardous Waste Facilities: Critical Siting Issues—State Roles 7* (undated memorandum on file with author).

¹²⁶MICH. COMP. LAWS ANN. § 299.509(2)-(3).

¹²⁷MINN. STAT. ANN. § 115.11.

¹²⁸For a review of the consistency debate, see J. DiMENTO, *THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* (1980).

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 [TSD] 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.¹²⁹

C. *Siting Boards*

Many sites have delegated the final decision on the acceptability of a site to permanent or ad hoc siting boards.¹³⁰ These new boards or commissions are modeled after power plant and industrial facilities boards that emerged in the 1970s in response to the problem of fragmented regulatory authority over large-scale public and private facilities, but they seek more legitimacy rather than expeditious “one-stop” licensing.

The composition of a siting authority is the key to its legitimacy. It must have the somewhat inconsistent attribution of widespread public appeal plus the capability to make intelligent and timely decisions. The dilemma facing legislators is finding the proper balance. If the board reflects the interests of the most interested groups, expertise may be gained at the expense of legitimacy. A board weighted too heavily in favor of industry or environmental community groups will only engender distrust by the other side. If special interests are disregarded altogether, citizen boards which lack expertise may be distrusted by both industry and industry opponents and may have difficulty reaching any decision. Many states have tried to resolve this tension by separating interest and expertise from the power to site. To accommodate demands that various special interests be given a formal role in devising siting policy, advisory commissions may be established that have the duty to consult with public bodies but lack the power to site facilities.¹³¹

Siting and advisory boards are generally a mix of interested and presumptively neutral parties. Interested parties predominate in many states, although those representing facility operators, waste generators, and transporters are a minority. The general 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.¹³² Massachusetts has departed from this model by creating a twenty-one member board composed of state officials, a “representative of the public knowledgeable in environmental affairs,” and six other members of the public. Industry officials are expressly excluded from the council.¹³³

Siting boards that are composed of interested parties—either for or against—might be vulnerable to the challenge that they deny due process of

¹²⁹UTAH CODE ANN. § 26-14(a)-6(6).

¹³⁰*See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 27-1105.

¹³¹*See, e.g.*, N.J. STAT. ANN. § 13:1E-54.

¹³²*See, e.g.*, Md. NAT. RES. CODE ANN. § 3-703(b).

¹³³MASS. GEN. LAWS ANN. ch. 21D, § 4(13).

law to applicants or to the public on the ground that contested issues have been prejudged or the public has been systematically unrepresented. In California the public's right to a fair decisional process has been recognized in a case holding that a forestry board partially charged with environmental regulation but dominated by industry representatives was created by an invalid delegation of legislative power to private parties.¹³⁴ However, it is unlikely that courts will conclude that the structure of a siting board per se denies due process to applicants or to the public at large. The Supreme Court has indicated the regulatory officials are presumed to act fairly.¹³⁵ This presumption makes it difficult to mount successful structural bias challenges as courts generally will conclude that regulatory boards are usually representative of enough interests to ensure that diverse viewpoints will be heard. Thus, the risk that issues will be prejudged has been adequately minimized.

Courts probably will follow the lead of the supreme court of Maine and reject a challenge to a siting board's compositional unfairness. In *In re Maine Clean Fuels, Inc.*¹³⁶ the court considered a challenge to the decision of the Maine Environmental Improvement Commission (EIC) denying a permit to 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-environment, but the court's reasons for rejecting the claim apply equally to a challenge that a board with too many industry 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 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."¹³⁷

A federal circuit court of appeals has reached the same conclusion with respect to a federal advisory board.¹³⁸ Clearly, the most likely successful challenges will be to the merits of the agency's siting decisions.

* * *

The verdict on the first generation of siting statutes is still out. Internal industry practices may solve the siting problem or it may become acute as

¹³⁴*Bayside Timber Co v. Bd. of Supervisors*, 20 Cal. App. 3d, 97 Cal. Rptr. 431 (1971).

¹³⁵*See Withrow v. Larkin*, 421 U.S. 35 (1975) and *United States v. Morgan*, 313 U.S. 409 (1941).

¹³⁶310 A.2d 736 (Me. 1973).

¹³⁷310 A.2d 750.

¹³⁸*Tug Valley Recovery v. Watt*, 702 F.2d 796, 801-02 (4th Cir. 1983):

Here, in contrast, Tug Valley has not alleged that members of the RBR have financial

federal and state EPAs begin to squeeze out unsafe existing TSD facilities. What is clear is that states face extremely difficult choices in designing statutes. Siting is primarily a technical problem (what is the geology and hydrology of the area), but purely technical approaches are an invitation to political confrontation. Statutes that merely add nontechnical factors to the list of relevant factors will not solve the problem. It is not clear that approaches that deal directly with community fears such as planning, negotiation, or mediation-arbitration will confer the necessary legitimacy on the siting process, although they are all worthy experiments. The most positive aspects of siting statutes is that they provide a backdoor to the basic problem, waste-stream reduction, that Congress has not yet directly faced. If states' responses limit TSD facilities to cases where economically reasonable and technological alternatives do not exist, perhaps in the end a Truman solution is possible: legitimacy will follow from the responsible exercise of power.

interests in the outcome of cases brought before them. Rather, the gist of Tug Valley's claim is that individuals trained and experienced in coal mining, agriculture, forestry, etc. and appointed to the RBR by the governor of West Virginia are inherently biased against environmental interests and may not therefore be allowed to sit in judgment on matters of ecological concern.

These allegations do not state a constitutional violation. There is no due process right to have one's claims heard before a court purged of ideology. One is certainly entitled to a tribunal untainted by monetary inducements or evident personal bias, but a litigant may not hold a judge's experience and education against him or her. A criminal defendant may be tried before a judge who was once a prosecutor, and a former legal aid attorney appointed to the bench may preside over a food stamp entitlement case.

