Local Opposition to Hazardous Waste Facilities in Pennsylvania

Kevin J. Garber
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It is estimated that some 77 billion pounds of hazardous wastes are generated annually in the United States. In Pennsylvania, about five million metric tons of hazardous waste are generated per year, the fourth highest among the states. It has also been estimated that only about ten percent of the hazardous waste generated in the United States is disposed of properly. The remaining ninety percent of these wastes has been disposed of improperly, in part because of an acute shortage of environmentally acceptable hazardous waste disposal facilities. In 1982, there were 16 treatment and disposal facilities operating in Pennsylvania; as of July, 1985, seven of those facilities remained open, with only one providing disposal capacity, and it is scheduled to close in June, 1987.

2. Pennsylvania Hazardous Waste Management Plan, Pennsylvania Department of Environmental Resources, Bureau of Waste Management (July, 1986) (hereinafter the “Pennsylvania HWMP”). The data averaged for 1982, 1983 and 1984 showed that of the hazardous waste generated in Pennsylvania and shipped off-site for treatment and disposal, 41% came from the primary metals industry, 12% from fabricated metals, 11% from chemicals and allied products such as pharmaceuticals, and 8% from electrical and electronic machinery. Id. at 11.
5. It has been estimated that the number of sites available for adequate disposal of hazardous waste has declined from one-hundred ten sites in 1975 to thirty sites in 1982, while the volume of waste generated in the United States requiring such disposal increased at an annual rate of three to four percent. See Canter, Hazardous Waste Disposal and the New State Siting Programs, 14 NAT. RESOURCES LAW 421 (1982).
6. See Pennsylvania HWMP, supra note 2, at 24-30. Six of the seven operational facilities are in eastern Pennsylvania, in the Philadelphia region, and the seventh operational
One factor contributing to the shortage of disposal facilities, and in turn to the improper disposal of hazardous waste, is the strong public opposition to siting such facilities in local communities.7

The intensity of local opposition was apparently largely unanticipated by Congress when it enacted the Resource Conservation and Recovery Act of 1976 (RCRA), since under RCRA the process of selecting sites for hazardous waste facilities is primarily a state and local responsibility.8 Consequently, local governments, in manners which often do not involve technical expertise or objections, can significantly influence, and perhaps exclude, hazardous waste disposal sites even after an owner or operator of a hazardous waste management facility has complied with both the applicable federal and state laws, and has secured all necessary permits.9 The competing interests concerning hazardous waste disposal are sharply defined. The interest of both federal and state governments to provide adequate and safe disposal sites is opposed to the interest of local communities, which for a variety of reasons including fear, misperception and concern about property value, seek to exclude such disposal sites from their communities.

This comment outlines the federal and Pennsylvania hazardous waste regulations and then focuses on two vehicles available for public opposition to hazardous waste siting in Pennsylvania: direct challenges to the state waste disposal permitting system and exclusionary zoning.

facility is in western Pennsylvania, in Washington County. Id. at 26. The Pennsylvania HWMP concluded that two disposal facilities with a combined capacity of 200,000 metric tons per year were needed to properly manage Pennsylvania’s hazardous waste by 1990, one facility to service the eastern part and the other to service the western part of the state. Id. at 81-88.

7. The “anywhere but here” response by local communities to the proposals to site hazardous waste treatment, storage or disposal facilities has been widespread. For example, Minnesota returned to the EPA over $3 million which had been granted to establish a chemical landfill because each of the potential sites selected by the state was rejected by local citizens. Harrington, The Right to A Decent Burial: Hazardous Waste and Its Regulation in Wisconsin, 66 MARQ. L. REV. 223 (1983). Similar instances where public opposition has resulted in the exclusion of hazardous waste facilities are detailed in Duffy, State Hazardous Waste Facility Siting: Easing the Process Through Local Cooperation and Preemption, 11 B.C. ENVTL. AFF. L. REV. 755 (1984).

8. See infra notes 37-46 and accompanying text. The Supreme Court has held that state and local siting regulations are not preempted by RCRA so that states can control the availability of waste disposal sites provided there is no discriminatory effect on interstate commerce. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

Federal Regulation of Hazardous Waste

The Solid Waste Disposal Act of 1965 was the first federal statute directed at controlling disposal of solid waste, refuse and garbage. Although the Act was passed in response to open burning which had been permitted in many landfills in various states, the Act did initiate the comprehensive investigation of hazardous waste management practices in the United States. This investigation ultimately led to the enactment of the Resource Conservation and Recovery Act of 1976 (RCRA). Under RCRA, the Environmental Protection Agency has the responsibility of tracking hazardous waste from "cradle to grave," specifically by promulgating regulations concerning the generation, transportation, storage, treatment and disposal of hazardous waste.

A "hazardous waste," for purposes of RCRA, is one which is either listed as hazardous by the EPA or which exhibits any of the characteristics of ignitability, corrosivity, reactivity or EP.

15. 42 U.S.C. § 6921(b) provides that "[n]ot later than eighteen months after [October 21, 1976] . . . the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular wastes . . . which shall be subject to the provisions of this subchapter." See also 40 C.F.R. § 260.1 et seq. (1986).
16. RCRA generally defines a "hazardous waste" as a solid waste which, because of its characteristics, may cause or significantly contribute to an increase in mortality or serious irreversible illness, or which may pose a substantial present or potential hazard to human health or the environment if improperly handled. 42 U.S.C. § 6903(5). Note that in order for a waste to be "hazardous" under RCRA, it must also be a solid waste. RCRA defines "solid wastes" as any "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material, resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . ." with the exception of certain wastes subject to the permit requirements of the Federal Water Pollution Control Act (33 U.S.C. § 1342). Id. at § 6903(27).
17. 40 C.F.R. §§ 261.30-.33 (1986). There are over 400 particular chemical species which are listed as hazardous.
18. Id. at § 261.21 Ignitable liquid wastes are those which have a flashpoint less than 60 degrees C. Id. Ignitable solid wastes are those which generally burn so vigorously or per-
(Extraction Procedure) toxicity. Those persons handling the waste bear the burden of determining whether it is indeed hazardous and, therefore, whether they are subject to RCRA regulation.

Stringent reporting and recordkeeping requirements apply to generators and transporters of hazardous waste. Generators must, for example, obtain an EPA identification number and prepare a manifest statement. A transporter may not accept hazardous waste from a generator unless it is accompanied by a manifest, and the transporter must in turn deliver the manifest with the waste to another transporter or to the designated disposal facility. If the hazardous waste cannot be delivered according to the manifest, the transporter must hold the waste until receiving further directions from the generator. Additionally, transporters must adhere to the rules concerning hazardous waste transportation and to the spill and accidental discharge reporting require-

sistently as to create a hazard when ignited. Id.

19. Id. at § 261.22. Highly acidic or alkaline wastes which have a pH less than 2.0 or greater than 12.5 or which corrode steel under standard conditions exhibit the characteristic of corrosivity. Id.

20. Id. at § 261.23. Reactivity is determined by whether the waste may react violently or explode while being handled or stored. Id.

21. Id. at § 261.24. This criterion measures whether extracts of the sample contain stated heavy metal and organic contaminants, such as mercury and lead. Id. The EPA has recently promulgated a revised extraction procedure, the Toxicity Characteristic Leaching Procedure (TCLP), to more accurately determine whether treatment standards are being satisfied for certain dioxin and solvent-containing hazardous wastes. See Final Rule, 51 Fed. Reg. 40,572 (November 7, 1986).

22. See, e.g., 40 C.F.R. § 262.11 which provides that a generator of hazardous waste "must determine if that waste is a hazardous waste" under the regulations in 40 C.F.R Part 261. Id.

23. Generators are defined under RCRA as any "person . . . whose act or process produces hazardous waste identified or listed in Part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation." 40 C.F.R. § 260.10.

24. Under RCRA, a transporter is defined as a "person engaged in the offsite transportation of hazardous waste by air, rail, highway or water," but does not include transporters of waste within a site. 40 C.F.R § 260.10.

25. Id. at § 262.12(a). A generator may not treat, store, dispose of or transport any hazardous waste without obtaining an EPA identification number. Id.

26. A "manifest" is defined in 40 C.F.R. § 260.10 as an EPA shipping document "originated and signed by the generator in accordance with the instructions" in 40 C.F.R. Part 262. Under 40 C.F.R. § 262.20, EPA requires that a manifest statement contain, inter alia, the generator's name and address, the EPA identification number of the generator, transporter and disposal facility, and a description and statement of quantity of each type of hazardous waste. Id.

27. Id. at § 263.20.

28. Id. at § 263.21. EPA regulations state that an emergency which prevents delivery may be one reason preventing a transporter from delivering the waste to the designated disposal facility. Id.
ments of the United States Department of Transportation. There is also a set of regulations concerning spills of hazardous waste while in transit. This manifest system is thus designed as a hazardous waste tracking and enforcement mechanism.

Owners and operators of hazardous waste treatment, storage and disposal facilities (TSDFs) are also subject to regulation under RCRA. In general, TSDF owners and operators must chemically analyze the hazardous waste handled at the facility; inspect and maintain adequate security around the disposal site; develop emergency and contingency plans; demonstrate financial responsibility to close a disposal facility at the end of its active life and care for a facility after closure; and be insured against bodily injury and property damage arising out of sudden and nonsudden accidental occurrences at the facility.

29. The EPA has expressly adopted certain regulations of the United States Department of Transportation governing the transportation of hazardous materials, and these appear at 40 C.F.R. Part 263.
30. Id. at §§ 263.30 and 263.31.
31. See generally 40 C.F.R. Parts 264 and 265. The standards of Part 264 apply to all owners and operators of all facilities which treat, store or dispose of hazardous waste unless there is a specific exclusion. Id. at § 264.1(b). To “treat” hazardous waste means any method which changes the physical, chemical or biological characteristics so as to make the waste less hazardous or to recover material resources; to “store” means to hold the waste “for a temporary period at the end of which the waste is treated, disposed of or stored elsewhere”; and to “dispose” means to put the wastes onto the ground or water. Id. at § 260.10. Specific exclusions from Part 264 apply to publicly owned wastewater treatment works and farmers disposing of waste pesticides from their own use, among other exceptions. Id. at § 264.1. The standards of Part 265 apply to “interim status” facilities, which generally include facilities existing when the federal standards were adopted. Id. at § 265.1.
32. Id. at §§ 264.13 and 265.13. These standards provide that before an owner or operator treats, stores or disposes of hazardous waste, he must analyze the waste to determine all information which must be known to treat, store or dispose of the waste in accordance with applicable regulations. Id.
33. Id. at §§ 264.14 and 265.14. TSDF owners and operators generally must provide security sufficient to prevent unauthorized entry into the facility by persons and animals, and must routinely inspect the integrity of these systems to prevent hazardous waste from being released into the environment. Id. Also, employees must regularly be educated to assure compliance with interim status. Id. at §§ 264.16 and 265.16.
34. Id. at §§ 264.51 and 265.51. Contingency plans are required to lessen potential adverse health and environmental effects of an unforeseen release of hazardous waste from the site. Id.
35. Id. at §§ 264.110 and 265.110. Closure and postclosure requirements are generally designed to prevent migration of hazardous waste from a landfill once its useful life has expired and to give notice in subsequent conveyances that the property had been used as a hazardous waste facility. Id. Financial responsibility standards require a TSDF owner to demonstrate financial resources adequate to close a disposal site and to bear the cost of postclosure monitoring and maintenance at the facility. Id. at §§ 264.140 and 265.140.
36. Id. at §§ 264.147 and 265.147. TSDF owners and operators must demonstrate financial responsibility for bodily injury and property damage to third parties from sudden
tors must also comply with the manifest system\textsuperscript{37} and monitor groundwater to detect releases from the facility.\textsuperscript{38}

RCRA contemplates joint federal and state authority for the administration of hazardous waste programs. States may apply to the EPA for authorization to develop a state hazardous waste program in lieu of the federal program,\textsuperscript{39} provided the state regulations are at least as stringent as the federal requirements and provided the state regulations are not inconsistent with the federal and other states' hazardous waste programs.\textsuperscript{40} Thus RCRA is designed to ensure that the administrative function of hazardous waste management is eventually transferred to the states.

However, because the RCRA regulatory scheme is complex, Congress devised in subtitle C of RCRA a two-stage method by which the states would implement a hazardous waste management program.\textsuperscript{41} Under the first stage, "interim authorization," a state can request temporary authorization to administer its own hazardous waste program if it had an existing program\textsuperscript{42} and if the state regulations are substantially equivalent to the federal regulations.\textsuperscript{43} Interim status is itself granted by the EPA in two steps. The first step is Phase I, which permits the state to implement portions of

and nonsudden releases of hazardous wastes arising out of operations at the facility. \textit{Id.} These obligations may be met through liability insurance using an instrument whose wording matches federal requirements, through a financial test which assures adequate capital, or both. \textit{Id.}

\textsuperscript{37} \textit{Id.} at §§ 264.70 and 265.70.

\textsuperscript{38} \textit{Id.} at §§ 264.90 and 265.90. Under the groundwater protection standards, the EPA will specify which hazardous constituents of the waste must be monitored, and the owner or operator must install a monitoring mechanism to detect waste constituents or other monitoring parameters. \textit{Id.}

\textsuperscript{39} 42 U.S.C. § 6926 (b) (1982). This section provides that any state desiring to administer and enforce a hazardous waste program may, after notice and opportunity for public hearing, apply to the EPA for such authorization. If approved, the state is "authorized to carry out such program in lieu of the Federal program." \textit{Id.}

\textsuperscript{40} \textit{Id.} The EPA may withhold authorization of the state plan if it finds the state plan is not equivalent to the federal program, if the state plan is not consistent with the federal or other state programs, or if the state plan does not provide adequate enforcement or compliance with the federal requirements. \textit{Id.}


\textsuperscript{42} 42 U.S.C. § 6926 (c). An "existing program" is one established "before the date ninety days after the promulgation of regulations under sections 3002, 3003, 3004, and 3005 [42 U.S.C. §§ 6922-6925 (1986)]" of RCRA. \textit{Id.} at § 6926(c).

\textsuperscript{43} \textit{Id.} If the existing state program is substantially equivalent to the federal program, interim status will be granted to the state for two years. \textit{Id.}
the federal regulations, including the identification and listing of hazardous wastes.\textsuperscript{44} The second step is Phase II,\textsuperscript{45} which permits the state to administer its own regulations concerning hazardous waste treatment, storage and disposal facilities in lieu of the federal regulations.\textsuperscript{46}

"Final authorization" is the second stage of transfer of authority to a state to administer its own hazardous waste management program.\textsuperscript{47} Once final authorization has been given, the state is free to fully administer its own program.\textsuperscript{48}

In 1981, the EPA granted Phase I interim authorization to Pennsylvania's hazardous waste management program under the Pennsylvania Solid Waste Management Act of 1980 (SWMA).\textsuperscript{49} Thereafter, Pennsylvania promulgated detailed regulations dealing with hazardous waste in general.\textsuperscript{50} Pennsylvania applied for and has been granted final authorization to administer its hazardous waste program in lieu of the federal hazardous waste regulations,\textsuperscript{51} subject to those areas still under federal regulatory control after the Hazardous and Solid Waste Amendments of 1984 (HSWA).\textsuperscript{52}

\begin{itemize}
  \item The interim status standards, found at 40 C.F.R. Part 265, are designed to establish minimum national hazardous waste treatment, storage and disposal standards, and apply to TSDF's in the absence of final permits. \textit{Id.} at § 265.1 (a). Interim status regulations were part of Phase I regulations enacted under RCRA in May 1980. 45 Fed. Reg. 33,156 (1980) (codified at 40 C.F.R. Part 265).
  \item Phase II regulations outline the requirements for a TSDF to obtain a permit under RCRA. \textit{See} 40 C.F.R. Part 264.
  \item In Sechan Limestone Indus. v. Com., Dep't of Envtl. Res., No. 86-126-G (Pa. Commw. July 24, 1985), the court held that because the Pennsylvania hazardous waste management program, \textit{see infra} notes 64-89 and accompanying text, had been granted Phase I interim authorization by the EPA, the Pennsylvania Department of Environmental Resources had authority to terminate appellant's state hazardous waste permit. \textit{Id.}
  \item 42 U.S.C. § 6926 (b). The requirements for and effect of final authorization are summarized at \textit{supra} notes 39-40.
  \item The regulations for final authorization of state hazardous waste programs are found at 40 C.F.R. Part 271. This part details the steps a state must take to be authorized to administer its hazardous waste management program. \textit{Id.}
  \item 46 Fed. Reg. 28,161 (May 28, 1981). The provisions of SWMA are discussed in detail at \textit{infra} notes 64-89 and accompanying text. As of 1984, forty-one states had received Phase I interim authorization. \textit{See} Laswell, \textit{supra} note 41, for complete cites to the dates on which the EPA granted such approval to these states.
  \item These regulations are found in Title 25, Chapter 75 of the Pennsylvania Administrative Code. \textit{See infra} notes 71-75 and accompanying text.
  \item In January 1985, the EPA extended for a year Pennsylvania's Phase I interim authorization to administer its hazardous waste program. 50 Fed. Reg. 3347 (January 24, 1985). Pennsylvania was granted final authorization on January 30, 1986 to administer its program in lieu of the federal program, subject to the authority retained by the EPA in accordance with the Hazardous and Solid Waste Amendments of 1984. 51 Fed. Reg. 1791 (January 15, 1986).
\end{itemize}
HSWA made extensive amendments to RCRA, including provisions for regulating small quantity generators of hazardous waste,\(^{53}\) for regulating the storage of hazardous waste in underground storage tanks,\(^{54}\) for restricting the land disposal of certain wastes\(^ {55}\) and for developing information concerning the potential for the public to be exposed to hazardous wastes at permitted TSDFs.\(^ {56}\) Like RCRA, HSWA contains a mechanism whereby a state may receive interim, then final, authorization to administer the HSWA provisions in lieu of the EPA.\(^ {57}\) Most states, including Pennsylvania, have not yet been authorized to administer HSWA.\(^ {58}\) Consequently, hazardous waste TSDFs are subject to both state and federal regulations under RCRA and HSWA.

The following sections of this comment evaluate the Pennsylvania hazardous waste regulations, and the effect of the influence of local communities on those regulations. This discussion is impor-


\(^{54}\) 42 U.S.C. §§ 6991-6991i. Owners and operators of underground storage tanks, and any person who puts a regulated substance in a tank, must notify appropriate authorities. Id. The EPA is currently in the process of adopting regulations for underground storage tanks. See Interpretive Rule, 51 Fed. Reg. 20,418 (June 4, 1986).

\(^{55}\) See 42 U.S.C. §§ 6924 (c), (d). As of April, 1985, bulk and noncontainerized liquid wastes were prohibited from being placed in landfills; effective July, 1987, the land disposal of certain wastes, including liquids containing heavy metals and halogenated organic solvents, is prohibited. Id. EPA is currently in the rulemaking process. See Final Rule, 51 Fed. Reg. 19,300 (May 28, 1986).

\(^{56}\) 42 U.S.C. § 6939 (a). Applicants for a permit for a hazardous waste TSDF must provide data on the potential for the public to be exposed to hazardous waste from various pathways from activities at the TSDF. Id.

\(^{57}\) 42 U.S.C. § 6926(g). This section provides that any requirement or prohibition which applies under HSWA shall also take effect in each state with interim or final authorization. Id. The EPA shall administer each requirement directly until the state program is finally authorized to administer a particular requirement under HSWA. Id. Interim authorization is granted to the state if its program is "substantially equivalent" to the federal program. Id. at § 6926 (g)(2). Final authorization will be granted when the state program is equivalent to the federal program, is consistent with the federal and other state programs, and provides for adequate enforcement. Id. at § 6926(b). There are federal regulations dealing with the showings a state must make to receive interim authorization. 51 Fed. Reg. 33,712 (September 22, 1986) (to be codified at 40 C.F.R. Part 271).

\(^{58}\) As an example of dual administration of the hazardous waste program, a person who handles a hazardous waste may petition the EPA to "delist" that waste if he can show the waste is no longer hazardous. See 40 C.F.R. § 260.22. As a result of HSWA, the delisting mechanism resides in federal hands, and as of September, 1986, only one state (Georgia) had received interim authorization for its delisting program. See Final Rule, 51 Fed. Reg. 29,219 (August 15, 1986).
tant because it is clear that eventually Pennsylvania regulations will replace the federal regulations and that Pennsylvania will independently administer its own program.

Pennsylvania Regulation of Hazardous Waste

The Pennsylvania Solid Waste Management Act of 1968 (Act 241)\(^69\) was the first Pennsylvania statute to establish state and local programs for comprehensive solid waste management. Act 241 required municipalities with population densities greater than three hundred persons per square mile to submit an official plan for solid waste management within their jurisdictions.\(^60\) Municipalities were given authority to adopt local ordinances and regulations for waste management.\(^61\) The Pennsylvania Department of Health was able to order municipalities to alter their storage and collection systems to prevent pollution and public nuisances.\(^62\) Act 241 did not, however, expressly distinguish between solid waste and hazardous waste.\(^63\)

The Pennsylvania Solid Waste Management Act of 1980 (SWMA)\(^64\) repealed Act 241.\(^65\) Among the major differences between these two acts are that SWMA more extensively regulates hazardous waste management and planning\(^66\) and provides more enforcement measures\(^67\) than did Act 241. Additionally, SWMA is broader than both Act 241 and RCRA in that hazardous waste, as well as municipal waste and residual waste, falls within the purview of SWMA.\(^68\)

As noted above, hazardous waste is only one of three types of


\(^{60}\) Id. at § 6005.

\(^{61}\) Id. at § 6010.

\(^{62}\) Id. at § 6011.

\(^{63}\) Solid waste under Act 241 was defined as "garbage, refuse and other discarded materials including, but not limited to, solid and liquid waste materials resulting from industrial, commercial, agricultural and residential activities." Id. at § 6003 (3).


\(^{65}\) 35 Pa. Stat. Ann. § 6018.1001 provides that SWMA repeals Act 241 but that "all permits and orders issued, municipal solid waste managements plans approved, and regulations promulgated under [Act 241] shall remain in full force and effect unless and until modified, amended, suspended or revoked." Id.

\(^{66}\) Id. at §§ 6018.401-507.

\(^{67}\) Id. at §§ 6018.601-617.

\(^{68}\) See infra notes 69-89 and accompanying text.
solid waste regulated by SWMA; municipal waste and residual waste are the other two distinct categories of solid waste to which SWMA restrictions apply. Pennsylvania defines a hazardous waste by using the same characteristics RCRA employs to identify hazardous wastes (ignitability, corrosivity, reactivity and toxicity), and incorporates the listed hazardous wastes identified by the EPA to determine whether a waste is hazardous under SWMA. In addition, a waste may be hazardous if it is comprised of a mixture of one or more listed wastes, or if it is generated from the treatment, storage or disposal of a hazardous waste. Finally, the Pennsylvania Department of Environmental Resources (DER) may regulate any waste that it determines to be hazardous if the waste presents a substantial present or potential threat to human health or to the environment.

Like RCRA, SWMA requires hazardous waste generators and transporters, and owners or operators of hazardous waste treatment and disposal facilities to notify the DER of their activities. Thus, it is unlawful to transport, treat, generate, store or

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70. "Residual waste" under SWMA is defined as "Any garbage, refuse, other discarded materials or other waste including solid, liquid, semisolid or contained gaseous material resulting from industrial, mining or agricultural water supply treatment facility, waste water treatment facility or air pollution control facility provided that it is not hazardous..." Id.

71. See supra notes 18-21. The numbering system of Title 25, Chapter 75 of the Pennsylvania Administrative Code generally parallels the numbering system of the federal standards found at 40 C.F.R. Parts 260 to 271. Thus, the Pennsylvania characteristics and lists of hazardous waste are found at 25 PA. CODE § 75.261 (Shepard’s 1986).

72. See supra note 17.

73. 25 PA. CODE § 75.261 (b).

74. Id. at § 75.261 (b)(1)(ii).

75. Id. at § 75.261 (b)(3)(ii).

76. 35 PA. STAT. ANN. § 6018.402 provides that the list of hazardous wastes promulgated by the Environmental Quality Board (EQB) shall not prevent the DER from regulating unlisted wastes which the DER determines to be hazardous. Id.

77. SWMA does not define hazardous transporters, but "transportation" is defined as the "off-site removal of any solid waste at any time after generation." Id. at § 6018.103. However, DER notification provisions do not apply to transporters of municipal and residual waste. Id. at § 6018.501(b).

78. "Disposal" means "incineration, deposition, injection, dumping, spilling, leaking or placing of solid waste into or on the land." Id. at § 6018.103.

79. Id. at § 6018.501 (c). The notification to the DER must state the location and
dispose of hazardous waste unless the DER has been properly notified.80 Persons wishing to transport hazardous wastes within Pennsylvania must first obtain a license to do so,81 and permits are required to operate a hazardous waste storage, treatment or disposal facility.82

Further general provisions of SWMA include bonding requirements for hazardous waste processing and TSDFs;83 establishment of the Solid Waste Abatement Fund to use fines and penalties collected for violations of SWMA to eliminate or abate hazardous waste-related threats to health and environment;84 and a provision requiring the grantor of property on which hazardous waste is disposed to acknowledge that fact when conveying such property.85

In July, 1986, the Pennsylvania Environmental Quality Board (EQB) adopted the Pennsylvania Hazardous Waste Facilities Plan developed by the DER.86 The DER developed the Plan under sections 104 and 507 of SWMA87 the latter of which provides that DER must consult with “affected persons, municipalities and state agencies” to ensure public participation in developing the Management Plan, specifically by appointing an Advisory Committee consisting of private citizens, representatives of public interest groups, public officials and citizens or representatives of organizations with substantial economic interest in the Plan.88 Thus, there is a statutory requirement of public participation in the initial development of the Plan. The DER is further required to review and amend the

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80. 35 PA. STAT. ANN § 6018.501(c).
81. Id. at § 6018.501(b).
82. Id. at § 6018.501(a); specific permit and license application requirements are detailed at § 6018.502. See also 25 PA. CODE §§ 75.270-75.282.
83. 35 PA. STAT. ANN. §§ 6018.505 and 6018.506 require TSDF owners and operators to file a bond and obtain insurance coverage for activities occurring at their facilities. The insurance regulations of 25 PA. CODE § 75.331 et. seq. were recently amended to permit the owner or operator of a TSDF to be self-insured under certain conditions. See 16 PA. BULL. 2831 (August 2, 1985).
84. 35 PA. STAT. ANN at § 6018.701.
85. Id. at § 6018.405. As to other general provisions of SWMA, see Katcher, Hazardous Waste Management Under Act 97, 86 DICKINSON L. REV. 665 (1982).
86. See Pennsylvania HWMP, supra note 2.
87. 35 PA. STAT. ANN. §§ 6018.104 and 6018.507. Section 507 provides that the Pennsylvania HWMP shall address the present and future needs for the treatment and disposal of hazardous waste in the Commonwealth. Id. Only treatment and disposal facilities are subject to the Hazardous Waste Facilities Plan outlined at 35 PA. STAT. ANN. § 6018.507. SWMA is silent with respect to planning hazardous waste storage facilities.
88. Id. at § 6018.507(a)(4).
Plan as necessary, but in no event less frequently than every five years following the EQB's adoption of the Plan.89

_direct challenges to the Pennsylvania Hazardous Waste Permit System_

As noted above, SWMA allows disposal of hazardous waste only if a valid permit has been issued.90 Apart from participation in the Hazardous Waste Facilities Plan and from participation during the permit review process,91 one of the most direct methods by which a municipality can participate in hazardous waste disposal siting issues occurring within its jurisdiction is through reviewing applications to, and challenging permits issued by, the DER. For example, a local government which is dissatisfied with a permit allowing hazardous waste disposal facilities to operate within its borders may procedurally appeal the DER's action to the Pennsylvania Environmental Hearing Board (EHB).92 However, until the Pennsylvania Supreme Court decided Franklin Township v. Com., Dep't of Envtl. Resources93 in 1982, Pennsylvania's law of standing94 generally prevented a municipality from challenging such a permit issued by the DER.

_Franklin Township_ dealt with the narrow issue of whether a municipality has standing to challenge permits issued under SWMA. However, William Penn Parking Garage v. City of Pitts-

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89. Id. at § 6018.504.
91. Under SWMA and the Pennsylvania hazardous waste regulations, there is an opportunity for the public to participate in agency review of a hazardous waste permit application. Section 504 of SWMA, 35 Pa. Stat. Ann. § 6018.504, provides that all applications for solid waste disposal permits must be reviewed by the county and host municipality. Under 25 Pa. Code §§ 75.281-75.282, the Pennsylvania Department of Environmental Resources must give public notice, and allow an opportunity for public comment and a public hearing, upon the filing of an application for a hazardous waste management permit. These public participation requirements must be satisfied before the DER undertakes its completeness and technical review of the application. Id. at § 75.280. See also the Pennsylvania Department of Environmental Resources policy publication, "Public Participation Policy for the Hazardous Waste Review Process," February 2, 1986.
92. 71 Pa. Stat. Ann. § 510-21(c) provides that any "action" taken by the DER may be appealed to the Environmental Hearing Board (EHB). EHB has statutory authority to issue adjudications on any permit granted by the DER. Id. at § 510-21(a).
93. 500 Pa. 1, 452 A.2d 718 (1982). Franklin Township is discussed more fully at infra notes 109-14 and accompanying text.
94. The Pennsylvania Supreme Court in Franklin Township pointed out that the Pennsylvania law of standing is distinct from the federal law of standing. Id. at 5, 452 A.2d at 720. The federal standard was announced in Association of Data Proc. Serv. Org. v. Camp, 397 U.S. 150, 152-53 (1970), in which it was held that a plaintiff has standing if he alleges injury in fact and an interest within the zone of interests protected by a statute. Id.
burgh\textsuperscript{95} is the leading Pennsylvania case concerning standing to challenge an administrative action generally, and deserves brief discussion to provide background to appreciate the contribution of Franklin Township. William Penn held that for a party to be a "person aggrieved"\textsuperscript{96} by an administrative or government action, and thus assert standing, that party must have a substantial, immediate and direct interest in the subject matter of the litigation.\textsuperscript{97} William Penn somewhat loosened the strictures of standing by announcing that plaintiffs would no longer be required to have a pecuniary interest in the litigation,\textsuperscript{98} previously a requisite element of standing.\textsuperscript{99} But William Penn made it clear that a party could not claim to be a "person aggrieved" by asserting a common interest held by the public generally.\textsuperscript{100} Under the William Penn rationale, it may be difficult for a municipality to demonstrate the precise interest it may have, distinct from the interests of the general public, in objecting to a permit for solid waste disposal issued under SWMA within its jurisdiction.

Moreover, Pennsylvania courts have generally not permitted a municipality to satisfy the "direct interest" prong of the William

\textsuperscript{95} 464 Pa. 168, 346 A.2d 269 (1975). In William Penn, parking lot operators and taxpayers challenged the City of Pittsburgh's ordinance imposing a tax on all patrons of non-residential parking lots and parking garages. \textit{Id.}


\textsuperscript{97} 464 Pa. at 195-97, 346 A.2d at 280-83. The court held that an interest has substance if there is "some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law"; an immediate interest is one which is more than a remote consequence of the judgment; and a direct interest means that the party aggrieved must show the causal connection between his interest and the matter of which he complains. \textit{Id.}

\textsuperscript{98} \textit{Id.} at 195, 346 A.2d at 282. The court said that "the requirement that the interest be pecuniary...no longer adds anything to the requirement of an interest having substance." \textit{Id.}

\textsuperscript{99} Earlier Pennsylvania decisions required that standing be based on whether plaintiff had an immediate, pecuniary and non-remote interest in the consequence of a judgment. See, e.g., Landsdowne Borough Bd. of Adjustment's Appeal, 313 Pa. 523, 170 A. 867 (1934) (since zoning board not adversely affected by a court's reversal of the board's decision, the board had no standing to appeal); GSF Corp. v. Milk Mktg. Bd., 4 Pa. Commw. 230, 284 A.2d 924 (1971) (milk dealers denied standing to challenge adoption of a uniform accounting system since they showed no pecuniary loss).

\textsuperscript{100} 464 Pa. at 192, 346 A.2d at 280. The court held that it "is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procuring obedience to the law." \textit{Id.}
Duquesne Law Review

Penn standing test by derivatively asserting the interest of individual citizens allegedly threatened by an administrative action. For example in Strasburg Associates v. Newlin Twp., the township appealed to the EHB from a permit issued by the DER for a sanitary landfill site in the township, contending that the DER failed to adequately address erosion control problems associated with construction of the landfill. The Commonwealth Court denied standing to the township, finding that its interests were not substantial, direct or immediate as required by William Penn. The court also held that the township failed to show injury to the rights of individual property owners for which the township could act as a trustee. Further, citing the previous Pennsylvania solid waste act, Act 241, the court held that municipalities have responsibility only over their own disposal facilities, which responsibility does not extend to privately owned or operated facilities. This type of "municipal function" analysis, which distinguishes between the interests a municipality is empowered to assert for itself and those it may represent on behalf of its residents, further reduces the likelihood that a municipality will meet the William Penn standing criteria. Other cases involving municipality appeals from DER orders have shown similar results.

102. Id. at 517, 415 A.2d at 1016.
103. Id. at 521-22, 415 A.2d at 1017-18. The court found that the township's allegation of injury was speculative, and that its functions, as a municipality, were not affected by the permit. Id.
104. Id. The court stated that the DER is vested with the powers and duties to protect the environment on behalf of Pennsylvania residents, and, consequently, the township would assume no role as trustee for its residents. Id.
105. See supra notes 59-63 and accompanying text.
106. 52 Pa. Commw. at 521, 415 A.2d at 1017.
107. Pennsylvania courts have used this "municipal function" element in analyzing whether municipalities have standing to appeal administrative actions in areas other than environmental issues. See Twp. of Upper Moreland v. Dep't of Transp., 48 Pa. Commw. 27, 409 A.2d 118 (1979) (township has no standing to enjoin the Pennsylvania Department of Transportation from using public funds for road construction since the allegedly unlawful expenditure can be challenged by injured taxpayers, and township cannot act as their fiduciary); Snelling v. Dep't of Transp., 27 Pa. Commw. 276, 366 A.2d 1289 (1976) (city has no standing to challenge Pennsylvania Department of Transportation permits on behalf of citizens who alleged they would suffer personal injury from an increased number of traffic accidents).
It was against this general background that the Pennsylvania Supreme Court, in 1982, held that a municipality does have standing to challenge permits issued under SWMA. In *Franklin Township*, the host township and county appealed DER's issuance of an SWMA permit to a private operator for an industrial waste processing facility which would handle hazardous wastes. The plurality opinion held that the interest of local government in protecting the environment from toxic wastes is a "substantial" interest within the meaning of *William Penn*. According to the court, the very nature of toxic wastes are such as to "irrevocably alter the fundamental nature of the land which in turn irrevocably alters the physical nature of the municipality and county of which the land is a part." Further, the court found the local government's interest is "direct," because hazardous wastes change the inherent character of the environment, and is "immediate," because hazardous waste disposal sites effect an instantaneous change to the environment and quality of life. Although *Franklin Township*'s grant of standing to local government arose from the siting of a hazardous waste processing facility, it has subsequently been held that local governments also have standing to appeal residual and municipal waste permits under SWMA.

Roughly six months after the *Franklin Township* decision, the Pennsylvania Supreme Court widened local government's potential access to the SWMA permitting process by holding, in *Susque*

110. *Id.* at 3-4, 452 A.2d at 718-19. The appellants challenged several substantive aspects of the permit, including the absence of provisions concerning accidental spillage of the hazardous waste and the potential that several springs on the property would become contaminated. *Id.* Appellants also charged the DER with several procedural violations of SWMA, including the allegation that the DER breached its duty to cooperate with local government by failing to notify the county and township of the permit application. *Id.*
111. *See supra* notes 95-100 and accompanying text.
112. 500 Pa. at 5, 452 A.2d at 720. Further, the court recognized that development of safe waste treatment facilities and disposal sites is a very pressing public problem, one which can best be solved through the efforts of all who have an "interest in the environment," including local residents and local government. *Id.* at 7, 452 A.2d at 721.
113. *Id.* at 7-8, 452 A.2d at 721-22.
hanna Cty. v. Com., Dep’t of Envtl. Resources, that a county has standing to challenge administrative orders which directly relate to the operation of a landfill within the county. In Susquehanna Cty., the host county and a group of private citizens complained to the DER that the operator of a sanitary landfill violated certain conditions of its permit. Dissatisfied with the DER’s subsequent order to the landfill operator to comply with certain terms of the permit, the county appealed, contending that the disposal permit should be revoked. The Supreme Court reversed the Commonwealth Court’s dismissal of the complaint for lack of standing and held that a county has standing to appeal DER operational orders which relate to a permitted landfill. The court reasoned that the daily operation of a waste disposal facility presents local government with the same “substantial, direct and immediate” interest as the establishment of a waste disposal site, which Franklin Township held sufficient to confer standing.

Thus, Franklin Township and Susquehanna Cty. have granted standing to local governments to challenge hazardous waste permits issued by the DER as well as any subsequent administrative orders pertaining to that landfill. Section 504 of SWMA also provides a procedural mechanism under which the county and host municipality may review applications for solid waste disposal permits. All applications for waste disposal permits must be reviewed by the county and host municipality.

116. 500 Pa. at 517, 458 A.2d at 932.
117. Id. at 514 n.2, 458 A.2d at 930 n.2. Id. The county alleged that the landfill violated several of the terms of its permit, including the allegations that there was continuous leaching of industrial waste into surface and ground waters, that the groundwater was not monitored for waste discharge, that large quantities of unpermitted industrial wastes were deposited at the site, and that the operator failed to construct an impoundment required by a previous order. Id.
118. Id. at 514, 458 A.2d at 930. The county asserted that the landfill permit should be revoked and the operator be required to reclaim the landfill. Id.
120. 500 Pa. at 517, 458 A.2d at 932. The Court expanded Franklin Township, supra notes 109-114, by reasoning that the threat to health and environment posed by the operation of a landfill is just as substantial, direct and immediate as that of the initial issuance of the permit. Id.
121. 35 PA. STAT. ANN. § 6018.504. This section is broadly written to include local government review of all solid waste permits, which includes hazardous, municipal and residual waste.
122. Id. The Pennsylvania hazardous waste regulations provide for public comment
may then recommend to the DER conditions, revisions or disap-
approval of the permit only if a specific cause is identified. The DER may override the municip-
ality's objections by publishing in the Pennsylvania Bulletin its justifica-
tion for disagreeing with the municipality.

Taken together, Franklin Township, Susquehanna Cty. and section 504 provide municipalities and other local governments with potentially considerable influence over permit applications, siting and operation of waste disposal facilities. First, during the permit application stage and after permit issuance, local governments have standing and the statutory right to recommend the conditions on which a hazardous waste disposal facility may be sited within its township or municipality. Further, a local government may appeal the DER's override of its objectives or recommendations made at the application stage. Second, although not expressly provided in section 504, local governments have, under Susque-

hanna Cty., the opportunity to monitor the continuing perform-
ance of a disposal facility after it has been permitted and to chal-
lege those DER administrative orders which would cause a threatening condition to local health and safety.

However, certain unresolved questions arise concerning the ex-

See supra note 91. Except when a proposed facility violates a Phase I exclu-
sionary criterion triggering the DER's automatic denial of the application without further review, 25 PA. CODE § 75.412, the public is entitled to participate in the DER's evaluation of whether a proposed facility meets the Phase II discretionary siting criteria. Id. at § 75.413. Phase II criteria are those for which an applicant may submit additional information to allow the DER to assess the effect, if any, that failure to satisfy the criterion has upon the acceptability of the site. Id. at § 75.441. These criteria include the adequacy of local safety services, id. at § 75.447, the effect of the facility on local economics, id. at § 75.449, and the siting of facilities over mineral bearing areas, id. at § 75.444. These regulations give the public an opportunity for substantial local input into the siting of a proposed facility from the moment an applicant submits an application which does not meet any mandatory or discretionary siting criteria.

An earlier draft of SWMA required approval by the affected municipality, but this provision was deleted from the final version of SWMA. The draft language provided that "no permit or license for the disposal of hazardous waste shall be granted without the written consent or approval of the governing body of the county in which the proposed disposal site is located." H.B. 1840, Printer's No. 2396, 163d Sess. (1979).

See supra notes 109-114 and accompanying text.

See supra notes 121-125 and accompanying text.

See supra notes 115-120 and accompanying text.
tent of public participation in the permitting process.\textsuperscript{129} For example, section 504 provides that a host county is deemed to have waived its right of review by not commenting on a permit application within sixty days.\textsuperscript{130} However, \textit{Franklin Township} allows review by local government after a permit is issued, contrary to the arguable legislative intent that host municipalities must voice their recommendations early in the permitting process.\textsuperscript{131} The DER as the permitting agency would thus never know for certain when it had received all local objections and recommendations.

Another unresolved issue is whether a local government has the same direct, immediate and substantial interest in the siting of non-hazardous waste facilities within its jurisdiction. Both \textit{Franklin Township} and \textit{Susquehanna Cty.} granted municipalities standing to appeal in connection with hazardous waste facilities. Certainly, a municipality could argue that some non-hazardous waste facilities operations do substantially impact the 'inherent character' of the environment and may effect the type of instantaneous change to the quality of life in the community, consistent with the reasoning of \textit{Franklin Township}.

However, the potentially substantial impact that a local government may have as outlined above seems to be somewhat tempered, and in fact may be overcome, by state regulatory authorities, because reviewing courts generally accord a considerable degree of deference to the technical expertise of the DER.

When evaluating a solid waste permit application under SWMA, the DER must consider Article I, section 27 of the Pennsylvania Constitution, which guarantees the right to a clean environment.\textsuperscript{132}

\textsuperscript{129} See generally Thomas, \textit{Pennsylvania's Solid Waste Management Act—Local Government Challenges to Permits Issued}, 54 \textit{Pa. B.A.Q} 175 (1983), which raises the additional issue, not discussed here, whether a local government asserting environmental or economic interests within its borders could challenge SWMA permits for facilities located outside its boundary but having effects within its boundary. \textit{Id.} at 178. Section 504 of SWMA, 35 \textit{Pa. Stat. Ann.} § 6018.504, provides that the "appropriate county" shall review permit applications, which could be broadly interpreted to mean that any county affected by the siting and operation of a waste facility would have the right to review permit applications.


\textsuperscript{131} \textit{Franklin Township} was concerned with a waste permit issued under Act 241, the predecessor of SWMA, but the opinion indicated that townships would have standing to challenge the issuance of a permit "even if the provisions of [SWMA] . . . had been adopted at the time of these proceedings." 500 \textit{Pa.} at 11 n.11, 452 A.2d at 723 n. 11. Justice Hutchinson, concurring, regarded that footnote as unnecessary dictum. \textit{Id.} at 13, 452 A.2d at 724.

\textsuperscript{132} \textit{Pa. Const.} art. 1, § 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural scenic, historic and aesthetic values of the environment. Pennsylvania's public
under the three criteria enunciated in *Payne v. Kassab.* Those three criteria are whether there is a compliance with the applicable statutes, whether there is a reasonable effort to reduce the environmental harm to a minimum and whether the proposed benefits are clearly outweighed by the environmental harm. The DER must apply these criteria on a reasonable basis to arrive at its decision. Upon doing so, subsequent review by the EHB is limited to whether the DER has abused its discretion or acted capriciously. Further review of an EHB decision by the Commonwealth Court is limited to whether constitutional rights were violated, whether an error of law was committed or whether the facts are supported by substantial evidence.

Several cases suggest that if the DER has followed the above guidelines, it is difficult for a municipality to successfully challenge the issuance of a SWMA permit. For example, in *Bedminster Twp.*

natural resources are the common property of all . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

*Id.*

133. 11 Pa. Commw. 14, 312 A.2d 86 (1973), affd, 468 Pa. 226, 361 A.2d 263 (1976). In *Payne*, the court denied city residents' demand for an injunction to prevent the Pennsylvania Department of Transportation from destroying a portion of a public park in a road widening project, finding that the Department acted in complete compliance with all applicable statutes. *Id.*

134. *Id.* at 29-30, 312 A.2d at 94. Although it has been argued otherwise, it seems that the DER has only the duty to minimize the environmental harm of the immediate project it is evaluating and does not have to seek out possibly more environmentally acceptable sites. *See, e.g.*, Coolspring Twp. v. Com., Dep't of Envtl. Res., 1983 Pa. EHB 151 (1983)(DER under no duty to find alternative sites to permit residual septic tank waste).


the Commonwealth Court affirmed the EHB order upholding the DER's grant of a sewage sludge permit under SWMA against appeal by the host township and local residents. In *Twp. of Indiana v. Com.*, *Dep't of Envtl. Resources*, the EHB dismissed the host township's opposition against a SWMA permit to landfill fly-ash from an electrical power generator. And in *Coolspring Twp. v. Com.*, *Dep't of Envtl. Resources*, the EHB dismissed the appeal of the host township and upheld the DER's issuance of an SWMA permit for topical application of sewage sludge, subject to certain modifications.

*Pa. Envtl. Mgt. Services v. Dep't of Envtl. Resources* also suggests it is difficult to successfully challenge a DER permit. In *Pa. Envtl. Mgt. Services*, the court reasoned that since the DER may abuse its discretion by allowing a project to proceed in the face of clearly superior environmental considerations, the DER may also abuse its discretion if it disallows a landfill when the economic needs for and "regionwide benefits" of a landfill outweigh potential environmental harm. The court held that the DER must balance the regionwide benefits of a landfill against the threatened environmental harm. The implication of this case is that the DER may consider both the technical aspects associated with landfill siting, to which reviewing courts give great deference, and the regionwide benefits that the landfill would provide. This combination would seem to be a powerful tool in overcoming local opposition.

There are now pending in the Pennsylvania legislature proposed amendments to SWMA (House Bill 367) which would statutorily win back for local government some of the powers eroded as outlined above. Among other things, House Bill 367 would absolutely

138. *Bedminster Twp.*, supra note 137.
139. *Indiana Twp.*, supra note 114. The EHB found the alleged health risk from the synergistic effects of fly-ash and diesel fumes from passing trains too speculative. *Id.*
140. *Coolspring Twp.*, supra note 114. The permit was upheld although the EHB directed the DER to include provisions for groundwater and soil monitoring. *Id.*
142. *Id.* at —, 503 A.2d at 480. The court vacated the EHB's order upholding the DER's denial of the application, finding the EHB's conclusion that the landfill would provide no benefit untenable because the region would receive some benefit from the "urgently needed landfill." *Id.*
143. *Id.*
prohibit a permit for a hazardous waste treatment and disposal fac-
cility within two miles of any public school or building owned by a
school district. The proposed amendments would also greatly in-
crease local government’s section 504 approval rights by providing
for negotiation, including arbitration if necessary, between the host
municipality and the DER for an agreement to issue a permit. This
agreement may obligate the applicant to pay a reasonable
compensation to protect public health and safety or to compensate
for reduced property values resulting from siting a hazardous
waste facility in the municipality. Thus the tension continues
between the need to develop safe disposal sites and the strong local
opposition to such development.

Local Opposition Through Exclusionary Zoning

Zoning laws and regulations are a second method by which local
government may influence or even disrupt hazardous waste dispo-
sal facility siting or operation within its community. This method
is perhaps more subtle than direct challenges to the SWMA permit
application process outlined above. While local zoning ordinances
and regulations can take a variety of forms, including zoning based
on nuisance law, the focus of this comment will be limited to the
effects of exclusionary zoning on the SWMA permit program.

Act 241, the predecessor to the existing solid waste management

145. Id. at § 507(h). This section would prohibit the DER from issuing a permit for
“any hazardous waste treatment facility or hazardous waste disposal facility within two
miles of any public facility or building which is owned by a school district or a private or
parochial school.” Id. Under the Phase II regulatory siting criteria which now exist, a treat-
ment or disposal facility located greater than one mile from a school, hospital, church or
retail center is deemed acceptable; if the applicant cannot meet this criterion, the applicant
may submit data to allow the DER to assess the effect of the proposed facility on the local
community. 25 PA. CODE § 75.448.

146. Id. at § 504(b). Other states including Massachusetts and Wisconsin have incor-
porated a negotiation process into their hazardous waste management acts to accommodate
both local and state/regional interests in waste facility siting. See Harrington, The Right to
a Decent Burial: Hazardous Waste and its Regulation in Wisconsin, supra note 7, and
Miller, Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation, 14
Nat. Resources Law 473 (1984) for a general discussion of these statutes.

147. Id.

(WV Sup. Ct. App. 1985)(RCRA and state hazardous waste management act do not preempt
city ordinance characterizing hazardous waste as a public nuisance and prohibiting perma-
nent disposal). But see EnSCO v. Dumas, No. 85-1410 (8th Cir. Dec. 22, 1986)(to be reported
at 807 F.2d 743)(RCRA preempts township ordinance which purported to prohibit the stor-
age, treatment or disposal of hazardous waste in the township where the ordinance conflicts
with the regulations adopted under RCRA).
Duquesne Law Review

statute in Pennsylvania, was silent as to its preemptive effect on local zoning ordinances with respect to siting waste disposal facilities. Several cases held that Act 241 did not preempt the field of local zoning regulations. For example, the Commonwealth Court in Greene Township v. Kuhl applied the test of legislative preemption of local zoning ordinances announced in City of Pittsburgh v. Commonwealth, that the legislature must manifest an explicit intent to override local zoning regulations, and held that Act 241 did not preempt local zoning power. Thus, under Green Township, solid waste disposal operators had to secure both a DER disposal permit and any applicable municipal permits or certificates before beginning operations. Other cases have reached similar results.

Likewise, the present solid waste management statute, SWMA, contains no express intent to preempt local zoning regulations concerning siting of solid waste disposal facilities. Several decisions have held that SWMA does not preempt local siting ordinances by relying on the "absence of an express legislative intent to override local zoning regulations" test stated in City of Pittsburgh. Moyer's Landfill v. Zoning Hearing Bd. upheld a lower court's finding that SWMA does not preempt local ordinances. And in Sunny Farms, Ltd. v. North Codorus Twp., the Commonwealth Court failed to find in SWMA any intent to protect hazardous waste facilities from local regulations and noted that the legisla-

149. See supra notes 59-63 and accompanying text.
150. 32 Pa. Commw. 592, 379 A.2d 1383 (1977). In Greene Township, appellants who had been issued solid waste disposal permits by the DER sought to avoid obtaining a zoning certificate and building permit from the host municipality. Id.
151. 468 Pa. 174, 360 A.2d 607 (1976). The Pennsylvania Supreme Court in City of Pittsburgh held that the state Bureau of Corrections must obtain a certificate of occupancy from municipal zoning authorities before building a pre-release center for women convicts in the municipality. Id.
152. Id. at 185-86, 360 A.2d at 613. According to the Court in City of Pittsburgh, "[i]n the absence of explicit language . . . whereby the legislature evidences a clear intent to override local zoning regulations this Court is bound to follow the mandate of the zoning enabling act." Id. (The Zoning Enabling Act, 53 Pa. Stat. Ann. § 25051, enables second class cities to regulate general building construction).
154. See supra notes 151-152.
155. 69 Pa. Commw. 47, 450 A.2d 273 (1982)(property owner sought to use his own property as a sanitary landfill against a local ordinance totally excluding such use in the township).
156. Id. at 49 n.2, 450 A.2d at 275 n.2.
ture is presumed to know the judicial non-preemption construction given Act 241 when it drafted SWMA.158

However, Pennsylvania courts have drawn a distinction between local ordinances which attempt to regulate the physical location of a solid waste disposal site and attendant land use, and those which attempt to regulate the daily operation of a disposal facility. It has been held, both under Act 241 and SWMA, that municipalities were not intended to have the power to regulate any aspects of the operation of landfills, since these state acts were construed to effect a limited preemption of solid waste disposal operations.159 In drawing such a distinction for a municipal waste landfill under SWMA, the court in *Municipality of Monroeville v. Chambers Dev.*160 reasoned that a local ordinance which regulated the hours of operation of a regional landfill was not an ordinance adopted “for the storage and collection of municipal wastes,” which municipalities are specifically permitted to regulate under SWMA,161 and as such was legislatively withheld from local government.162 Given the long history of local government involvement with sanitary landfills and the fact that Article II of SWMA grants to municipalities certain powers and duties with respect to disposal of municipal waste,163 the result in *Municipality of Monroeville* seems to satisfy the legislative intent test of *City of Pittsburgh.*

However, *Crown Wrecking Co., Inc. v. Township of Ross*164 held

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158. *Id.* at 374, 474 A.2d at 59. The Commonwealth Court upheld an ordinance requiring a 500 yard buffer between a disposal facility and existing dwellings. *Id.*

159. *See* Greater Greensburg Sewage Authority v. Hempfield Twp., 5 Pa. Commw. 495, 291 A.2d 318 (1972), for authority under Act 241. (Act 241 did not require a limited preemption of regulation of sewage facility operations, including disposal of waste generated by such operations.) For comparable results under SWMA, *see* Municipality of Monroeville v. Chambers Dev., 88 Pa. Commw. 603, 491 A.2d 307 (1985). In *Chambers*, a local ordinance prohibited any activity at sanitary landfills between 6 p.m. and 6 a.m. *Id.* The landfill operator obtained a permanent injunction against the enforcement of this ordinance from the Court of Common Pleas of Allegheny County, which was upheld on appeal. *Id.* However, *see* Fiore v. Zoning Hearing Bd. Eliz. Twp., 134 P.L.J. 169 (1986) (a local ordinance imposing a per ton fee on hazardous waste handled at a landfill was not preempted by SWMA.)


161. 35 PA. STAT. ANN. § 6018.202 provides that, included in the powers and duties of municipalities to regulate municipal waste, municipalities have the power to “adopt ordinances, regulations and standards for the storage and collection of municipal wastes,” which regulations shall not be less stringent than those promulgated by the DER. *Id.*

162. 88 Pa. Commw. at 608, 491 A.2d at 311.


164. 132 P.L.J. 290 (1984), aff’d, --- Pa. Commw. ----, 500 A.2d 1293 (1985). A private landfill operator under a SWMA permit sought an order enjoining the host township from enforcing an ordinance which regulated on-site and off-site conditions of the site, including mud on public roads, excessive truck noise, and odors drifting from the site. *Id.*
that a local ordinance regulating on-site and off-site conditions of demolition waste landfill, which waste would most likely be classified as a residual waste,\textsuperscript{165} was preempted by SWMA.\textsuperscript{166} Municipalities have no express powers and duties with respect to residual waste under SWMA.\textsuperscript{167} Applying the \textit{City of Pittsburgh} criteria to residual waste landfill operations, or to hazardous waste landfill operations over which municipalities were likewise given no powers or duties,\textsuperscript{168} suggests that the state legislature did not evidence a clear intent to override local zoning regulations.

There is, then, an inconsistency in solid waste management in the sense that zoning regulations affecting disposal facility siting are not preempted by SWMA while regulations affecting the operations of disposal facilities are preempted by SWMA. Such an inconsistency seems to undermine a stated purpose of SWMA to “establish and maintain a cooperative state and local program . . . for comprehensive solid waste management,”\textsuperscript{169} a management which must emphasize “area-wide planning.”\textsuperscript{170} Further, it was just such a distinction between siting and operations of disposal facilities that the Pennsylvania Supreme Court rejected in \textit{Susquehanna Cty.} when it extended standing to local governments to challenge DER administrative orders affecting daily facility operations.\textsuperscript{171}

Despite the fact that SWMA does not preempt a municipality’s ability to regulate the siting of solid waste disposal facilities through zoning ordinances, although the power to regulate operations is preempted, it is clear that there is a limit on the reach of exclusionary zoning ordinances. It has been held that the total exclusion of a solid waste disposal facility is unconstitutional unless the local government enacting such an ordinance or regulation can prove a substantial relationship between the exclusion and the health, safety and welfare of the community sufficient to justify the exclusionary regulation.\textsuperscript{172} For example, the total ban of a com-

\textsuperscript{165} Residual waste is defined as non-hazardous waste resulting from industrial, mining and agricultural operations. 35 PA. STAT. ANN. § 6018.103. See supra note 70.

\textsuperscript{166} Crown Wrecking Co., Inc. v. Twp. of Ross, supra note 164, at 295.

\textsuperscript{167} See Article III, Residual Waste, of SWMA. 35 PA. STAT. ANN. §§ 6018.301-.303.

\textsuperscript{168} See Article IV, Hazardous Waste, of SWMA. Id. at §§ 6018.401-.405.

\textsuperscript{169} Id. at § 6018.102(1).

\textsuperscript{170} Id. at § 6018.104(3). The DER and the Pennsylvania Department of Health are required under SWMA to “develop a Statewide solid waste management plan in cooperation with local governments . . . [E]mphasis shall be given to area-wide planning.” Id.

\textsuperscript{171} See supra notes 115-20 and accompanying text.

\textsuperscript{172} Gen. Battery v. Zoning Hearing Bd. of Alsace Twp., 29 Pa. Commw. 498, 371 A.2d 1030 (1977). In \textit{Gen. Battery}, a corporation which generated waste from a lead-smelting operation was denied a permit to build a disposal facility on land it owned because the local
mercial demolition landfill,173 the exclusion of all sanitary landfills,174 a ban on the disposal of lead-smelting waste175 and a distance requirement of a local ordinance which de facto excluded a solid waste landfill176 have been held invalid. While apparently no case has directly addressed the question whether a hazardous waste facility may be totally excluded from a community, the lead-smelting case suggests that a flat ban on such a facility would be held invalid.177

Since the ability of local government to control land within its jurisdiction is a function of its police power,178 zoning regulations to be constitutional must advance the public health, safety or general welfare.179 In many states, there has been considerable judicial deference to local land use classifications when such classifications are not arbitrary, capricious or lack a reasonable relationship to the general welfare.180

Pennsylvania has recently moved away from a formerly more interventionist position and adopted a degree of judicial deference to exclusionary zoning laws, which attitude may prove useful to local communities seeking to limit hazardous waste disposal facility ac-

ordinance banned industry-related uses in the township. Id. In finding the ordinance invalid, the court held that:

[The total exclusion of industrial waste disposal facilities in [the township] shifts the burden of proof to the municipality . . . We therefore conclude that waste disposal facilities under the diligent control of [DER] do not embody a use, the total exclusion of which appears prima facie to be designed to protect the public health, safety and welfare.

Id. at 502-03, 371 A.2d at 1032. See also Moyer's Landfill, supra note 155 (local ordinance totally excluding sanitary landfills declared unconstitutional).


174. See Moyer's Landfill v. Zoning Hearing Etc. supra note 155 (total exclusion of sanitary landfills held not substantiated where township's evidence consisted of technical issues concerning landfill siting that are the subject of DER regulations under SWMA).


177. See supra note 172. Under the DER regulations, waste from a lead-smelting operation would probably be classified as hazardous. See supra notes 64-69.

178. See generally R. ANDERSON, AMERICAN LAW OF ZONING § 3.10 (1976).

179. Id. § 703. See also Campbell v. Zoning Hearing Bd., 10 Pa. Commw. 251, 310 A.2d 444 (1936) ("Zoning classifications and the fixing of lines of demarcation [by municipalities] . . . will not be interfered with by the Court except in cases where it is obvious that the classification has no relation to public health, safety, morals, or general welfare").

180. See D. MANDELKER, LAND USE LAW §§ 1.13-.16 (1982).
tivity in their community.\textsuperscript{181} The Pennsylvania Supreme Court's 1983 decision in {	extit{Appeal of M.A. Kravitz Co.}}\textsuperscript{182} strengthened a position taken in 1977 which rejected a \textit{per se} test of exclusionary zoning in favor of an analysis balancing the severity of the exclusion against the needs of the municipality.\textsuperscript{183} Under the \textit{Kravitz} analysis, an ordinance is excessively exclusionary if a municipality is likely to experience development pressure and additional growth, and the exclusion created by the ordinance is unreasonable in relation to regional growth pressures.\textsuperscript{184}

The reasoning of \textit{Kravitz} raises at least two implications for hazardous waste disposal facility siting, although the case itself dealt with exclusion of multifamily dwellings. First, \textit{Kravitz} suggests that if a township is not a likely place for population growth or development, an exclusionary regulation would be upheld. This could be a serious consideration since there are often attempts to site disposal facilities in sparsely populated areas to limit local opposition. Second, \textit{Kravitz} suggests that a reviewing court would defer to a municipality's consideration of non-technical factors, such as social factors, aesthetics and economics when the municipality drafted its regulations.

Notwithstanding the implications of \textit{Kravitz}, it is clear that local government can impose on waste disposal facilities criteria additional to those required by an SWMA permit. In \textit{Greene Town-}

\textsuperscript{181} See \textit{Appeal of Girsh}, 437 Pa. 237, 263 A.2d 395 (1970) (noting that low-income groups were moving away from cities, the supreme court found an ordinance making no provision for apartments frustrated local population growth and was unconstitutional); Twp. of Willistown v. Chesterdale Farms, Inc., 426 Pa. 445, 341 A.2d 466 (1975) (ordinance allowing apartments on 80 of township’s 11,589 acres did not satisfy the municipality's obligation to provide its fair share of regional housing).

\textsuperscript{182} 501 Pa. 200, 460 A.2d 1074 (1983). In \textit{Kravitz}, a developer challenged a zoning ordinance permitting multifamily units in less than one percent of the township. \textit{Id.} The Pennsylvania Supreme Court, reversing the appellate court, upheld the zoning ordinance. \textit{Id.}

\textsuperscript{183} \textit{Id.} at 209, 460 A.2d at 1080, citing Surrick v. Zoning Hearing Board of Adjustment, 476 Pa. 182, 382 A.2d 105 (1977). The \textit{Surrick} court, in holding that a township had evaded its responsibility to provide its fair share of multifamily units, developed a three-part balancing test to analyze whether exclusionary zoning restrictions are proper; namely, whether the community is a logical place for development, whether additional growth could occur, and finally the effect of the exclusionary regulation on regional development and local conditions. 476 Pa. at 192-94, 382 A.2d at 110-11.

\textsuperscript{184} In upholding the ordinance in \textit{Kravitz}, the court deferred to the zoning board's consideration of projected low population growth, lack of major highways and mass transportation, and distance from major employment centers in the board's decision to permit multifamily units on less than one percent of the township property. \textit{Id.} at 214-16, 460 A.2d at 1082-83.
the Commonwealth Court held that:

[A] local community cannot set geological or engineering standards stricter than those established by DER for issuance of its permit. However, factors other than geological ones, such as those involving aesthetics, population density, and accessibility govern the selection of a landfill site, and these factors are the appropriate subject of local land use planning.

Relying on this language, an ordinance excluding sanitary landfills from within 500 yards of a church, school or other inhabited dwelling was upheld in Sunny Farms.

The state legislature also seems willing to impose non-technical barriers to waste disposal facility siting under SWMA. House Bill 367 would prohibit siting a hazardous waste treatment and disposal facility within two miles of any public school or building owned by a school district. Further, a host municipality would be given the power under section 504(d) to create zoning rules "equal to or more stringent than the Commonwealth's on the siting and operation of a hazardous waste facility, provided that such ordinances do not preclude or prohibit the siting or continued operation of hazardous waste facilities." A municipality could construe this section to allow it to create such burdensome local regulations, which although not an outright exclusion, may effectively bar hazardous waste disposal facilities from the community. Finally, House Bill 367 would amend sections 608 and 609 of SWMA to extend to host municipalities and counties the power to inspect the records and enter the premises, by search warrant if necessary, of a waste disposal facility.

SWMA does contain one mechanism by which the Commonwealth and the DER may override local zoning opposition to hazardous waste facility siting. This device is the Certificate of Public
A hazardous waste facility operator may petition the EQB for a CPN to establish a hazardous waste treatment or disposal facility after securing all permits from the DER and relevant federal agencies. The EQB is required to review several criteria when deciding whether to issue a CPN, including the somewhat ambiguous criterion of whether the public has had a "meaningful opportunity to participate" in the site selection process. If issued, a CPN:

shall suspend and supersede any and all local laws which would preclude or prohibit the establishment of a hazardous waste treatment or disposal facility at said site, including zoning ordinances. The suspension and supersession is explicitly extended to any person to whom such certificates issued for the purpose of hazardous waste treatment or disposal, and to the successors and assigns of such person.

When considered in light of the above discussion of zoning, the CPN provision of SWMA raises several issues. First, the preemptive power of a CPN over local regulations concerning hazardous waste facility siting in theory, at least, undercuts the right given municipalities by Franklin Township to challenge siting permits issued by the DER. Second, a CPN by its terms only suspends and supersedes local rules which would "preclude or prohibit" establishing a facility, but does not apply to non-prohibitory local rules or to rules which regulate facility operations. This raises the question whether a CPN would suspend a local zoning ordinance which so highly restricts the siting and/or operation of a hazardous waste treatment or disposal facility that as a practical matter the ordinance prohibits the establishment of that facility.

Consequently, local townships appear able to strongly influence facility siting indirectly through regulations fashioned on aesthetic and other factors additional to SWMA permit requirements, even though a CPN precludes local rules which would directly prohibit facility siting. This inconsistency between the ability of a township to impact facility siting and facility operation is precisely the distinction the Pennsylvania Supreme Court rejected in Susquehanna Cty. when it reasoned that daily operations of a facility present

193. Id.
194. Id. at § 6018.105(f)(3)(iv). SWMA gives no indication whether, for instance, a meaningful opportunity under this section is equivalent to the sixty day period for a host county to review solid waste permits under § 6018.504 of SWMA.
195. Id. at § 6018.105(h).
196. See supra notes 109-114 and accompanying text.
local government with the same substantial, direct and immediate interest in the character of the township as does the establishment of a waste disposal site.  It would seem for consistency’s sake, at least, that local governments should have equal access to the permitting and operation of hazardous facilities, whether through direct challenge to permits issued under SWMA or through zoning regulations.

Finally, House Bill 367 proposes amending the above-quoted CPN provision by adding to the end of the first sentence the qualifier “but shall not suspend or supersede ordinances which regulate the siting or continued operation of a facility enacted under [proposed] section 504(d).” This proposal would certainly limit the preemptive effect of a CPN since local siting and operational regulations which are more stringent than DER permit requirements would be sanctioned under section 504(d), and the above amendment would protect local government from the preemptive effect of a CPN in both operations and siting. This suggests that of the competing interests, the legislature favors local government over hazardous waste treatment and disposal facility operators, and perhaps over state and regionwide disposal needs as well.

Conclusion

The issue of proper hazardous waste disposal has generated two sharply defined competing interests for the largely unrenewable and limited resource of suitable property on which to dispose of waste. The interests are those of industry and state and federal agencies who seek to remove barriers to economic development while mitigating the hazards associated with improper waste disposal, and those of local communities, who would agree with the hazardous waste management mechanisms as long as treatment and disposal sites are kept out of their communities. The Pennsylvania Solid Waste Management Act of 1980 was drafted in part in an attempt to address both interests since it gave the DER as the administrative body the power to develop detailed requirements concerning siting and operation of hazardous waste treatment and disposal sites while ensuring public participation in developing a long-term Management Plan. However, recent developments suggest that the influence local communities have over hazardous waste siting and operations issues has grown considerably, perhaps more

197. See supra notes 115-20 and accompanying text.
198. H.B. 367, supra note 144, at § 6018.105(h).
than envisioned by SWMA or RCRA.

First, local governments have standing to challenge DER's waste permit issuance system, as it relates both to siting and to operations of treatment and disposal sites. While it is true that reviewing courts generally accord a fair degree of deference to the DER's technical expertise, and that at least one appellate decision requires the DER to balance regionwide benefits against threatened environmental harm, the new standing rules give local governments the ability to look over DER's permitting shoulder to protect local interests. At the least, local governments and citizens groups thus entitled to participate can lengthen and perhaps complicate the permitting process.

Second, exclusionary zoning is a powerful tool by which local interests can oppose comprehensive waste management. There is an inconsistency in that local governments have standing to challenge both siting and operations permits but that SWMA preempts only zoning regulations relating to operations but not siting. As a result, local communities can require that a facility operator secure all local certificates in addition to a SWMA permit, and can impose non-technical limits on those local certificates so long as the limits bear a substantial relationship to the health and safety of the community to justify the limits. Moreover, the Pennsylvania courts appear to have adopted an increasingly deferential position toward such regulations. The statutory Certificate of Public Necessity which overrides local regulations may not prove to be widely useful to circumvent local opposition, since it is limited by its terms to local laws which preclude or prohibit siting.

Finally, the Pennsylvania legislature seems willing to grant more powers to local communities, since the proposed SWMA amendments would, among other things, totally set aside certain areas from hazardous waste disposal siting, give municipalities express power to adopt zoning rules equal to or more stringent than the DER's rules, give broader inspection and enforcement powers to local government, and require the DER to submit to negotiation concerning siting, which may include requiring the permitted owner or operator to compensate local residents for reduced property values.

Kevin J. Garber