

THE MASSACHUSETTS HAZARDOUS WASTE FACILITY SITING ACT: WHAT IMPACT ON MUNICIPAL POWER TO EXCLUDE AND REGULATE?

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"There was no need for environmental law when there was enough water that you could dump anything into it." Justice Potter Stewart (retired), United States Supreme Court.**

I. INTRODUCTION

Abandoned industrial chemicals threaten a number of Massachusetts municipalities—Dartmouth,¹ Freetown,² Woburn,³ New Bedford,⁴ Pittsfield,⁵ Ashland,⁶ and Lowell⁷ among them. Such chemical

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** R. Reeves, *American Journey*, New Yorker, April 5, 1982, at 73 (quoting Justice Potter Stewart (retired), U.S. Supreme Court).

1. MASS. DEP'T. OF ENV'T'L QUALITY ENGINEERING (DEQE), DIVISION OF HAZARDOUS WASTE, THE HAZARDOUS WASTE PROBLEM AND ITS MANAGEMENT 12 (September 1981) [hereinafter cited as HAZARDOUS WASTE].

2. *Id.*

3. N.Y. Times, Dec. 28, 1981, at A16, col. 1.

4. Dougan, R., *Victims of Toxic Waste Dumping: Who Should Bear the Costs?* Masscitizen, vol. 2, no. 1 (Fall 1981) at 6, reports that New Bedford harbor is contaminated with polychlorinated biphenyls (PCBs). PCB levels in the blood of several New Bedford residents are among the highest amounts ever recorded. Boston Globe, April 21, 1982, at 21, 22.

5. Dougan, *supra* note 4, at 6. The Housatonic River at Pittsfield has also been polluted with PCBs.

6. *Id.* The abandoned Nyanza Dye Works in Ashland are leaching mercury and other chemicals into the Sudbury River.

7. DEQE, News Release No. 82-23, Oct. 15, 1981.

wastes, or "hazardous wastes" as they have come to be called,⁸ are an expensive problem. The state has spent nearly 3 million dollars so far⁹ on removing wastes from just one site, that of the bankrupt Silresim Chemical Corporation in Lowell. Contractors have removed over 5,000 cubic yards of solid debris and 22,000 barrels of liquid waste plus another 270,000 gallons of liquid waste in seven bulk tanks from the site.¹⁰ According to the Massachusetts Department of Environmental Quality Engineering (DEQE), Silresim's 5.2 acres are still "grossly contaminated," and may still need to be paved over, encapsulated, or dug up and hauled away to prevent the further spread of toxic elements into ground or surface waters.¹¹

8. This is a phrase that seems both to frighten and to confuse the public. Surveys have shown that citizens often believe that "hazardous" wastes are comprised of or include radioactive waste. S. Garland, *New England Braces For Its First Toxic Waste Landfill Site*, *Christian Science Monitor*, Nov. 10, 1981, at 6. Note that, in Massachusetts, the statutory definition of "hazardous waste" does not exclude low-level radioactive waste. See MASS. GEN. LAWS ANN. ch. 41D, § 2 (West 1981). Nuclear wastes usually go by the more cryptic, and thus less frightening term "radwaste." Sometimes, of course, chemical and radioactive wastes are dumped together. *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 243 (7th Cir. 1981).

The term "hazardous waste" is thought to have been coined by the United States Environmental Protection Agency (EPA), and first used in the reports leading up to the adoption in October, 1976, of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980), Title II of which is labeled "Hazardous Waste." State environmental administrators reportedly tried through various informal and lobbying efforts to convince EPA to adopt less alarming nomenclature. EPA apparently responded that to speak of "chemical" or "industrial" waste would downplay the seriousness of the problem, and declined to change the designation. Interview with Debra Sanderson, Director of Policy & Management Analysis, Massachusetts Executive Office of Environmental Affairs, in Boston, Massachusetts (March 26, 1982) [hereinafter cited as Sanderson Interview].

9. HAZARDOUS WASTE, *supra* note 1, at 12, reports a \$2.7 million total. See Lowell Sun, Oct. 15, 1981, at 4 (reporting that the state had spent first \$2.4 million, then an additional \$378,000 on the above-ground phase of cleaning the site; the next phase, testing area ground water, would require an initial outlay of \$121,000).

10. DEQE, News Release No. 82-14, August 11, 1981.

11. Lowell Sun, Dec. 11, 1981, at 6. See also M. BROWN, *LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS* 227-28 (1978). The description of Silresim and its troubles includes a notorious spill into Lowell's municipal sewerage system. The site itself is adjacent to River Meadow Brook which flows into the Concord River, a tributary of the Merrimack River, a major source of drinking water. *Id.* at 227. Ironically, Silresim had been founded by a chemical engineer who proposed to establish a "model" facility. *Id.* at 227. Brown reports that following Silresim's adjudication of bankruptcy, its founder, Dr. John Miserlis, described his business venture thusly: "I had a dream of responding to a need which exists throughout the country. But I'm afraid I was ahead of my time." *Id.* at 228.

Silresim had been licensed to store and reprocess hazardous wastes under the state Water Pollution Control Act, MASS. GEN. LAWS ANN. ch. 21, §§ 57, 58 (West 1981). State officials several times cited the company for violations of operating standards and narrowed the scope of its licenses, which were finally revoked in 1977. M. BROWN, *supra* this note, at 229. See Draft: Silresim, at 2 (1981) (available from Division of Hazardous Waste, DEQE, One Winter Street, 8th floor, Boston, MA 02108).

It is the threat of contaminated water that makes neglecting chemical dump sites an even less attractive alternative than the costly process of cleaning them up. Portions of public water supplies in thirty Massachusetts communities have become unfit for use because of poisoning from illegal hazardous waste dumps.¹² This can be an ill-afforded problem in a state in which over thirty communities already have local water shortages.¹³ Additionally, contamination of drinking water poses health threats. The Massachusetts Department of Public Health is currently studying the suspected connection between abnormally high leukemia rates in the town of Fairhaven and chemicals dumped in the Acushnet River and New Bedford Harbor.¹⁴ Researchers from the Harvard School of Public Health are currently studying the link between the elevated cancer rate in the city of Woburn¹⁵ and chemical pollution in two of its public wells.¹⁶ These wells lie at the bottom of a watershed that drains through a chemical dump which is rated by the United States Environmental Protection Agency as one of the ten worst hazardous waste sites in the nation.¹⁷

The Woburn dump cleanup is slated to receive financial assistance from the \$1.6 billion federal "Superfund" Trust Fund set aside for the emergency disposal of toxic wastes.¹⁸ The smaller Silresim site in Lowell has received federal attention just recently;¹⁹ Massachusetts

12. HAZARDOUS WASTE, *supra* note 1, at 1. See also COMMONWEALTH OF MASSACHUSETTS, SPECIAL LEGISLATIVE COMMISSION ON WATER SUPPLY, CHEMICAL CONTAMINATION (September, 1979); Boston Globe, April 20, 1982, at 24 (reprinting the DEQE map showing the locations of these communities).

13. New England Rivers Center Bulletin, at 2 (Winter 1982).

14. The chemicals are PCBs. Boston Globe, April 16, 1982, at 15. See also Dougan, *supra* note 4, at 7; Boston Globe, June 24, 1982, at 17, 23; Boston Globe, March 13, 1983, at 1, 16.

15. Woburn has the highest cancer rate of any Massachusetts community with a population of over 20,000. N.Y. Times, Dec. 28, 1981, at A16, col. 1.

16. The state closed the wells in 1979 upon discovery of the contamination. *Id.*

17. *Id.* The infamous Love Canal dump, by contrast, has been ranked only 24th. Boston Globe, March 11, 1982, at 1.

18. N.Y. Times, Dec. 28, 1981, at A16, col. 1. The superfund was created by Congress in 1980, as part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, at 94 Stat. 2767, 42 U.S.C. §§ 9601-9657 (1980).

19. Lowell Fair Share has asked U.S. Sen. Paul Tsongas (D. Mass.) to use his influence in Washington to have Silresim added to the current superfund priority list of 115 waste sites that will receive cleanup funding. Lowell Sun, Feb. 18, 1982, at 5. Tsongas also agreed to ask then-federal EPA chief Anne Gorsuch Burford to meet with consumer group Fair Share and discuss the Silresim situation, reportedly telling the group, "I'll send the letter, but you know she won't come." *Id.* Tsongas' pessimism over Burford's concern with environmental problems seems to be well-placed; the EPA head subsequently decided to strip the agency's enforcement counsel of all independent powers. N.Y. Times, April 4, 1982, at 23, col. 1. An unnamed official in the enforcement division was quoted as saying that Mrs. Burford "wants to

also is trying to recover its cleanup costs by suing the bankrupt corporation that collected and hauled the hazardous wastes stored on the site.²⁰ Cleaning up these sites, however, is only a crude and partial remedy for the damage done.²¹ At the Woburn site, for instance, the dumping of chemicals began in 1853, and has left sixty acres of poisoned earth and water.²²

Sobered by such spectres, Congress²³ and various state legislatures²⁴ have moved toward creating regulations that will prevent

solve things informally, nonconfrontationally, and [feels] that, normally, you don't need lawsuits." *Id.* The direct consequences of this approach have resulted in a congressional investigation of the EPA and the eventual resignation of Mrs. Burford. See M. Dowd, *Extra*, "Extra" *Shredder Update*, Time, Feb. 28, 1983, at 17.

Federal assistance finally has been granted to the Silresim site. Silresim was added to the Superfund priority site list in late summer of 1982. DEQE Hazardous Waste Update, Jan. 1983, at 1. Senators Kennedy (D. Mass.) and Tsongas (D. Mass.) have requested the EPA to conduct a health study of the area with a view toward possible evacuation of nearby families. Physicians have advised families with young children to leave the area. Boston Globe, March 13, 1983, at B1.

20. *McMahon v. Silresim Chem. Corp.*, Suffolk Civil Action No. 38257 (filed November, 1979).

21. It is also extremely expensive, estimated to be 20 to 60 times more than the cost of initial correct management. See *Proper Waste Disposal is Cheaper*, EPA Administrator Says, 9 ENV'TL REP. (BNA) 2088 (1979).

22. N.Y. Times, Dec. 28, 1981, at A16, col. 1.

23. There have been numerous federal laws geared toward alleviation of environmental pollution. The Federal Water Pollution Control Act, originally 62 Stat. 1155 (1948), and after amendments in 1982 and 1977, the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980), are aimed at preventing discharge of harmful chemicals into surface water. The Clean Air Act, originally 69 Stat. 322 (1955), amended in 1966, 1970, and 1977, and currently codified at 42 U.S.C. §§ 7401-7642 (1976 & Supp. IV 1980), regulates discharge of chemical by-products into the air. Similarly, the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976 & Supp. IV 1980), addresses the personal health hazards of workers exposed to chemicals during industrial processes.

Ultimately, Congress came to realize that "there are no existing statutes which authorize the direct control of industrial chemicals themselves for their health or environmental effect. . . ." 4 U.S. CODE CONG. & AD. NEWS 4492 (1976). In 1976, Congress passed two major statutes intended to change the focus of the regulation of hazardous chemicals at every stage of their use. The Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629 (1976 & Supp. IV 1980), was designed "to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use or disposal of chemical substances [by filling] a number of regulatory gaps which currently exist." 4 U.S. CODE CONG. & AD. NEWS 4491 (1976) (emphasis added). The Resource Recovery and Conservation Act (RCRA), 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980), similarly, was adopted to eliminate "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." 5 U.S. CODE CONG. & AD. NEWS 6241 (1976).

24. At the time of the adoption of RCRA, Congress found that seven states (California, Illinois, Maryland, Minnesota, Oklahoma, Oregon and Washington) had comprehensive waste management laws, but that only California implemented a hazardous waste management program under authority of explicit state law. It also found that Florida, Massachusetts, New Jersey, New York, New Mexico, and Texas had developed regulations in advance of, or in

this kind of blight. Massachusetts is one of the states that has made major changes in its laws relating to the disposal of hazardous wastes. In 1979, the state legislature enacted the Massachusetts Hazardous Waste Management Act (the Management Act).²⁵ This law, which incorporates many of the standards of the federal Resource Conservation and Recovery Act,²⁶ is not especially controversial.

Then, in the summer of 1980, the state legislature adopted the Massachusetts Hazardous Waste Facility Siting Act (the Siting Act),²⁷ enacted as an emergency law designed to "immediately encourage and expedite the . . . development of hazardous waste treatment and disposal facilities which provide adequate safeguards to protect the public health, safety, and environment of the Commonwealth."²⁸ The 1980 Siting Act placed express limitations on the power of municipalities²⁹ to regulate hazardous waste facilities or to exclude them through zoning changes.³⁰ It also established the disposal and treatment of hazardous waste as acceptable uses of any industrially zoned land in Massachusetts by declaring them as-of-right uses.³¹ These provisions have caused some municipalities to fear that they could become the unwilling hosts of an enterprise which has earned an unsavory reputation.³²

The Management Act gave DEQE responsibility to regulate comprehensively the collection, transport, storage, and disposal of dangerous waste materials.³³ It also authorized DEQE to study the generation of hazardous wastes within the state³⁴ and to plan for future

place of, legislation specifically covering hazardous wastes. It noted that "New York has a Hazardous Substances Act, which is so general that the State has chosen not to implement it." 5 U.S. CODE CONG. & AD. NEWS 6261 (1976).

25. MASS. GEN. LAWS ANN. ch. 21C, §§ 1-12, 14 (West 1981).

26. 42 U.S.C. §§ 6901-6987. *See also supra* notes 8, 23; *infra* note 51.

27. MASS. GEN. LAWS ANN. ch. 21D, §§ 1-19 (West 1981).

28. *Id.* § 1.

29. For purposes of this paper, "municipality" will be considered to be any city, town, village or other political subdivision within a state. "Regulation" will refer to any rule, law, or statute; and "local regulation" will refer to municipal ordinances and by-laws.

30. *See infra* text and notes at notes 102-05.

31. *See infra* text and note at note 136.

32. *See Boston Globe*, Dec. 16, 1981, at 48; *Boston Globe*, Sept. 19, 1981, at 1, 24.

33. MASS. GEN. LAWS ANN. ch. 21C, § 4. Section 3 of the Management Act created a hazardous waste advisory committee within the DEQE to carry out these duties. *Id.* § 3.

34. Many human activities create the same sort of refuse as an unintended byproduct. Hazardous wastes are simply those elements of our collective garbage which pose unusual dangers because of their special properties. They may be, for example, explosive, corrosive, or poisonous. *See infra* text and note at note 52. Of the approximately 7.5 million total tons of waste generated in Massachusetts each year, about 350,000 tons (5% of the total) are hazardous.

safe disposal.³⁵ The Management Act is clearly designed to protect the public from careless handling of hazardous wastes.³⁶ Under the Management Act any unlicensed disposal (often called midnight dumping) is a felony.³⁷ While waste disposal may be licensed, landfill disposal is the choice of last resort. It is permitted only when DEQE finds that certain chemicals "cannot be recycled, destroyed, or disposed of by some other means."³⁸ DEQE has determined, however, from its study of the chemical waste situation in Massachusetts, that the state will need at least one "secure landfill" disposal site.³⁹ No such facility currently exists—legally—in Massachusetts.⁴⁰

Although the 1980 Siting Act was designed to facilitate the establishment of secure disposal sites, it remains unclear how such facilities are to fit in with local land use regulations. While producers of hazardous wastes have become increasingly eager to find in-state

HAZARDOUS WASTE, *supra* note 1, at 1. Most industrial processes generate some hazardous waste. The industries which produce the greatest quantities of hazardous wastes are electroplating and metal finishing, smelting and refining industries; manufacturers of special machinery, electronics equipment, plastics, inorganic chemicals, textiles, pesticides, rubber, pharmaceuticals, batteries, explosives, and paint; leather tanning and finishing; and petroleum refining. *Id.* at 4-7. See also N.Y. Times, March 13, 1983, at sec. 3.

35. MASS. GEN. LAWS ANN. ch. 21C, § 4.

36. Ironically, the public probably receives more protection from toxic chemicals that have become waste than it receives from the same chemicals while they are stored, transported, and used for industrial purposes. Sanderson Interview, *supra* note 8.

37. MASS. GEN. LAWS ANN. ch. 21C, § 10.

38. MASS. GEN. LAWS ANN. ch. 21C, § 7. This section also forbids the construction of a landfill over any existing or potential drinking water source, and prohibits the operation of any facility in such a way as to permit the discharge of hazardous waste into water supplies. By contrast, the United States EPA on Feb. 25, 1982, lifted the federal ban on the burying of barrels of liquid hazardous wastes in landfills, calling the rule "unworkable and costly." New York Times, March 12, 1982, at A12. Apparently, both environmental and industrial groups protested, and EPA reinstated the ban on March 12. Blake, *Hazardous Wastes, Changing Rules*, Boston Globe, April 20, 1982, at 1, 24.

39. HAZARDOUS WASTE, *supra* note 1, at 7; see also NAT'L WILDLIFE FED. WASTE PROJECT, HAZARDOUS WASTE MANAGEMENT IN MASSACHUSETTS 5, 6 (May, 1981) (Available from DEQE) [hereinafter cited as MANAGEMENT REPORT]; MASS. DEP'T OF ENVT'L MGT., BUREAU OF WASTE DISPOSAL, HAZARDOUS WASTE MANAGEMENT IN MASSACHUSETTS: STATEWIDE ENVIRONMENTAL IMPACT REPORT 5-13 (May, 1981) [hereinafter cited as IMPACT REPORT].

40. It is important to remember that not all hazardous waste facilities are the same. A "dump" is literally that—wastes are left directly on or buried in bare earth. A more sophisticated version of the dump is a "secure landfill," in which wastes sealed in barrels are buried in clay-lined pits which are designed to prevent leakage. Garland, *New England Braces for its First Toxic Waste Landfill Site*, Christian Science Monitor, Nov. 10, 1981, at 6. At present, none of Massachusetts' nine licensed hazardous waste treatment and disposal facilities maintains a landfill. The largest off-site facility, Recycling Industries in Braintree, incinerates some of the wastes it receives, and consolidates others. It accepts hydrocarbon liquids, aqueous inorganics, pesticides, cyanide, plating wastes, and all kinds of solids and sludges. Lewis Chemical Corp. in Hyde Park accepts solvents and organic chemicals, while most of the other firms only reclaim solvents or recycle or burn waste oil. MANAGEMENT REPORT, *supra* note 39, at 5.

disposal sites,⁴¹ communities have become more reluctant to accommodate this need. Some communities have passed their own by-laws banning the dumping of toxic wastes.⁴² Others have succeeded in persuading the state legislature to pass bills forever exempting them as sites for hazardous waste facilities.⁴³ Pressure for legally approved facilities continues to be exerted by industry, state officials, citizens, and environmentalists concerned about illegal dumping.⁴⁴

Several developers have already initiated proposals to build facilities under the procedures set up by the Siting Act.⁴⁵ They have not

41. A large percentage of the hazardous waste produced in Massachusetts must be shipped out of state for disposal because local facilities do not have the capacity to meet the needs of local industries. Wastes are currently sent to sites in New York, New Jersey, Ohio, and Alabama. MANAGEMENT REPORT, *supra* note 39, at 5. While expensive for Massachusetts industry, these options do provide a temporary available solution to the disposal problem. These soon could become unavailable, however—the Niagara Falls, N.Y., landfill that became the resting place of much of the waste removed from the Silresim site in Lowell has had difficulty with its licenses and may be forced to close. Planners expect that a Massachusetts capacity shortfall will cause severe difficulties within a few years. IMPACT REPORT, *supra* note 39, at 5-13.

Massachusetts industry could theoretically shut down or revamp its processes to stop producing hazardous waste. This is unlikely, however, since manufacturing brings in half of the state's income, and employs a third of its workers. Any retooling of industrial processes to accomplish environmental goals would have to be done very carefully to avoid massive economic displacements. MANAGEMENT REPORT, *supra* note 39, at 2.

42. Sanderson Interview, *supra* note 8.

43. In 1978, local industry began to complain to then State Secretary for Environmental Affairs, Evelyn Murphy, about the absence of nearby disposal facilities. The state then hired the engineering firm of Camp, Dresser & McKee to conduct a study to select a site for a sludge landfill. The firm selected three possibly appropriate sites from eleven which had been under consideration. Somehow, this information was leaked to the press. At the time the Department of Environmental Management had eminent domain power, *see* MASS. GEN. LAWS ANN. ch. 21D, § 17, ch. 16, § 19C (West 1981), and some communities must have feared the imminent condemnation of a landfill site. The town of Sturbridge and city of Taunton promptly responded by filing an exemption bill, MASS. HOUSE NO. 6359 (1978) which was passed by the state legislature, and signed into law by then-Governor Dukakis on Sept. 19, 1979. Sanderson Interview, *supra* note 8. The bill is codified at Acts and Resolves of 1979, 1979 MASS. ACTS ch. 574 (1979).

44. Boston Globe, Oct. 12, 1981, at 22, 23. *See also* DEP'T OF ENV'T'L MG'T (DEM), Hazardous Waste Needs a Safe Place to Go (July, 1980) (available from DEM).

45. Public concerns raised by these proposals have been presented consistently. Consider the following letters to the editor:

Key issue on hazardous waste sites

Hazardous waste treatment and disposal have become a cause celebre to many in Massachusetts—and justifiably so. Our public officials and policymakers, in their pronouncements, do not, however, appear to understand why we would not welcome such a facility into our communities.

For me, the central issue of hazardous waste is governance. I would not hesitate to support a proposal to locate such a plant in my community if three conditions were met:

been well received; at least two municipalities faced by possible sitings have filed suit against the state over issues raised by the Siting Act.⁴⁶ Some aggrieved state legislators have criticized the process of siting under the Act, attacking its fairness and questioning its legality. A bill has been filed to place a five-year moratorium on the Siting Act, but has not emerged from study in committee.⁴⁷ An alternative bill to amend the Siting Act to accommodate many community concerns not only would retain but would strengthen those sections of the original Siting Act which preclude the direct municipal regulation of hazard waste facility development.⁴⁸

In 1981, the town of Warren was selected by the Safety Council as a possible site for a hazardous waste facility to be operated by IT

1. Lowest achievable emission rate (LAER) technology is installed and adequate monitoring performed.

2. Community residents elected by their fellow residents constitute 25 percent of the board of directors of the Massachusetts corporation operating the facility, and

3. All records of the corporation and the facility are open to public inspection.

I believe the people of the Commonwealth will accept the risks of Massachusetts hazardous waste generators along with the economic benefits if they can exert local control and need not have blind faith in a faceless inaccessible corporation that may or may not be trustworthy.

The Boston Globe, Apr. 13, 1982, at 18, col. 2.

Opposed to SRS

The Globe's Jan. 18 editorial, "Hazardous Waste Hazards," mentioned SRS's financial status and the perplexing Massachusetts siting process, but it failed to mention that SRS proposes and is determined to locate on one of our most important waterways, namely the Merrimack River. This has been a primary and important issue in Haverhill since the beginning of the siting process by the state and SRS.

SRS is a New Jersey firm and that state will not allow such hazardous waste facilities to be built on a waterway . . . it seems that New Jersey is exercising more sense than Massachusetts.

Is Massachusetts so shortsighted in the hazardous waste siting process that it is willing to risk its residents and its natural resources to contamination by toxic and disease-causing chemicals?

The Boston Globe, Feb. 2, 1982, at 16, col. 2.

46. Town of Warren v. Hazardous Waste Facility Site Safety Council, Worcester Super. Ct., No. 82-21740 (1982). Warren charges that the Siting Act violates the state constitution. Haverhill is suing the state for allegedly improper actions taken pursuant to the Siting Act. City of Haverhill v. Hazardous Waste Facility Site Safety Council, Middlesex Super. Ct., Civ. No. 82-683 (1982).

47. See Boston Globe, Sept. 19, 1981, at 13; Boston Globe, Oct. 12, 1982, at 1, 22, 23; Boston Globe, Dec. 16, 1981, at 48. See MASS. S. 1752, 1979 Mass. Gen. Ct., 1st Sess. (1979) introduced by Sen. Robert Wetmore (D. Worcester).

48. Sen. Carol Amick (D. Waltham) has introduced MASS. S. 1899 (formerly S. 823) 1982 Mass. Gen. Ct., 1st Sess. (1982), an act making corrective changes in the hazardous waste siting process which is under consideration by the Ways and Means Committee. The changes it proposes are described *infra* notes 127-34, and include disallowing any municipality from prohibiting the siting of a facility.

Corporation. Warren challenged the procedures of the Siting Act by which the selection was made, asserting that they impermissibly delegate legislative powers to private parties and the Safety Council in violation of due process clauses in the state and federal constitutions, and that the procedures impermissibly preclude the exercise of municipal authority to exclude hazardous waste facilities through zoning changes. On January 5, 1983 the Superior Court for the County of Worcester granted the Safety Council's motion for summary judgment, upholding the administrative regulations of the Siting Act and the restriction of a municipality's authority to exclude hazardous waste facilities.⁴⁹ The court concluded that Warren's recently adopted by-laws excluding hazardous waste facilities were preempted by state law in the Siting Act. On this basis, the court did not fully reach the constitutional issues before it.

While the court's order appears to reach a sensible result, the fundamental issues before it remain to be fully explored, and further litigation is expected. This article is directed towards discovering the legality of the Siting Act's limitations on the ability of local communities to regulate hazardous waste facility development. Section II examines more closely the nature of hazardous wastes and disposal facilities in order to clarify the positions of the municipalities and the state on the issues. Section III presents the Siting Act in detail, especially those sections which constrain the exercise of municipal power over hazardous waste facilities.

Section IV explores the division of power in government. It begins by describing the powers that states have, and explains how states divide these powers between themselves and their political subdivisions. This section specifically addresses whether the Siting Act violates the Home Rule Amendment of the Massachusetts constitution,⁵⁰ the ultimate source of municipal power in this state. Subsequent subsections explore the exercise and limits of municipal powers in relation to private entities and vis-a-vis the state. The limits placed on municipal power by supervening state action in the form of "override" and "preemption" will be scrutinized closely. A subsection on the case history of an analogous environmental problem—the siting of a liquefied natural gas facility—will examine these

49. Memorandum of Decision and Order on Cross Motions for Summary Judgment, Town of Warren v. Hazardous Waste Facility Site Safety Council, Worc. Super. Ct., No. 82-21740 (Jan. 5, 1983).

50. This is one of the allegations made by the Town of Warren in its suit against the state. See *supra* note 46.

special state powers in action. The final part of Section IV will then apply this theoretical framework to the Siting Act to discover the limits that it actually places on the exercise of municipal power. Once the limitation on municipal power posed by the Siting Act is characterized, Section V will consider whether in this effort Massachusetts has violated the dictates of the federal constitution.

Section VI presents a different mode of analysis. Rather than investigating the legality of the Siting Act itself, it proceeds from the premise that the Siting Act is either in harmony with the dictates and constraints of law, or is unassailable in the courts. The section addresses the questions whether, in spite of or in accordance with the Siting Act, a municipality could prevent the construction of a hazardous waste facility, or otherwise ensure the safety of any facility that was built. The section presents three areas of legal doctrine which provide a municipality with potential land use controls that could be brought to bear upon a hazardous waste facility siting problem. The first of these sources is the Siting Act itself: the powers that it gives a municipality directly, and other remedies that are available through the administrative process and through court review of the siting process. The next area of possible influence is the common law, specifically the tort of public nuisance. The third area is federal statutory law, to the extent that it confers substantive rights upon municipalities.

While the conceptual framework of this article aims to be exhaustive, its substantive content has no such pretense. Its individual parts are by no means uniformly thorough; many merely suggest areas in which further analysis should be done. It will be clear that some parts are more fully developed than others; the federal questions especially are prohibitively vast and complex for the scope of this article. It should satisfactorily answer some questions, for other inquiries, it is merely a prolegomenon.

Although this article is framed in a posture of challenge, it is not intended to encourage adversary relations between the Commonwealth and its municipalities over the Siting Act. To characterize either side as right or wrong is to oversimplify and distort a problem as complex as post-industrial society itself. The real "problem" is not the Siting Act, but the inherent nature of hazardous waste. The real "enemy" is the accumulation of toxic substances in our soil, food chain, air, and water supply.

II. THE NATURE OF THE PROBLEM

A. *What is Hazardous Waste?*

Now, here had been this mudhole, the size of a moon crater, 240 miles long, 60 miles wide, 20 feet deep, black, repellent, all ooze, crisscrossed with gutters containing the poisonous effluents extruded by a better industry for a better tomorrow.

[Science fiction description of Lake Erie]*

The Detroit River, which feeds Lake Erie, carries *every day*, in addition to Detroit's largely untreated sewage, 19,000 gallons of oil, 100,000 pounds of iron, 200,000 pounds of various acids, and 2,000,000 pounds of chemical salts. The fertilizer used on the farms of Ohio and Pennsylvania and New York drains into streams that pour into the Erie. Paper mills in the Monroe area of Michigan pour volumes of pollutant waste into the lake. Steel-makers pour in mill scale and oil and grease and pickling solution and rinse water. The Engineers of the Army dredge the harbors and channels of the area and dump the sludge into the middle of Lake Erie.

[Non-fiction description of Lake Erie]**

The Massachusetts Siting Act defines hazardous waste in almost the same language as does the federal Resource Conservation and Recovery Act (RCRA).⁵¹ The Siting Act definition is that of a waste product

which because of its quantity, concentration, or . . . characteristics may cause, or significantly contribute to an increase in mortality or . . . in serious irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health, safety or welfare or the environment when improperly treated, stored, transported, used, or disposed of, or otherwise managed. . . .⁵²

* A. BESTER, *THE COMPUTER CONNECTION*, 27 (1975).

** G. MARINE, *AMERICA THE RAPED* 105 (1969).

51. Pub. L. 94-580, codified at 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980). *See also supra* notes 5, 23 (background information on this statute). RCRA is the basic federal statute dealing with the problem of all solid waste, including hazardous waste. It is incorporated by reference in several sections of the Massachusetts Hazardous Waste Management Act, MASS. GEN. LAWS ANN. ch. 21C, §§ 1-12, 14 (West 1981). For instance, the statute directs that DEQE "establish a manifest system that conforms with the requirements of RCRA." *Id.* § 4 (West 1981).

52. MASS. GEN. LAWS ANN. ch. 41D, § 2. The differences between the federal and state definitions are these: RCRA defines hazardous waste as "solid waste;" the Siting Act refers only to "waste" (though there is no indication that RCRA is intended to exclude liquids or sludges); the RCRA definition speaks only of "human health" whereas the Siting Act includes "human health, safety, and welfare;" RCRA also omits the term "used" from the list of aspects of improper handling. *See* 42 U.S.C. § 6903(5) (RCRA definition of hazardous waste).

Hazardous wastes, then, are substances which by definition pose public health problems.

All creatures and substances are composed of chemical elements and compounds, but different chemicals have very different properties. Some are very dangerous, or have the potential to be dangerous in large concentrations. Whether a chemical is natural or synthetic does not determine whether it is harmful. Natural substances as well as man-made chemicals can cause sickness or death under certain circumstances of exposure. Apologists for the chemical industry are quick to remind the public that there are such things as lethal doses of such naturally benign substances as water, salt, and aspirin. It is true that toxicity is relative, but there are significant differences among potentially poisonous substances which should not be ignored. For instance, synthetic insecticides such as aldrin, parathion, DDT, and dieldrin are so toxic that spillage of a single pound must be reported to the United States Environmental Protection Agency under Clean Water Act regulations.⁵³ By comparison, a reportable quantity of vinylidene chloride, chloroform, hydrochloric acid, or most arsenic, lead, and nickel compounds, each of which has been recognized as dangerous in certain amounts, is in the range of five thousand pounds.⁵⁴

Admittedly, many natural substances are quite toxic and pose hazards when mined or used in manufacture. Good examples of these would be asbestos and the heavy metals⁵⁵ such as lead, mercury, nickel, chromium, selenium, and arsenic.⁵⁶ Asbestos is perhaps the most commonly used material which has recently been shown to cause disease upon exposure.⁵⁷ Some of the man-made chemicals

Both definitions exclude discharges subject to permits issued under the Clean Water Act, 33 U.S.C. § 1312 (1976 & Supp. IV 1980), and nuclear material as defined by the federal Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. IV 1980). The Siting Act exclusion is part of its definition of hazardous waste; RCRA puts this exclusionary clause in its separate definition of solid waste, 42 U.S.C. § 6903(27). A proposed amendment to the Siting Act would exclude from its coverage low-level radioactive waste as well. MASS. S. 1899, 1982 Mass. Gen. Ct. Special Sess., § 18 (1982). See Section by Section Analysis of MASS. S. 1899 (1982), at 3 (available from office of Sen. Carol Amick (D. Waltham) the bill's sponsor) ("[l]ow level radioactive waste was intended to be excluded from the definition of 21D; however, it was not").

53. Allied Chem. Legal Compliance Series, Compliance with the Environmental Laws 31-36 (June, 1980, available from Allied Chem. Corp., Law Dep't, P.O. Box 2245R, Morristown, N.J. 07960).

54. *Id.*

55. L. CASARETT & J. DOULL, TOXICOLOGY: THE BASIC SCIENCE OF POISONS 11-13, 454-502, 565-66 (2d ed. 1975).

56. *Id.* at 464-65.

57. *Id.* at 216. See also S. EPSTEIN, THE POLITICS OF CANCER 79-102 (1979).

which cause problems as waste are halogenated aromatic hydrocarbons such as PCBs, PBBs, and vinyl chloride; and pesticides such as kepone, chlordane, heptachlor, and aldrin.⁵⁸ Others are solvents and degreasers such as trichloroethylene and carbon tetrachloride.⁵⁹ Paints, dyes, and resins are some other spent industrial products and byproducts⁶⁰ which pose problems as well.

Most of these substances share a common characteristic—they break down very slowly, if at all. For instance, elements such as mercury, arsenic, and lead do not degrade.⁶¹ They do not decompose, but rather persist in the environment, where they harm or destroy plant and animal life.⁶² Humans who are exposed to these substances, either acutely at high doses or chronically at lower levels, increase their risk of suffering from any of a variety of maladies, some of which may be fatal.⁶³

58. L. CASARETT & J. DOULL, *supra* note 55, at 504-09; *see also* W. NICHOLSON, J. MOORE, *HEALTH EFFECTS OF HALOGENATED AROMATIC HYDROCARBONS* Vol. 320 (1979).

59. L. CASARETT & J. DOULL, *supra* note 55, at 503-26.

60. A recent federal case contains a nice vignette of what happens when solvents become waste:

Among the chlorinated hydrocarbons which Solvents Recovery receives, processes and distributes are tetrachloroethylene, chloroform, trichloroethylene, 1,1,1 trichloroethane, dichloroethane and carbon tetrachloride. All of these chemicals are either known or suspected to be carcinogenic. In addition, exposure to some or all of these chemicals has caused serious illnesses or disorders in human beings. For example, trichloroethylene may cause cell mutations, damage the nervous system and induce liver disorders. The nervous, pulmonary and cardiovascular systems, as well as the liver and kidneys, may be injured by exposure to 1,1,1 trichloroethane. Similar toxic effects have been ascribed to the other organic chemicals listed above.

The chemical wastes which entered the soil on the Solvents Recovery site have "percolated" downward into the underlying groundwater and migrated generally in a southeasterly direction. The migration of these toxic organic wastes has reached the aquifer—i.e., the subterranean stratum which is saturated with groundwater—in which Well No. 6 of the Board of Water Commissioners for the Town of Southington is located. This well, which is approximately 1,600 feet south-southeast of the Solvents Recovery property, is one of six public wells maintained by the Board to provide drinking water to residents of Southington.

United States v. Solvents Recovery Service, 496 F. Supp. 1127, 1130 (D. Conn. 1980) (footnotes omitted).

Solvents Recovery Service, Inc., is presently proposing to build a solvent recovery plant in Haverhill, Massachusetts. Garland, *supra* note 8, at 6.

61. "Bodies . . . not capable of being decomposed are considered . . . as elements." Sir Humphrey Davy, *Agric. Chem.* (1813) in *OXFORD ENGLISH DICTIONARY* 893 (4th ed. 1979).

62. *See generally*, W. MCKEE, *ENVIRONMENTAL PROBLEMS IN MEDICINE* (1974).

63. P. RHEINGOLD, N. LANDAU & M. CANAVAN, *TOXIC TORTS: TORT ACTIONS FOR CANCER AND LUNG DISEASE DUE TO ENVIRONMENTAL POLLUTION* 1, 120-36, *American Trial Lawyers Ass'n* (1977).

Exposure to toxic chemicals can cause respiratory,⁶⁴ neurological,⁶⁵ kidney,⁶⁶ or liver damage;⁶⁷ it can cause blood or skin disease,⁶⁸ miscarriage, sterility, and other reproductive disorders.⁶⁹ Some elements of hazardous waste are mutagenic—substances which harm exposed persons and their offspring by altering their basic genetic structure.⁷⁰ Chemicals may cause birth defects either through their mutagenic potential or by direct ordinary toxic effects on developing fetuses. Such chemicals are called teratogens.⁷¹ Other chemicals cause cellular damage that results in cancer in exposed individuals or their unborn children. These substances are called carcinogens.⁷² It is certainly possible to treat these chemicals respectfully and carefully so that humans are not exposed to them regularly or in high dosages. Nevertheless, chemical wastes have historically been treated as though they were no different from ordinary garbage. As a result, many persons have been exposed to dangerously hazardous wastes which have been released into the air, water, and food chain.

*B. Why Municipalities Want to Exclude Hazardous
Waste Facilities*

“Are there those among them who can see the water need of
your tribe? . . . You must make a water decision, friend.”*

Municipalities want to keep out hazardous waste facilities because they have a poor track record. Early waste disposal facilities employed no sophisticated engineering techniques to achieve containment; boxes and barrels of waste were often dumped into trenches or stacked in empty lots.⁷³ Over time, the containers decayed, releasing high concentrations and peculiarly toxic combina-

64. *Id.* at 140-60. Asbestos is a major contributor to lung diseases, including cancers. See also G. PETERS, B. PETERS, SOURCEBOOK ON ASBESTOS DISEASE (1980).

65. Lead is a widespread offender. L. CASARETT & J. DOULL, *supra* note 55, at 477-82.

66. The kidneys are a prime target of many of the metals. *Id.* at 459.

67. *Id.* at 170-89. Most toxins damage the liver, since one of the functions of that organ is to filter poisons from the body. Major hepatotoxins include the solvents carbon tetrachloride, chloroform, trichloroethylene and tetrachlorethane. *Id.* at 172.

68. See W. NICHOLSON & J. MOORE, *supra* note 58.

69. *Id.* See also S. EPSTEIN, *supra* note 57, at 114, 242-81 (naming plastic vinyl chloride as dangerous in this regard, as are most of the pesticides).

70. L. CASARETT & J. DOULL, *supra* note 55, at 314.

71. *Id.* at 315.

72. S. EPSTEIN, *supra* note 57, at XV, XVI.

* F. HERBERT, DUNE 28 (1966).

73. M. BROWN, *supra* note 11, at 255, 226.

tions of chemicals into the air, earth, and water surrounding the disposal sites.⁷⁴ One of the better-known of such incidents occurred in the town of Niagara Falls, New York.⁷⁵ That state evacuated families from several blocks of residential neighborhoods due to contamination by toxins escaping from 20,000 tons of chemical garbage which the Hooker Chemical Company had dumped into Love Canal.⁷⁶

Some waste sites have erupted into explosive flames. In 1977, a chemical waste treatment facility in Bridgeport, New Jersey, burned, killing six; dozens of firemen were treated for inhalation of toxic fumes.⁷⁷ Similar explosions and fires destroyed hazardous waste facilities in Elizabeth and in Perth Amboy, New Jersey, in 1980.⁷⁸ In some cases, when winds directed fumes from such fires toward populated areas, temporary evacuations of major population centers were necessary.⁷⁹

The most common and insidious problem associated with hazardous wastes, however, is that of water pollution. One leaking landfill site, for example, has destroyed the water supply of Farmington, New Jersey.⁸⁰ The underground chemical plume from this site, which contains thousands of times the "safe" levels of dichloroethane and benzene as well as arsenic, vinyl chloride, lead, mercury, cadmium, and chloroform, also threatens the water supply of Atlantic City.⁸¹ The United States Environmental Protection Agency

74. *Id.* at 227.

75. *See, e.g.*, *United States v. Hooker Chem. & Plastics Corp.*, No. 79-990 (W.D.N.Y. 1981); *Mervak v. City of Niagara Falls*, 420 N.Y.S.2d 687 (Sup. Ct. 1979). *See also* M. BROWN, *supra* note 11, at 3-59 (detailed history of Love Canal).

76. M. BROWN, *supra* note 11, at 5, 28-40.

77. *Id.* at 155-56.

78. Halbert, *Toxic Chemical Wastes*, *Medicolegal News*, vol. 8, no. 4, at 15 (Sept. 1980). Garland, *supra* note 8, reports that negotiations over the construction of a solvents recycling facility between the city of Haverhill, Mass., and SRS, Inc., ended when the SRS plant in Linden, New Jersey, went up in flames on Oct. 1, 1981. *Id.* at 6.

79. Halbert, *supra* note 78, at 15.

80. Janson, *Atlantic City Rushing to Move Wells*, *N.Y. Times*, Nov. 1, 1981, at B1, B2. "Perhaps the most pernicious effect is the contamination of ground water by leachate from land disposal of [hazardous] waste." H. REP. NO. 1461 Pt. II, 94th Cong., 2d Sess., *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 6238. *See id.* at 6255-6261 (reporting 53 incidents in 20 states in which hazardous waste escaped containment, 51 of which resulted in contamination of ground water and/or surface waters).

Ground water collects in formations called aquifers, layers of rock, sand, or gravel holding quantities of subsurface water. Unlike rivers and streams, ground water flows extremely slowly—from a few feet per day to a few feet per decade. It may move vertically as well as horizontally. Ground water is a major source of drinking water in Massachusetts. HAZARDOUS WASTE, *supra* note 1, at 8.

81. Janson, *supra* note 80, at B2.

(EPA) is suing for a cleanup of the dump site and of the poisoned aquifer as well as for replacement water supply systems for those rendered unusable. Estimated costs may approach \$20 million.⁸²

Chemicals leaching from hazardous waste sites have contaminated aquifers all over the country: New Castle, Delaware;⁸³ Islip, Long Island;⁸⁴ Charles City, Iowa;⁸⁵ several Minnesota cities, including Minneapolis;⁸⁶ Aurora, Illinois;⁸⁷ Houston, Texas;⁸⁸ Hardeman County, Tennessee;⁸⁹ Clarkson, Washington;⁹⁰ and Southington, Connecticut⁹¹ are among those communities where such pollution has occurred, often forcing the capping of wells. Underground water contamination is especially problematic, since once trapped in aquifers, chemicals are unlikely to evaporate or degrade.⁹² This is a matter of some concern in the United States, where 80 percent of municipal water systems serving 30 percent of the nation's population depend on ground water.⁹³ Chemical dump sites also leak toxins into rain runoff and from there into drainage ditches, lakes, creeks, streams, and rivers, either through careless engineering practices or by accident.⁹⁴

For most of its history, chemical waste disposal has not been subject to good engineering practices. Many handlers of waste chemicals were probably unaware of their hazardous qualities; others simply did not care. Some who contracted to dispose of waste chemicals found that it was easy and profitable to dump them illicitly on other people's property, or to stockpile the chemicals in barrels on leased land, then abandon the site.⁹⁵ Such unscrupulous practices have led some observers to warn that hazardous waste disposal businesses may be in the hands of organized crime.⁹⁶

Awareness of these problems and their potential economic consequences⁹⁷ has led to tighter controls over the manufacture, use, and

82. *Id.*

83. M. BROWN, *supra* note 11, at 100.

84. *Id.*

85. *Id.* at 103-08.

86. *Id.* at 108.

87. *Id.* at 111.

88. *Id.*

89. *Id.* at 123-25.

90. *Id.* at 127.

91. *United States v. Solvents Recovery Service*, 496 F. Supp. 1127 (D. Conn. 1980).

92. M. BROWN, *supra* note 11, at 100.

93. *Id.* at 101.

94. *Id.* at 231-40, 289-310.

95. *Id.* at 243-53, 260-65. *See also supra* text and notes at notes 6-14.

96. M. BROWN, *supra* note 11, at 240-41, 253-60.

97. Dougan, *supra* note 4, at 6, reports that "Love Canal has cost New York State tax-

disposal of hazardous chemicals. Congress has promulgated its own regulatory statutes, most notably the Resource Conservation and Recovery Act and the Toxic Substances Control Act, under the authority of the Commerce Clause of the Constitution.⁹⁸ Congress has declared that "with respect to the environment and health, . . . hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste. . . ." ⁹⁹

The Resource Conservation and Recovery Act (RCRA) is the federal statute which most pervasively regulates the disposal of toxic chemicals.¹⁰⁰ It sets up a framework in which the federal government has the responsibility to set minimum standards for the maintenance of hazardous waste facilities and the states have the responsibility, at very least, to require and supervise conformity with these minimum standards. RCRA provides that

[N]o state or political subdivision may impose any requirements less stringent than those authorized under [RCRA] respecting the same matter . . . [but] nothing in this title shall be construed to prohibit any state or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [RCRA].¹⁰¹

This provision appears to leave the states with clear federal authorization to run their own waste management and facility siting programs. It seems as well to allow some room for political subdivisions of the States—municipalities or even counties—to adopt more stringent requirements regarding hazardous waste disposal. RCRA, however, does not itself divide this authority between states and municipalities. As a consequence, there are many relatively new complicated laws concerning hazardous waste disposal, among them the Massachusetts Hazardous Waste Facility Siting Act. The Siting Act sets out elaborate procedures for determining how a municipality will be chosen as the site of any new hazardous waste facilities.

payers \$265 million already; federal taxpayers another \$500 million."

98. These include the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976 & Supp. IV 1980), and the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. IV 1980).

99. Resource Conservation and Recovery Act, 42 U.S.C. § 6901(b)(5).

100. TSCA also regulates disposal of toxic chemicals, but in much less detail. *See supra* note 23. In practical effect as well as structure, TSCA is geared more toward the regulation of hazardous chemicals as *products*, with emphasis on the pre-marketing stage. *See* 15 U.S.C. § 2609.

101. Resource Conservation and Recovery Act, 42 U.S.C. § 6929 (emphasis added).

The problem is that no municipality seems to want any such facility located within its borders. In fact, the municipalities want the state or the EPA to dig up their old, abandoned waste dumps and haul them away. The resulting conflict has done little to alleviate the problems posed by hazardous wastes.

III. THE MASSACHUSETTS HAZARDOUS WASTE FACILITY SITING ACT

The Massachusetts Siting Act is a comprehensive statute which provides for state assistance with and supervision of the construction and operation of new hazardous waste facilities (HWFs). The statute gives the state Department of Environmental Management (DEM) primary responsibility for the siting process.¹⁰² The Siting Act directs DEM to study the risks and impacts of various hazardous waste sources and management technologies; to solicit and evaluate construction proposals; and to disseminate information regarding these matters to the public.¹⁰³

The Siting Act creates a state Hazardous Waste Facility Safety Council (Safety Council)¹⁰⁴ to oversee the operation of the hazardous waste facility siting process. The Safety Council is empowered to advise participants in the siting process; to award technical assistance grants to cities and towns; to review all proposals for construction and operation of hazardous waste facilities, and to reject proposals which it finds to be unacceptable.¹⁰⁵ The twenty-one member Safety Council¹⁰⁶ also has responsibility for facilitating negotiations be-

102. The reader will recollect that primary responsibilities under the state Hazardous Waste Management Act, MASS. GEN. LAWS ANN. ch. 21C, §§ 3, 4 (West 1981), including licensing, are vested in the Department of Environmental Quality Engineering, DEQE, not in DEM. Section 4 of the Siting Acts provides that both departments "shall cooperate . . . and exchange information where possible to avoid duplication of activities." *Id.* § 4.

103. MASS. ANN. LAWS ch. 21D, § 3 (Michie/Law. Co-op. 1981).

104. MASS. ANN. LAWS ch. 21D, § 4 (Michie/Law. Co-op. 1981).

105. MASS. ANN. LAWS ch. 21D, § 4 cl. 8 (Michie/Law. Co-op. 1981) allows the Council to reject unacceptable proposals after appropriate consultation with the DEQE. This is one of the sections that would be affected by the amendments to the Siting Act introduced into the legislature by Sen. Carol Amick (D. Waltham). *See supra* text and note at note 49. The proposed changes would give the council the authority to approve, reject, or reconsider whether the proposals warrant additional review to continue in the siting process either after consultation with the DEQE or after the receipt of information from the DEM, local, state, or federal agencies, or other sources. MASS. S. 1899, 1982 Mass. Gen. Ct. Special Sess., § 2 (1982). All other references to the proposed changes in the notes to this section of the article will refer to the changes suggested by these proposed amendments.

106. The Council consists of the Secretaries of Environmental Affairs, Public Safety, Economic Affairs, Communities and Development, or their designees; the Commissioners of Environmental Quality Engineering, Environmental Management, Public Health, or their designees; the chairman of the Public Utilities Commission or his designee; one representative

tween a facility developer and the host community, and determining whether at any point the parties have come to a negotiations impasse.¹⁰⁷ The Safety Council may, if it chooses, appoint two residents of the host community to participate in and vote on matters related to the site selection in the community.¹⁰⁸

Developers who propose to construct HWFs must submit notices of intent¹⁰⁹ to the Safety Council, the Department of Environmental Management, the Department of Environmental Quality Engineering, and to the chief executive officers of the proposed host communities.¹¹⁰ The Safety Council then reviews the proposed projects to determine whether they are "feasible and deserving of state assistance."¹¹¹ The Department of Environmental Management must conduct briefing sessions to ensure the participation of interested persons.¹¹² If the developer has indicated a willingness to accept alternative site suggestions, DEM will accept such suggestions for a fifty-day period after the briefing sessions.¹¹³ If suggestions are submitted, the Council draws up a final list and notifies the chief executive officers of the proposed host communities and all abutting com-

each of the Massachusetts Municipal Association, the Massachusetts Health Officers Association, the local boards of health, the Associated Industries of Massachusetts; a professional hydrogeologist; a professional chemical engineer; a representative of the public knowledgeable in environmental affairs; and six representatives of the public. The proposed changes would replace two of the six representatives of the public with representatives of two different organizations whose major activities are environmental protection. MASS. S. 1899, 1982 Mass. Gen. Ct. Special Sess., § 3 (1982).

107. MASS. ANN. LAWS ch. 21D, § 4 (Michie/Law. Co-op. 1981).

108. *Id.* The proposed changes would make appointment of two host community residents mandatory. MASS. S. 1899, *supra* note 52, § 4 (1982).

109. A notice of intent must include a description of the proposed facility, what hazardous wastes the developer proposes to treat, a description of the site and the present suitability of the site, including what additional measures, if any, will be required to make the site suitable. MASS. ANN. LAWS ch. 21D, § 7. The proposed changes require that the notice of intent contain a site analysis made by qualified professionals with respect to impact on wetlands, surface water bodies and their floodplains, and drinking water supplies. MASS. S. 1899, *supra* note 52, § 10 (1982).

110. MASS. ANN. LAWS ch. 21D, § 7 (Michie/Law. Co-op. 1981).

111. *Id.* The proposed changes would establish specific criteria upon which the Council must base its decision. These criteria include a determination of a regional need for the facility proposed; the soundness of the proposed technology; and the developer's financial capability and management history. The changes also provide that no facility can be located within a 100-year floodplain, wetlands, areas of critical environmental concern, a barrier beach, or within an area of an existing conservation restriction. MASS. S. 1899, *supra* note 52, § 11.

112. MASS. ANN. LAWS ch. 21D, § 8. The proposed changes would provide that briefing sessions be held before the Council's decision on whether the project warrants additional review. MASS. S. 1899, *supra* note 52, § 12 (1982).

113. MASS. ANN. LAWS ch. 21D, § 9 (Michie/Law. Co-op. 1981).

munities.¹¹⁴ The developer is required to prepare a preliminary project impact report which includes both an environmental impact report and a social economic appendix, and must submit the report to the Council and the Secretary of the Executive Office of Environmental Affairs,¹¹⁵ who must both approve the proposal.

Within thirty days after a developer notifies a community of intention to construct a HWF, that community must establish a local assessment committee composed of officials and residents of the host community as well as representatives of abutting communities.¹¹⁶ The local assessment committee must then negotiate with the developer the detailed terms of a siting agreement.¹¹⁷ The committee becomes entitled to receive and expend technical assistance grants during this process.¹¹⁸ The assessment committee ultimately has the power and duty to enter into a binding contract with the developer,¹¹⁹ a contract which represents the "best interests" of the host community.¹²⁰ These interests are expressed as protection of public health and safety, and of the environment and fiscal welfare of the host community.¹²¹ This contract, represented by the siting agreement,¹²² must receive further analysis and approval before the parties can act upon it. The developer must use the contract as the basis for a final project impact report which the developer submits to the state.¹²³ The Secretary of the Executive Office of Environmental Affairs and the Safety Council evaluate this report.¹²⁴ Only after

114. *Id.*

115. *Id.* § 10.

116. *Id.* § 5.

117. *Id.* § 5(2).

118. *Id.* § 5(3) (referring to grants made available pursuant to § 11 of the same chapter).

119. *Id.* § 5 lists the powers and duties of local assessment committees without indicating whether all the listed items are in fact duties—activities which are mandatory—or whether some are simply powers which may be exercised at will. The proposed changes do not address this problem of unartful drafting. Subsection (4) of the list, *id.* § 5(4), says that the contract with the developer is entered into by the decision to sign a siting agreement. The contract and siting agreement thus will be considered, for purposes of this statute, synonymous.

120. *Id.* § 5(1).

121. *Id.* § 5(2).

122. The siting agreement is a nonassignable contract binding on both parties. Its terms and conditions include, but are not limited to: facility construction, maintenance, and operating procedures; the design of the facility; practices and standards necessary to demonstrate the safety of the facility; services provided by the host community; compensation and special benefits provided by the developer; provisions for tax prepayments; provisions for renegotiating terms and for resolving disputes. The agreement may also include provisions to assure public health and safety; provisions to assure the continuing economic viability of the project; and provisions to assure the protection of the environment. *See id.* § 12.

123. *Id.* § 10.

124. *Id.*

both have found it to be in compliance with all applicable provisions of law may the Safety Council declare that the siting agreement is operative.¹²⁵ Under the Siting Act, no construction can begin until these procedural steps have been followed.¹²⁶

The Siting Act does not contemplate that negotiations between developer and host community will necessarily run smoothly and progress to a siting agreement in all cases. The statute provides that, if within sixty days after the Safety Council's initial approval of the project,¹²⁷ either the developer or the local assessment committee of the host community informs the Safety Council of a negotiations impasse, the Council may proceed to frame the issues in dispute for submission to final and binding arbitration.¹²⁸ The arbitration panel has forty-five days¹²⁹ to resolve the issues in dispute, and, presumably, forge a siting agreement from its resolutions.¹³⁰

The binding arbitration provision adds a new twist to the siting process as described so far. Up to this point, the Siting Act has had the character of a piece of enabling legislation.¹³¹ It has created

125. *Id.* A siting agreement becomes effective when signed by the chief executive officer of the host community, who has been so directed by a majority vote of the local assessment committee, and by a representative of the developer. *Id.* § 13.

126. *Id.* § 12.

127. The Siting Act does not call for a specific time after Safety Council approval of a project proposal during which the developer and the local assessment committee must *begin* to negotiate, as called for in § 5. The only indication of the timeframe which is contemplated exists in § 15 which provides for a 60-day period after the Safety Council's approval before determining whether a negotiations impasse exists. *See id.* § 15.

Under the proposed changes, the phase of the negotiations period would be extended to 180 days. MASS. S. 1899, *supra* note 52, § 14 (1982). Under the existing section 15, MASS. ANN. LAWS ch. 21D, § 15, the Safety Council has the sole discretion to extend this 60-day period, even if both developer and community would like to postpone the declaration of impasse.

128. MASS. ANN. LAWS ch. 21D, § 15 (Michie/Law. Co-op. Supp. 1982). The arbitration panel which the Safety Council is directed to establish under this section is to consist of three persons; one each chosen by the developer and community, and a third impartial arbitrator selected by or acceptable to both. *Id.*

129. This time period may be extended at the request of any member of the arbitration panel. *Id.* § 15 (Michie/Law. Co-op. Supp. 1982).

130. Section 15 provides that the arbitration proceedings be terminated should "the parties mutually resolve each of the issues in dispute." *Id.* § 15. However, parties locked in intractable dispute will probably find themselves held to the panel's decisions, which the statute does describe as "final and binding." *Id.* The Massachusetts Supreme Judicial Court has upheld a similar mandatory arbitration provision applicable to towns locked in a bargaining impasse over wages and employment conditions with their police forces and firefighters. *See Arlington v. Bd. of Conciliation & Arbitration*, 370 Mass. 769, 774, 352 N.E.2d 914, 918 (1976), *later proceedings*, 6 Mass. App. Ct. 874, 375 N.E.2d 343 (1978). This case tends to support the state constitutionality of the mandatory arbitration provisions of the Siting Act.

131. For an explanation of what enabling legislation is and what it does, see *infra* text and note at note 166.

specific, substantive powers in the municipalities that become prospective host communities, and further described the procedures by which those powers are brought into play. Binding arbitration, however, places a substantive limit on municipal power.¹³² It takes from the community the power to opt out of the siting process by refusing to bargain with the developer.

Under the Siting Act, municipalities confronted by HWF proposals must be prepared to protect their interests through negotiations and arbitration¹³³ and through the provision that the developer pay compensation to the host community for demonstrable adverse impacts imposed by the siting of the facility.¹³⁴ Communities which

132. An interesting contrast to this imposition on local autonomy is presented by section 17 of the Siting Act, MASS. ANN. LAWS ch. 21D, § 17, which establishes the eminent domain authority of DEM with respect to hazardous waste facility sites. Eminent domain refers to the power of governments to "take" private land for public purposes, such as the building of highways, when necessary. Owners of such property are entitled to receive its fair market value in compensation for its being so taken. *See* U.S. CONST. amend. V. If a developer has difficulty purchasing land for the construction of a HWF, he may petition the Department of Environmental Management to exercise its eminent domain power. Under the Siting Act, however, DEM can take the parcel by eminent domain only if a majority of the governing body of the municipality votes to approve this action. *See* MASS. ANN. LAWS ch. 21D, § 17 (Michie/Law. Co-op. 1981).

A case from another jurisdiction demonstrates how tempting it can be to invoke the eminent domain power in order to gain advantage in a dispute over hazardous waste facility siting. A county in Georgia attempted to obstruct the development of that state's first hazardous waste disposal facility, a landfill, by condemning the property intended to be sold to the developers for the purported purpose of creating a public park. The Georgia Supreme Court invalidated this maneuver, finding that the parcel of land had been taken in bad faith for the sole purpose of preventing the construction of the hazardous waste landfill. *Earth Management v. Heard County*, 16 ENV'T REP. CAS. (BNA) 1720, No. 37303, Georgia Supreme Court, 1981.

133. Massachusetts Hazardous Waste Management Act, MASS. ANN. LAWS ch. 21C, 1-12, 14 (Michie/Law Co-op. 1980 & Supp. 1982), admittedly provides additional significant safeguards, especially in § 7, Licensing Requirements and Siting of Facilities. *Id.* § 7.

134. This is one of the optional conditions that may be included in a siting agreement. MASS. ANN. LAWS ch. 21D, § 12(B)(1) (Michie/Law. Co-op 1981). The chief executive officer of any abutting community may also petition the Safety Council for the payment of compensation by the developer to the abutting community for any "demonstrable harm." *Id.* § 14. Neither of these sections, however, either defines "demonstrable adverse impacts" or suggests what harms are contemplated to be compensable. It is likely that decreases in real estate value are the impacts referred to. *See* Garland, *supra* note 8. It is theoretically possible that a community might want to trade a present, lump-sum payment from the developer in exchange for accepting an adverse impact from the waste facility which the community would not otherwise be expected to—or inclined to—countenance. One possible example of this could be a continual shower of ashes from an incinerator facility.

Such an exchange would be rather unusual. Ordinarily, the remedy that a town has against an ongoing nuisance such as this would be an injunction against the perpetrator. Under section 12, however, the local assessment community could effectively bargain away this right of the townspeople for the payment of what amounts to advance damages. *See id.* § 12. A trade such as this was created as a judicial remedy in the well-known case of *Boomer v. Atlantic Cement*

have existing zoning by-laws and other local land use ordinances concerning hazardous wastes may have greater protection from unwanted development proposals. The Siting Act itself, however, purports to preclude municipal regulatory actions which are deemed to be designed to obstruct the construction of a HWF under the Act. Section 16 of the Act dictates that "[n]o license or permit granted by a city or town shall be required for a hazardous waste facility which was not required on or before the effective date of this chapter by said city or town. . . ." ¹³⁵ An amendment to the Massachusetts Zoning statute, adopted as part of the Siting Act, creates a similar restriction. It provides that:

A hazardous waste facility as defined in the Siting Act shall be permitted to be constructed as of right for any locus presently zoned for industrial use . . . provided that all permits and licenses required by law have been issued to the developer and a siting agreement has been established . . . , provided, however, that following the submission of a notice of intent by a developer proposing to construct a HWF, a city or town may not adopt any zoning change which would exclude the facility from the locus specified in said notice of intent. This . . . shall not prevent any city or town from adopting a zoning change relative to the proposed locus . . . following the final disapproval and exhaustion of appeals for permits and licenses required by law and the Siting Act. ¹³⁶

Obviously, these provisions, if legitimate, create significant limitations on the substantive regulatory powers of municipalities. In

Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). There, a factory was acknowledged to be causing severe air pollution, but the court was disinclined to order an injunction which would effectively have closed the factory, because of the economic consequences. The townspeople objected to this solution, as did Judge Jasen in his dissent, stating:

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. Permitting the injunction to become inoperative upon the payment of permanent damages is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing . . . pollution of an area without abatement.

25 N.Y. at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 320-21. See also *infra* text and notes at notes 301-52 (the subject of nuisances and remedies for them).

135. MASS. ANN. LAWS ch. 21D, § 16 (Michie/Law Co-op. 1981). The proposed changes would strengthen and tighten this provision by declaring that, in addition, "[a] city or town may not adopt a by-law or ordinance prohibiting the siting of a hazardous waste facility." MASS. S. 1899, § 16 (1982).

136. MASS. ANN. LAWS ch. 40A, § 9, as amended and approved with emergency preamble July 15, 1980, 1980 Mass. Acts ch. 508, § 5. The provision of this section which freezes zoning changes once a notice of intent has been issued was not in the original Siting Act but was add-

order to discover whether the state may impose such restrictions on municipalities, however, it must be determined generally what powers governments have, and how these powers are distributed.

IV. DIVISION OF POLICE POWER BETWEEN STATES AND MUNICIPALITIES

Municipalities are not sovereigns.*

A. *Division of Power in Government*

The Constitution of the United States describes a government of dual sovereignty. The federal government has paramount power over international relations such as the power to make treaties¹³⁷ and declare war;¹³⁸ certain enumerated national affairs such as coining money,¹³⁹ taxation,¹⁴⁰ creation of armies;¹⁴¹ and interstate relations—notably, everything that conceivably could be considered “interstate commerce.”¹⁴² Additionally, the federal government has, through its judicial power, the final say on what are the basic, irreducible rights of individuals as against federal or state power to regulate.¹⁴³

The states, subject to these specified limitations, have paramount power over all other aspects of the regulation, control, and discipline of community life.¹⁴⁴ This pervasive dominion over intrastate affairs

ed during legislative debate of the bill. Sanderson Interview, *supra* note 8.

* J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 449-50 (5th ed. 1911), construed by Prof. W. Ryckman's lecture, Boston University School of Law.

137. U.S. CONST. art. II, § 2, cl. 2.

138. *Id.* art. I, § 8, cl. 11.

139. *Id.* art. I, § 8, cl. 5.

140. *Id.* art. I, § 8, cl. 1.

141. *Id.* art. I, § 8, cl. 12.

142. *Id.* art. I, § 8, cl. 3.

143. *Id.* art. III, § 1, cl. 1 (federal judicial power is vested in one supreme court); *id.* art. I, § 8, cl. 9 (Congress has the authority to establish in addition “Tribunals inferior to the Supreme Court”). *Id.* art. III, § 2, cl. 1 announces that “the judicial Power shall extend to all Cases . . . arising under this Constitution, and under the Laws of the United States.” *Id.*

Article VI declares that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.” *Id.* art. VI, cl. 2. Known as the supremacy clause, this constitutional text was early in our history taken to mean that the people of the United States had chosen “to invest the general government” with “a permanent and supreme authority,” in order to “prohibit to the states the exercise of any power . . . incompatible with the objects of the general compact.” *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 307 (1816).

144. U.S. CONST. art. I, § 10, cl. 1, 2, 3, enumerate certain specific prohibitions against the states. States cannot, for instance, enter treaties, coin money, or grant titles of nobility.

is referred to as the police power.¹⁴⁵ Its scope typically extends to the control of the health, safety, and morals of a state's citizenry.¹⁴⁶ Under our system of government, this police power has belonged traditionally to states, not to their subdivisions. Any powers of self-government held by municipalities have been seen as derivative of state power and not independently held.¹⁴⁷

The doctrine that municipalities possess no inherent rights of self-government is known as Dillon's rule, after Professor Dillon's treatise on municipal corporations. In accordance with Dillon's rule, "any fair, reasonable doubt concerning the existence of a particular power is resolved by the courts against the municipality and the power is denied."¹⁴⁸ The United States Supreme Court has acknowledged the primacy of this doctrine, holding that in the absence of state constitutional provisions establishing independent rights, municipalities are mere departments of the state which can grant or withdraw privileges and powers as it sees fit.¹⁴⁹ Dillon's rule, however, has been modified in many states by the passage of some form of Home Rule amendment to the state's constitution, or by the enactment of a Home Rule statute.

B. Dillon's Rule and Home Rule

Home Rule amendments take a variety of forms and create differing degrees of autonomy. In some states the exercise of municipal

Amendment X states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." *Id.* amend. X. This has been interpreted as investing with the states the internal powers which they had traditionally exercised. "[I]t is perfectly clear, that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) at 307.

145. The term "police," in this sense, is rooted in the Greek "*polis*," a city, hence, a state," and refers generally to the control of a community. E. PARTRIDGE, *ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH* 509 (1958).

146. "Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits and is an essential attribute of government." *Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. 1962).

147. "[A]ll sovereign authority 'within the geographical limits of the United States' resides either with 'the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in subordination, to one or the other of these.'" *Community Communications Co. v. City of Boulder*, ___ U.S. ___, 102 S. Ct. 835, 838 (1982) (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

148. J. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 237 (5th ed. 1911).

149. *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923).

power is limited to specific, enumerated grants of power¹⁵⁰ which are "scarcely more than constitutional authorization for the state legislature to delegate its power to cities."¹⁵¹ An arrangement such as this represents the most limited end of the Home Rule spectrum, the legislative supremacy model.¹⁵²

In other states, Home Rule grants to municipalities all powers of self-government over "local" affairs, without requiring the authorization of or interference by the state legislature.¹⁵³ This variety of Home Rule grant creates "an area of independence, however vague," into which the state theoretically cannot intrude.¹⁵⁴ Arrangements like these represent the other end of the Home Rule spectrum, the *imperio in imperium* model—the sovereign within a sovereign.¹⁵⁵

Home Rule in Massachusetts conforms to neither extreme. It contains elements of both, and thus may be seen as a middle model. The Massachusetts Home Rule Amendment, adopted in 1966, provides that:

Any city or town may, by the adoption . . . of local ordinances or by-laws, exercise any power or function which the general

150. See, e.g., *Canavan v. Messina*, 31 Conn. Supp. 447, 334 A.2d 237 (1973) (interpreting that state's Home Rule statute, CONN. GEN. STAT. §§ 7-194 (1975)).

151. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 294 (1968).

152. *Id.* at 293-96.

153. California is one such state. See, e.g., *Hubbard v. City of San Diego*, 55 Cal. App.3d 380, 127 Cal. Rptr. 587 (1976).

COLO. CONST. art. XX, § 6, grants all of its cities and towns with populations over 2,000 the power to govern through their charters "all . . . local and municipal matters," and provides that the charters and "ordinances made pursuant thereto in such matters shall supersede . . . any law of the state in conflict therewith." *Id.* But see *Community Communications Co. v. City of Boulder*, ___ U.S. ___, 102 S. Ct. 835 (1982). In *Community Communications* the Court limited the effect of such a grant of local autonomy by holding that a legitimate exercise of municipal Home Rule authority in Colorado does not enjoy state action immunity from antitrust challenge under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

154. Vanlandingham, *supra* note 151, at 285.

155. *St. Louis v. Western Union Telegraph Co.*, 149 U.S. 465, 468 (1883). "The Latin *imperare* . . . has derivative *imperium*, power over a family, over a great household, over a state, hence, supreme power, empire . . ." E. PARTRIDGE, *supra* note 145, at 181. This form of Home Rule structure is highly reminiscent of the relationship of the federal government and states described *supra* text and notes at notes 143-47. The Supreme Court, however, apparently does not accept the view that the two forms of relationship are completely analogous, as it has stated that "federalism . . . contains its own limitation: Ours is a 'dual system of government,' which has no place for sovereign cities." *Community Communications v. City of Boulder*, ___ U.S. ___, 102 S. Ct. 835, 839 (1982) (citing with approval, "We are a nation not of 'city-states' but of States." *Community Communications v. City of Boulder*, 630 F.2d, 704, 717 (1981)). But see, the sharp dissent of J. Rehnquist in *Community Communications*, ___ U.S. ___, 102 S. Ct. 835, 845 (1982).

court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity to the powers reserved to it . . . and which is not denied . . . to the city or town by its charter. . . .¹⁵⁶

The element of this grant which resembles the legislative supremacy model is the requirement that a municipal exercise of power be not inconsistent with the laws enacted by the general court. This is a significant substantive limitation, both *a priori* to municipal action, and as a potential legislative veto proviso. Municipal regulations must certainly conform to existing state law when adopted, but this is no guarantee of continuing legitimacy. Regulations "not inconsistent" with state law initially can be later overturned if the state adopts a general law which renders the otherwise consistent by-laws incompatible.

There is also an element of Massachusetts Home Rule which draws on *imperio in imperium* principles. This is the allowance that a municipality may "exercise any power which the general court *has the power to confer* upon it." This means that Massachusetts municipalities need not wait for specific enabling legislation from the state before they may act, as must municipalities in enumerated powers jurisdictions.¹⁵⁷

The Massachusetts Supreme Judicial Court (SJC) has had occasion to describe the changes wrought in the state's power structure by its Home Rule Amendment. Prior to 1966, Massachusetts operated under Dillon's rule, applying the philosophy that "what the State gave, it also could take away."¹⁵⁸ The legislature repudiated this doctrine by passing the Home Rule Amendment, which gave cities and towns a broad grant of "independent municipal powers which they did not previously inherently possess."¹⁵⁹ One commentator has described the "independent powers of municipalities in the Commonwealth" as these: "first, the power to adopt and amend a charter which may make broad changes in the local government structure

156. Mass. Declaration of Rights, MASS. CONST. art. II, § 6. The Home Rule Proceedings are codified at MASS. ANN. LAWS, ch. 43B, §§ 1-19 (Michie/Law. Co-op. 1980). The "general court" is the quaint name by which Massachusetts refers to its state legislature.

157. Vanlandingham, *supra* note 151, at 280. In one case, the Massachusetts SJC upheld a city ordinance creating a human rights commission enacted in the absence of specific enabling legislation, despite the existence of a state civil rights commission with an arguably similar scope of interest. See *Bloom v. Worcester*, 363 Mass. 136, 293 N.E.2d 268 (1973).

158. *Bd. of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 356, 294 N.E.2d 393, 407 (1973). See *Paddock v. Brookline*, 347 Mass. 230, 238, 197 N.E.2d 321 (1964).

159. *Bd. Appeals Hanover*, 363 Mass. at 358, 294 N.E.2d at 408.

without state legislative approval; second, the power, within a somewhat circumscribed area, to institute new programs on their own initiative without securing prior state legislative approval."¹⁶⁰

The area for the proper exercise of local initiative remains unclear. Some of the limitations which circumscribe it, however, are set out explicitly in the Home Rule Amendment itself. By the terms of the power grant no municipality may regulate elections, levy or collect taxes, borrow money, dispose of park land, or enact laws "governing civil relationships," declaring felonies, or providing for punishment by imprisonment without express authorization of the state legislature.¹⁶¹ By contrast, the limitations that the Home Rule Amendment places on the state legislature are trivial. There are no limitations on the substance of legislative authority, only on the procedures through which that authority is exercised—and possibly some limitation on highly disparate effects of that exercise. The legislature retains the power to act in relation to municipalities as long as it does so "by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws" enacted according to specified procedures, including local petition.¹⁶²

Analogizing from the federal constitution, these restraints upon state power can be described as providing two levels of due process-type¹⁶³ controls to provide some democratic balance for centralized

160. Brown, *Home Rule in Massachusetts: Municipal Freedom and Legislative Control*, 58 MASS. L.Q. 29, 31 (1973).

161. Massachusetts Declaration of Rights, AMEND. art. II, § 7. Violations by towns of their Home Rule powers typically run afoul of this section. For instance, the Massachusetts SJC found a local rent control law invalid as an attempt to govern a civil relationship—that between landlord and tenant. *Marshal House, Inc. v. Rent Review & Grievance Bd.*, 357 Mass. 709, 260 N.E.2d 200 (1970). The civil relationship prohibition has a saving clause under which municipalities may affect civil relationships, "as an incident to an exercise of an independent municipal power." MASS. CONST. AMEND. art. II, § 7.

162. Massachusetts Declaration of Rights, MASS. CONST. AMEND. art. II, § 8, provides that: special laws [may be] enacted "(1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor.

Id.

The scope of the Home Rule Amendment restrictions upon the legislature's ability to enact statutes which restrict local legislation is narrow. *Arlington v. Bd. Conciliation & Arbitration*, 370 Mass. 769, 773, 352 N.E.2d 914, 917 (1976), *later proceedings*, 6 Mass. App. Ct. 874, 375 N.E.2d 343 (1978).

163. U.S. CONST. amend. V, provides that "no person shall be . . . deprived of life, liberty, or property without due process of law . . ." *Id.* The same restraint is imposed on state ac-

power. One control is that the legislature, if it enacts a "special law" affecting a single locality or a select few, generally must follow procedures that rely on the consent of those localities. If the legislature bypasses the special procedures for special laws, the general laws which it enacts presumably must "apply alike" to every municipality of the state. Drawing on the federal constitutional analogy again, this latter provision may be seen as a kind of equal protection clause,¹⁶⁴ applicable whenever the legislature passes a law of state-wide effect.¹⁶⁵

In practice these may not be very great constraints on legislative power, but the legislature does not necessarily exercise all the power that it possesses to affect the details of municipal life. The legislature may through general law impose certain procedural restrictions on the way municipalities adopt and impose their own regulations. These procedural restrictions, in the form of enabling legislation,¹⁶⁶ also confer or acknowledge large substantive areas of local regulatory powers. One of the primary areas of local control is the use of local land, especially as affected through the zoning power. Indeed, the Massachusetts SJC has held that municipalities do not enjoy zoning power merely because the legislature has conferred it upon them through the Zoning Act.¹⁶⁷

In the case of *Board of Appeals of Hanover v. Housing Appeals Committee*,¹⁶⁸ the Massachusetts SJC declared that the power to zone land is part of the "independent municipal powers included in the [Home Rule Amendment's] broad grant of powers to adopt ordinances or by-laws for the protection of the public health, safety, and general welfare."¹⁶⁹ Since the legislature had the power to authorize municipalities to zone, the adoption of the Home Rule Amendment automatically vested that power directly in the municipalities them-

tion by incorporation of these federal prohibitions to the fourteenth amendment, U.S. CONST. amend. XIV.

164. U.S. CONST. amend. XIV, § 1, holds that no state shall "deny to any person within its jurisdiction the equal protection of the laws." For discussion of the question of whether municipalities are "persons" within the meaning of the fourteenth amendment see *infra* text and notes at notes 287-99.

165. For a fuller discussion of this issue see Brown, *supra* note 160, at 41-48.

166. Enabling legislation is the specific delegation of power from a legislature or a directive as to how existing power is to be exercised. An example of the latter is the Massachusetts Zoning Act, MASS. GEN. LAWS ANN. ch. 40A, §§ 1-22 (West 1979 & Supp. 1982).

167. MASS. GEN. LAWS ANN. ch. 40A, §§ 1-22 (West 1979 & Supp. 1982).

168. *Bd. Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 294 N.E.2d 393 (1973).

169. 363 Mass. at 359, 294 N.E.2d at 409.

selves.¹⁷⁰ This concept represents a radical departure from Dillon's rule.¹⁷¹ One commentator has suggested that "no more complete and far-reaching, no more absolute reversal of the direction of governmental authority has ever occurred in an American state."¹⁷² Whether or not this is so, it is certainly true that Massachusetts municipalities have significant regulatory powers. The extent and limits of these powers is the subject of the next section of this article.

*C. The Home Rule Grant in Action:
Municipal Power Over Private Land Use*

Most confrontations over the exercise of municipal power in Massachusetts take place between the makers of regulations and the businesses and individuals who are subject to them. Most land use disputes are of this nature; the state becomes involved in local land transactions only infrequently. It will be helpful, for purposes of comparison with the situation involving HWF siting under the Siting Act, to look at the more typical relationship between municipality and developer. In the typical case, the developer is a private person or company proposing a particular land use. The difference in the HWF context is that the private developer is operating under the aegis of state law. If it were not for the existence of the Siting Act and the privileges given developers thereby, such as the arbitration clause that essentially forces the town to bargain, HWF developers would be in the same position as ordinary private firms or individuals in their dealings with the municipalities in which they hoped to locate. Thus, it is instructive to explore the scope of municipal regulatory power over private land use and its limitations. This inquiry will produce a model of what hazardous waste facility development might be like without the Siting Act.¹⁷³

170. The court in *Hanover* stated:

Municipalities are now free to exercise any power or function, excepting those denied to them by their own charters or reserved to the State . . . which the Legislature has the power to confer on them, as long as the exercise of these powers is not inconsistent with the Constitution or laws enacted by the Legislature. . . .

363 Mass. at 358, 294 N.E.2d at 408.

171. See *supra* text and notes at notes 158-60.

172. E. MARINER, THIS IS YOUR MASSACHUSETTS GOVERNMENT 39 (6th ed. 1970). See also Brown, *supra* note 160 at 54 n.35.

173. There are certainly other conceivable social forms that the hazardous waste disposal enterprise could take. It could be structured like the existing civic services of sewage and conventional solid waste disposal. Under the Siting Act, it resembles more the privately owned but highly regulated public utilities.

Despite the acknowledged power of Massachusetts municipalities to enact land use regulations, their exercise of that power is circumscribed and subject to scrutiny by the courts. Massachusetts courts analyze municipal lawmaking in the same way that they look at any other legislative action. Initially, a court will inquire whether the regulatory effort falls within the regulatory body's grant of substantive power.¹⁷⁴ If it does not, the court may invalidate the regulation by declaring it to be *ultra vires*—literally, an act that exceeds the municipality's authority.

The courts of the Commonwealth will also examine, when called upon to do so, whether a municipal regulation infringes impermissibly on the constitutional rights of individuals. Individual property rights are such that a regulation may not so restrict the permissible uses of land as to amount to a "taking" of private property without due process of law¹⁷⁵ or without payment of compensation.¹⁷⁶ Challenging plaintiffs may also try to persuade courts that the rules under attack are preempted by the rules on the same subject which have been enacted by another government authority to which the challenged rulemaker is subordinate.¹⁷⁷

174. In the case of municipalities, the sources would be specific enabling legislation or the Home Rule amendment itself. *See Bloom v. Worcester*, 363 Mass. 136, 293 N.E.2d 268 (1973).

175. *See, e.g., Nectow v. City of Cambridge*, 227 U.S. 183 (1928); U.S. CONST. amends. V, XIV.

176. *See* U.S. CONST. amend. V. *See also supra* note 132 (discussion of eminent domain). One Massachusetts case has suggested that certain wetlands protection by-laws might pose such an unconstitutional burden on the ownership of land. *See Comm'r of Natural Resources v. S. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965). The U.S. Supreme Court, however, has so far refused to accept the argument that a mere regulation of land use under the police power can constitute a "taking" for purposes of compelling the regulating government to pay the owner for the diminished market value of the land affected. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980). *See Agins v. City of Tiburon*, 447 U.S. 255 (1980); annotation on this case at 65 L. Ed. 106 (1980).

177. Preemption is defined as that doctrine adopted by U.S. Supreme Court holding that certain matters are of such national, as opposed to local, character that federal laws "preempt," or take precedence over state laws. BLACK'S LAW DICTIONARY 1060 (4th ed. 1979). Thus, states may not pass laws which are inconsistent with the federal law that governs the same subject matter, provided, of course, that the subject is one properly committed to federal control. *See also supra* text and notes at notes 137-48 (explaining division of power in government, especially note 143 on the supremacy clause). Preemption is also an issue in the state-municipal relationship, which has many analogies to the federal-state relationships. These are discussed in depth *infra* text and notes at notes 182-91.

For purposes of this paper, it will be assumed that no federal statute preempts the Massachusetts Siting Act. There is good authority for this position; the U.S. Supreme Court, in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), held that RCRA did not preempt a New Jersey statute governing waste transport. Similarly, at least one federal court has held that a municipal ban on disposal of one particular hazardous chemical is not preempted by the Toxic Substances Control Act (TSCA), 15 U.S.C.A. §§ 2601-2629. *See SED, Inc. v. City of Dayton*,

Challenges of municipal regulations by private developers have been typically unsuccessful, indicating that local power to regulate land use under Home Rule is broad.¹⁷⁸ The Massachusetts SJC has explicitly held the zoning power to be part of the independent municipal powers granted under the Home Rule Amendment.¹⁷⁹ Other decisions have established that municipal regulatory power over land use extends beyond that conferred by the Zoning Act¹⁸⁰ and that non-zoning land use by-laws need not conform to the procedural requirements of that Act.¹⁸¹ Municipal creation and regulation of flood plain districts¹⁸² and protected wetlands,¹⁸³ for example, have been sustained on this basis. At least one case has held that regulations to preserve and maintain the ground water table are specifically within local authority.¹⁸⁴

Since the Home Rule Amendment deposed the reign of Dillon's rule in Massachusetts,¹⁸⁵ the state courts have been liberal in construing the scope of local regulatory powers. Yet, even before Home Rule, state courts analyzing the validity of municipal regulations have operated from a presumption "in favor of the validity of an ordinance, and [where] its reasonableness is fairly debatable the judgment of the local authorities . . . will prevail."¹⁸⁶ A municipal regulation ordinarily will be sustained where it has a reasonable rela-

519 F. Supp. 979 (S.D. Ohio 1981). It should be noted, however, that federal preemption doctrine in application is not precisely analogous to the state-local relationship. The hazardous waste context raises more thorny issues than can be properly considered in this article.

178. *See, e.g.*, *Lovequist v. Conservation Comm'n*, 379 Mass. 7, 13-14, 393 N.E.2d 858, 860 (1979) (the Massachusetts SJC upheld the refusal of the Town of Dennis on Cape Cod to allow a developer to build a road over an ecologically fragile cranberry bog); *Am. Sign & Indicator Corp. v. Town of Framingham*, 1980 Mass. App. Adv. Sh. 101, 103, 399 N.E.2d 41, 43 (1980) (Massachusetts Appeals Court upheld the town's efforts to regulate sign height and other factors of display); *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973) (Massachusetts SJC upheld decision of town not to grant a special permit to developer who wanted to build apartment houses on a parcel of land periodically flooded by the Charles River).

179. *Bd. of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 359, 294 N.E.2d 393, 410 (1973).

180. MASS. ANN. LAWS ch. 40A §§ 1-23 (Michie/Law. Co-op. 1981).

181. *See, e.g.*, *Am. Sign & Indicator Corp. v. Town of Framingham*, 1980 Mass. App. Adv. Sh. 101, 103, 399 N.E.2d 41, 43.

182. *Turner v. Town of Walpole*, 1980 Mass. App. Adv. Sh. 1745, 409 N.E.2d 807; *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972).

183. *Lovequist v. Conservation Comm'n*, 379 Mass. 7, 393 N.E.2d 858 (1979); *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512 (1976). The latter case involved a wetlands by-law adopted pursuant to the Zoning Act.

184. *Turnpike Realty*, 362 Mass. 221, 227-28, 294 N.E.2d 891, 896-97 (1972).

185. *See supra* text and note at note 170.

186. *Schertzer v. Somerville*, 345 Mass. 747, 751, 189 N.E.2d 555, 559 (1963).

tionship to some legitimate purpose,¹⁸⁷ does not exceed the terms of the municipality's own authority, and violates no constitutional standards.

If developers of hazardous waste facilities were to approach Massachusetts municipalities on the same footing as other private developers, the Massachusetts courts would probably uphold the validity of reasonable local regulations and permit requirements that might apply to them. Hazardous waste facility developers, however, enjoy a preferred status under the Siting Act. By proceeding in accordance with the site assignment procedure under the Act, developers are able to invoke the authority of the state—and as against the state municipalities remain subordinate. Thus, the special provisions of the Siting Act apparently undermine municipal authority under Home Rule with respect to proposed HWF siting.

D. The Home Rule Grant: Municipal Power and State Override

As might be expected, it is not only private landowners and developers who come into conflict with local land use regulations. The state, acting through its agencies and licensees, can make provisions for land use that conflict with municipal designations and requirements. The early case law held unequivocally that state-owned property was exempt from local licensing¹⁸⁸ and zoning¹⁸⁹ requirements. It was not even necessary for purposes of establishing

187. 345 Mass. at 751, 189 N.E.2d at 559; *Turner v. Town of Walpole*, 1980 Mass. App. Adv. Sh. 1745, 409 N.E.2d 807. Similarly, where the *application* of a particular ordinance is supported by substantial evidence, a court will be inclined to uphold it. *See, e.g., Lovequist v. Conservation Comm'n*, 379 Mass. 7, 393 N.E.2d 858 (1979); *Turnpike Realty*, 362 Mass. 221, 233-34, 284 N.E.2d 891, 901-02 (1972). A reviewing court will demand such support. Findings of fact must dovetail with the permissible goals of the ordinance for a local land use decision to survive challenge. In one celebrated case, a landowner was denied by a local board of appeals a special permit to excavate and fill marshland three times in the course of 14 years. Three times, and with increasing vexation, the Supreme Judicial Court annulled the decision of the board. *See MacGibbon v. Board of Appeals of Duxbury*, 347 Mass. 690, 200 N.E.2d 254 (1964); *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 255 N.E.2d 347 (1970); *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 340 N.E.2d 487 (1976).

The SJC saw the town's reasons for denying the permit as inapposite to legitimate regulatory ends. The Court held, for instance, that "the preservation of the ocean food chain and other public benefits of land in its natural state did not provide a legally tenable ground for denying the permit." *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 518, 349 N.E.2d 487, 493 (1976). As to public health dangers alleged to be posed by flooding and erosion due to the filling of the site, the Court held these could be "decreased to an acceptable level by appropriate conditions and safeguards." 369 Mass. at 519, 340 N.E.2d at 494.

188. *Teasdale v. Newell & Snowling Construction Co.*, 192 Mass. 440, 78 N.E. 504 (1906).

189. *Medford v. Marinucci Bros. & Co.*, 344 Mass. 50, 181 N.E.2d 584 (1962).

exemption from local regulation that the land belong to the state if it were being used in a manner designated by the state. The plaintiffs in *Village on the Hill, Inc. v. Mass. Turnpike Authority*,¹⁹⁰ contested the propriety of a state plan to relocate a factory displaced by an expansion of the Massachusetts turnpike. The Massachusetts SJC upheld the plan, even though the new factory site was to be taken from a private owner by eminent domain, and the land was zoned for exclusively residential use.

There was some thought at the time the Home Rule Amendment was adopted that municipalities were acquiring greater powers to prevent these sorts of unwanted state intrusions. Subsequent court decisions rapidly dispelled this theory. The signal case of the series, *Board of Appeals of Hanover v. Housing Appeals Committee*,¹⁹¹ arose as a challenge to the override provisions of the state's "Anti-Snob Zoning" law. The boards of appeal of Hanover and Concord had denied building permits to developers seeking to build low- and moderate-income housing. The towns claimed to have denied the permits not only because the proposed dwellings violated the local zoning by-laws, but because the projects posed public health threats as well. In one case, the developer was said to have failed to submit sewerage plans acceptable to the responsible agencies; in the other, detriment to public health and safety was alleged, due to "severe subsurface water conditions."¹⁹²

Both developers appealed to a state agency, the Housing Appeals Committee, which had been designated by statute¹⁹³ to hear such appeals and to vacate local board decisions which were "unreasonable" and "not consistent with local needs."¹⁹⁴ In both cases, the Committee reversed the local decisions and ordered the issuance of building permits. Both local boards sought judicial review. They challenged not only the legitimacy of the substantive decisions made by the Housing Appeals Board, but also challenged the authority of the state, under the recently adopted Home Rule Amendment, to provide by statute for override of municipal determinations.

190. *Village on the Hill, Inc. v. Mass. Turnpike Authority*, 348 Mass. 107, 202 N.E.2d 602 (1964).

191. *Bd. of Appeals of Hanover v. Housing Appeals Comm'n*, 363 Mass. 339, 294 N.E.2d 393 (1973). This case has been already discussed at length for its pronouncements on local power. See *supra* text and notes 158-70.

192. *Bd. of Appeals of Hanover*, 363 Mass. at 343 & n.1, 344 & n.3, 294 N.E.2d at 397 & n.1, 398 & n.3 (1973).

193. MASS. ANN. LAWS ch. 40B, §§ 20-23 (Michie/Law. Co-op. 1980), inserted by Mass. Acts 1969, ch. 774, § 1, the so-called Massachusetts "Anti-Snob Zoning" law.

194. *Bd. of Appeals of Hanover*, 363 Mass. 339, 366, 294 N.E.2d 393, 420 (1973).

On the substantive issues, the Massachusetts SJC conceded that at least one site was "beset by difficult water problems."¹⁹⁵ It found, though, that there was substantial evidence that the developers' plans would provide an adequate solution to the water problem.¹⁹⁶ These findings of the SJC illustrate how narrow the function of a reviewing court is in determining the propriety of a state agency's override of a local ordinance or permit determination. Where the agency is bound to a decisionmaking standard made explicit in the statute, the court will inquire only whether the agency's decision has been based on "such evidence as a reasonable mind might accept as adequate to support the conclusion."¹⁹⁷ Under the Massachusetts Administrative Procedure Act, a court may set aside a state agency override decision where it is "unsupported by substantial evidence"¹⁹⁸ in cases where the agency's mandate calls for factfinding. In this case, the SJC found that the evidentiary burden had been met.

As to the facial attack on the override provisions of the statute, the SJC found no violation of municipal rights under the Home Rule Amendment. According to the court, Home Rule increased local power without altering the basic power structure. When direct confrontation with the general laws of the state occurs, local powers are clearly subordinate. The SJC viewed the problem as purely one of authority.

Municipalities can pass zoning ordinances or by-laws as an exercise of their independent police powers but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a . . . law enacted by the Legislature. . . . [T]he Home Rule Amendment has not altered the Legislature's supreme power in zoning matters. . . . [The challenged statute] is a proper exercise of the powers reserved to the Legislature by [the Home Rule Amendment] because it is a general law which applies to two or more municipalities. . . . [T]he statute's grant of power . . . to override local zoning . . . which would otherwise frustrate the statute's objective . . . does not violate the Home Rule Amendment.¹⁹⁹

Nor is substantive fairness an element of Home Rule analysis. While the instant statute in *Hanover* set minimum housing obliga-

195. 363 Mass. at 382, 294 N.E.2d at 431.

196. 363 Mass. at 382-83, 294 N.E.2d at 432.

197. 363 Mass. at 375-76, 294 N.E.2d at 415-16.

198. MASS. ANN. LAWS ch. 30A 14(8)(e) (Michie/Law. Co-op. 1980). This is the standard in appeals from final decisions of agencies in adjudicatory proceedings, as defined *id.* § 1(1), (2).

199. Bd. of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 360, 294 N.E.2d 393, 418 (1973).

tions, which if met foreclosed mandatory override of local decisions, state override in cases when the minimum was already met was still permitted.²⁰⁰ For a statute to be valid under Home Rule it is not necessary that the burden of serving the state's legislative purpose be evenly distributed among the municipalities of the Commonwealth. The Massachusetts SJC views a Home Rule challenge not as a " 'town's rights' case, nor a 'county's rights' case, but rather as a question of legislative intent."²⁰¹

Cases decided subsequent to the adoption of the Home Rule Amendment indicate that "while the scope of the authority granted to municipalities to act on municipal problems is very broad, the scope of the disability imposed on the Legislature by the amendment is quite narrow."²⁰² Even where legislative action singles out a municipality for disparate treatment, a court is likely to sustain the state's desires against Home Rule objections.²⁰³ Individual municipalities have had unique burdens placed on them by the legislature through laws of purportedly general application.²⁰⁴ Municipalities may still be chosen by the state as the locations for public facilities which may decrease property values and threaten public safety within the community. In one case, the Conservation Commission of the Town of Dartmouth sued the County Commissioners of Bristol to stop the construction of a jail on a site which was not zoned for such use.²⁰⁵ The Massachusetts SJC upheld a declaratory judgment that the commissioners charged with siting the jail did not have to apply for a zoning variance. The Court said that "an entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulations (absent statutory provision to the contrary) at least insofar as that entity or agency is performing an essential government function."²⁰⁶

Judge Wilkins, dissenting from the majority's opinion in this case, took issue with the principle that "every grant of eminent domain to a state entity or agency . . . contains an implied right to disregard

200. 363 Mass. at 366-67, 294 N.E.2d at 422-23 (1973).

201. *Cty. Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 1980 Mass. Adv. Sh. 1289, 1300, 405 N.E.2d 637, 646 (1980).

202. *Director of Div. of Water Pollution Control v. Uxbridge*, 281 N.E.2d 585 (Mass. 1972).

203. The state legislature must follow special rules in enacting such special laws. MASS. CONST. AMEND. art. II, § 8. *See supra* note 162.

204. A general law, to meet such definition need apply to only two municipalities at minimum. *See supra* text and note at note 162.

205. *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 1980 Mass. Adv. Sh. 1289, 1290-91, 405 N.E.2d 637, 638-39 (1980).

206. 1980 Mass. Adv. Sh. at 1293, 405 N.E.2d at 641.

explicit, lawful, local restrictions.”²⁰⁷ Judge Wilkins felt that due regard for Home Rule should require that state override powers be recognized only where they have been explicitly conferred by the legislature.²⁰⁸

It should be noted that such explicit override provisions exist in some statutes. The Department of Public Utilities (DPU), for instance, has the express power to exempt public utilities from local zoning ordinances.²⁰⁹ The zoning provisions of the Siting Act, however, are not phrased in terms of exemption. They prohibit municipalities from adopting in the first instance any zoning *change* which would exclude a HWF from a proposed site.²¹⁰ This zoning regulation and the regulatory restrictions posed by section 16 of the Siting Act²¹¹ raise the issue of another state power alluded to previously,²¹² the power of state preemption of local regulation.

*E. The Home Rule Grant in Action:
Municipal Power and State Preemption*

Even broad grants of legislative autonomy to local governments remain subject to the preemptive effect of statutes enacted at the state level. “State legislation may preempt local ordinances even in Home Rule states. The easy preemption cases are those in which a

207. 1980 Mass. Adv. Sh. at 1301, 405 N.E.2d at 647.

208. *Id.* at 1301, 405 N.E.2d at 647. The strength of J. Wilkens’ dissent is buttressed by the fact that the cases relied on by the majority to support a general override power were all decided *before* the Home Rule amendment was adopted.

209. MASS. ANN. LAWS ch. 40A, § 3 (Michie/Law. Co-op. 1973) provides that “[l]ands or structures . . . to be used by a public service corporation may be exempted . . . from the operation of a zoning ordinance . . . if . . . the department of public utilities, shall . . . find that the . . . use . . . is reasonably necessary for the convenience or welfare of the public.” *Id.*

210. MASS. ANN. LAWS ch. 410A, § 9. This section was undoubtedly adopted to foreclose the sorts of problems which have obstructed HWF construction in other jurisdictions, as indicated by the following newspaper story:

N.H. town rejects waste plant

The Merrimack, N.H. Planning Board has rejected plans by a Lynnfield, Mass., company to build a chemical waste treatment plant in town. Applied Chemical Technology, trying for more than four months to win town approval for its plant, says it will appeal the 6-1 vote. The board invoked a zoning ordinance that permits 18 kinds of industries in Merrimack, none of them a chemical waste treatment plant. The town zoning board can grant exceptions to the ordinance, and that may be the company’s next step, said planning board Chairman Nelson Disco. The plant, proposed for a 4.5 acre site on the Merrimack River, would recycle hazardous industrial solvents.

Boston Globe, December 18, 1981, at 33.

211. *See supra* text and note at note 135.

212. *See supra* text and note at note 177.

state statute expressly envelops and occupies an area, forbidding localities any measure of control over the subject matter."²¹³

Bloom v. Worcester,²¹⁴ the case which most explicitly describes post-Home Rule preemption in Massachusetts, adopts as an analytic tool the analogy of the federal preemption doctrine.²¹⁵ It states that the same process of ascertaining legislative intent must be performed in both instances.²¹⁶ The Massachusetts SJC noted that any legislation may be presumed to be preemptive when it deals with a subject comprehensively and explicitly describes what municipalities can and cannot do in relation to that subject.²¹⁷ Such legislation is deemed to preclude any exercise of local power which would frustrate the purpose of the statute.

There are some conceptual differences between the doctrines of state override and state preemption. Preemption is a blanket prohibition of the exercise of local power over a particular subject matter. Override is a piecemeal abeyance of an otherwise legitimate

213. D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 216-17 (1977).

214. *Bloom v. Worcester*, 363 Mass. 136, 293 N.E.2d 268 (1973).

215. 363 Mass. at 151, 293 N.E.2d at 280. The Massachusetts equivalent of the federal supremacy clause is the requirement in § 6 of the Home Rule Amendment, MASS. CONST., AMEND., art. II, and in § 13 of the Home Rule Procedures Act, MASS. ANN. LAWS ch. 43B, § 13 (Michie/Law. Co-op. 1980) that "a local ordinance or by-law is not inconsistent with any general law within the meaning of those words." *Bloom v. Worcester*, 363 Mass. 136, 155, 293 N.E.2d 268, 280 (1973). See also *supra* text and note at note 77 (on federal preemption).

216. 363 Mass. at 155, 293 N.E.2d at 280 (1973).

217. The Massachusetts SJC, in *Bloom v. Worcester*, 363 Mass. 136, 293 N.E.2d 268 (1973), created a simple standard for determining preemption: that the legislative intent to preclude local action be clear. "The Legislature may, of course, explicitly forbid certain local action [by municipalities]." 363 Mass. at 155 & n.13, 293 N.E.2d at 280 & n.13 (1973).

If the legislature has made no explicit indication of its intention to preempt, an intention to bar local ordinances and by-laws purporting to regulate the same subject may be inferred from the circumstances. Legislation which deals with a subject comprehensively, describing (perhaps among other things) what municipalities can and cannot do, may be deemed to preclude the exercise of any local power over the same subject, because otherwise the legislative purpose of that statute would be frustrated. For example, even if § 7 of the Home Rule Amendment did not deny municipalities the power to borrow money or to levy, assess and collect taxes except pursuant to legislative authority, the existing general laws concerning those subjects are so comprehensive that an inference that the Legislature intended to preempt those fields would be fully justified. 363 Mass. at 155, 293 N.E.2d at 280.

A conclusion that the legislature intended to preempt a subject may also be inferred if the legislature has explicitly limited the manner in which cities and towns may act on that subject. In most jurisdictions, comprehensive statutes are generally seen as totally preemptive, regardless of whether the intent to preempt has been made explicit by the legislature. See, e.g., *County Comm'r of Bristol v. Conservation Comm'n of Dartmouth*, 1980 Mass. Adv. Sh. 1289, 405 N.E.2d 637; *So. Ocean Landfill, Inc. v. Mayor & Council*, 64 N.J. 190, 314 A.2d 65 (N.J. 1974); *Cleveland Elec. Illum. Co. v. City of Painesville*, 15 Ohio St.2d 125, 239 N.E.2d 75 (1968); *City of So. Burlington v. Vermont Elec. Power Co., Inc.*, 133 Vt. 438, 344 A.2d 19 (1975).

local regulation.²¹⁸ At times these concepts blur, as when a statutory provision for override such as the DPU zoning exemption power previously described is characterized by a court as a preemptive measure.²¹⁹ This blurring is evident in the Massachusetts SJC's discussion of *County Commissioners of Bristol v. Conservation Commission of Dartmouth*, involving the Bristol County jail.²²⁰ The Massachusetts SJC's reference in that case to state "supremacy" in zoning matters suggests the preemption doctrine.²²¹ Such an approach would be appropriate in the context of federal versus state power, where federal supremacy is an explicit dictate of the United States Constitution.²²² Yet the exercise of what might be deemed an analogous power of the state is described variously as preemption, exemption, and override, depending on the form it takes or the manner in which it is characterized. As earlier discussion has demonstrated, it can be of consequence to municipalities which of these different manifestations of the same power the legislature chooses to use.²²³

The interplay of these different concepts and the interpretation of them by the courts is illustrated by the series of cases that will be discussed next. These cases may be viewed as a paradigm of the conflict of state versus local power over the construction of a hazardous though arguably necessary facility. The purpose of introducing these cases here is twofold. First, they illustrate the way that the highest court of this state, the Massachusetts SJC, applies the fairly abstract

218. The example of zoning provides a model of these differences. Imagine a state which has no Home Rule amendment, no Zoning Act, and no zoning. The state legislature decides that zoning would be a good thing, and creates a comprehensive zoning plan that includes every municipality in the state. By virtue of such a legislative plan preemption would occur. The legislature, however, could delegate to its municipalities the responsibility for local zoning plans, and at the same time reserve power in the state to grant zoning variances when it chose to. Towns could then initiate valid zoning plans, but each time the legislature granted a variance it would override the town's otherwise legitimate exercise of power. Moreover, the state itself would be exempt from submitting to the zoning plans of its subordinate parts, the municipalities.

219. *New England LNG Co. v. Fall River*, 368 Mass. 259, 265-67, 331 N.E.2d 536, 540-41 (1975).

220. *See supra* note 201.

221. *New England LNG Co. v. Fall River*, 368 Mass. 259, 265, 331 N.E.2d 536, 541 (1975).

222. *See supra* note 143.

223. Both preemption and override are exercises of the same basic power—namely, state sovereignty or supremacy; but the two allow very different scopes of power to municipalities. Where there is preemption, municipalities may not act at all. Reservation of override power by the state gives municipalities general freedom to act which is subject to veto in certain circumstances.

concepts discussed above in concrete fact situations. The cases also show how abstract issues of power often eclipse concrete environmental concerns in litigation, especially at higher appellate levels.

F. The New England Liquefied Natural Gas Cases

Liquefied natural gas (LNG) does not pose many of the problems presented by hazardous waste. The Massachusetts SJC has stated dismissively that LNG does not create a significant threat of harmful ecological effects by water or air pollution.²²⁴ It does, however, share one important quality with many hazardous wastes: it is remarkably explosive.²²⁵ An LNG facility also has a major aesthetic impact, even compared to other heavy industrial uses. The gas liquefaction and storage facility which New England LNG (NELNG) proposed to build on Mount Hope Bay in Fall River in 1971 was designed to include three storage tanks 107.5 feet high and 250 feet in diameter, each holding 600,000 barrels of LNG, impounded by a dike 17 feet high; two pipelines connecting the facility with a pier; an administrative building; and another structure to house liquefaction machinery.²²⁶ The City of Fall River at the time required that persons storing gas products and other flammable substances first obtain a license from the City. This was a generally applicable regulation, promulgated under the City's explicit authority under the Zoning Act to "secure safety from fire, panic, and other dangers."²²⁷

The owners of the property abutting the proposed LNG facility site won an injunction in the Superior Court²²⁸ preventing NELNG from using the site without first obtaining a license from the

224. *Save the Bay, Inc. v. Dep't of Public Utilities*, 366 Mass. 667, 684, 322 N.E.2d 742, 756 (1975).

225. See H. WESSON, ed., *AN EXPERIMENTAL STUDY OF THE MITIGATION OF FLAMMABLE VAPOR DISPERSION AND FIRE HAZARDS IMMEDIATELY FOLLOWING LNG SPILLS ON LAND*, Report to the American Gas Association by University Engineers, Inc., February 1974; *Storage and Handling of LNG*, Document No. 59A, Section 4222, National Fire Protection Association.

226. *Pereira v. New England LNG Co.*, 364 Mass. 109, 111, 301 N.E.2d 441, 443 (1973).

227. MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1980). Most Massachusetts municipalities are likely to have similar regulations. It is also likely that municipalities would try to use what licensing and permit requirements they have to obstruct HWF development, since § 16 of the Siting Act both forbids the adoption of new requirements applicable to HWFs, and requires that all required licenses and permits be granted or denied within 60 days of application for them, or within 21 days after establishment of a siting agreement. MASS. GEN. LAWS ANN. ch. 21D, § 16 (West 1981).

228. The Superior Courts in Massachusetts are trial courts of general jurisdiction over civil matters. MASS. GEN. LAWS ANN. ch. 212, § 84; ch. 214, § 1 (West 1981). The suits brought by Warren and Haverhill challenging the HWF siting process under the Siting Act will be heard first by Superior Courts in Worcester and Middlesex Counties respectively. See *supra* note 46.

municipal authorities.²²⁹ The Massachusetts SJC overturned this decision in *Pereira v. New England LNG Co., Inc.*, holding that a municipal license was not required.²³⁰ The SJC reasoned that the legislature, by vesting control of gas companies in the Department of Public Utilities (DPU), by giving DPU the power to grant zoning exemptions to public utilities, and by requiring state licensing of gas companies, had evidenced an intent to preempt the field of gas company regulations.²³¹ This state preemption by specific legislation was found to have superseded the general municipal licensing power.²³² The SJC stated that, "[t]o hold otherwise would impute to the Legislature an intent to Balkanize the Commonwealth and to permit a single municipality to deny access to such vital services to any and all other municipalities."²³³

Undaunted, a local citizens' group calling itself Save the Bay, Inc., brought an appeal to the Massachusetts SJC challenging the DPU grant of a zoning exemption for the LNG facility.²³⁴ The petitioners' charges were that NELNG was not a public service corporation eligible for the exemption under the statute and that DPU in granting the exemption had incorrectly applied the statutory standard of "reasonably necessary for the convenience or welfare of the public."²³⁵ The Massachusetts SJC, in *Save the Bay, Inc. v. Department of Public Utilities*,²³⁶ upheld both DPU findings as questions of fact which were supported by substantial evidence.

Some interesting points come out of the Massachusetts SJC's analysis of the evidence supporting the administrative adjudication of the DPU. In determining that NELNG was a public service corporation, the court appeared to place great weight on the federal certification of NELNG's services and the fact that the Federal Power Commission viewed importation of LNG as "an act in interstate commerce . . . subject to certain of the Commission's jurisdictional

229. *Pereira v. New England LNG Co.*, 364 Mass. 109, 110, 301 N.E.2d 441, 442 (1973).

230. 364 Mass. at 113, 301 N.E.2d at 445.

231. 364 Mass. at 115-23, 301 N.E.2d at 446-52.

232. 364 Mass. at 118-19, 301 N.E.2d at 449-50.

233. 364 Mass. at 121, 301 N.E.2d at 451-52.

234. *Save the Bay v. Dep't of Public Utilities*, 366 Mass. 667, 322 N.E.2d 742 (1975). The abutters and an unincorporated association of local citizens joined as plaintiffs against DPU (which was exercising legislative override powers which had been delegated to it under MASS. GEN. LAWS ANN. ch. 40A, § 10).

235. 366 Mass. at 671, 322 N.E.2d at 745 (citing MASS. GEN. LAWS ANN. ch. 40A, § 10 (1979), predecessor to ch. 40A, § 3 (West 1981)).

236. 366 Mass. at 678-87, 322 N.E.2d at 751-52.

powers.”²³⁷ What the SJC does with this language is to suggest without embracing the argument that the matter is not subject to a state court’s discretion because it has been *federally* preempted.²³⁸ The argument evokes the majestic tenor of federal supremacy without invoking its specific application to the case. In this vague, amorphous form, the federal preemption argument is simply an impressive piece of legal makeweight. It does not clarify the problem of the respective areas of federal, state, and local jurisdiction over LNG. It is important to be aware of this dynamic in potential Massachusetts SJC decisions, because it can be an important ground for nonsuit or unfavorable decision. It might be useful to think of the technique as a kind of reverse abstention doctrine.²³⁹ That is, where the Massachusetts SJC perceives a significant federal regulatory participation in some field of endeavor, it will often treat that field as federally preempted and defer to a perceived federal policy without really engaging in minimal preemption analysis. As between the state and a municipality, the court apparently considers the state as the exclusive agent in implementing such perceived federal policies.

This is a potentially important factor in state court decisions about hazardous waste, since there are major federal statutes on the subject.²⁴⁰ Despite the fact that these federal statutes seem clearly designed not to preempt state and local regulation and have been interpreted by federal courts as *not* preempting state and local regulation,²⁴¹ state courts, including the Massachusetts SJC, will doubtless look to federal statutes for guidance. Consider the likely reaction of the SJC to the following statement of federal policy:

While EPA has always believed that states should have the right to set pollution control standards more restrictive than the Fed-

237. 366 Mass. at 679-80, 322 N.E.2d at 753-54.

238. This is a tactic that the Massachusetts SJC has employed in other contexts as well. *See, e.g.,* Bishop v. Klein, 1980 Mass. Adv. Sh. 857, 402 N.E.2d 1365 (1980), where the SJC declined to assign as reversible error a trial judge’s refusal of a defendant’s motion under the MASS. R. CIV. P. 34 that the court compel a personal injury plaintiff to produce medical treatment records from a Veterans Administration Hospital. Though these records could have been released upon plaintiff’s written request, the SJC found that under federal regulation, “the decision as to ultimate disclosure . . . rests with the [V.A.] administrator.” 1980 Mass. Adv. Sh. at 860, 402 N.E.2d at 1368. *See also supra* note 177.

239. The abstention doctrine refers to the policy of federal courts to refrain from deciding cases which rest upon open questions of state law which could yet be settled in the state courts, in order to avoid excessive federal interference in state self-governance. Abstention is usually a discretionary matter; an exercise of judicial self-restraint in the interest of comity. *See, e.g.,* Railroad Comm’n of Texas v. Pullman Co., 312 U.S. 496 (1941); Harrison v. NAACP, 360 U.S. 167 (1959).

240. *See supra* note 23.

241. *See supra* text and note at note 177.

eral standards, it would be a matter of national concern if this principle were to become the basis for refusal by states to share in the national responsibility for finding safe means for the proper disposal of hazardous substances.²⁴²

Although this is a statement of an administrative agency and not one of Congress, it is likely to influence all state appellate courts in their deliberations on hazardous waste issues. It is likely to sway state courts toward finding that many local hazardous waste regulations are merely obstructionist or indicative only of a desire to share in the national responsibility in a limited capacity.

Another notable aspect of the Massachusetts SJC's review of the evidence in *Save the Bay* is more conventional, but important in the context of the regulation of hazardous activities. This is the extreme deference that the court gave to the judgments of designated state agencies in carrying out their assigned functions. The SJC did not deny that the LNG facility could pose safety problems, but found "that the Department of Public Utilities fully inquired into relevant factors to determine possible hazardous and detrimental effects. . . . It is not for us independently to redetermine those issues."²⁴³ The SJC stated that it was "not insensitive to the special hardships that the proposed facility may have in its area of immediate impact," but noted that the zoning exemption clause was based on a recognition of the "absolute interdependence of all parts of the Commonwealth."²⁴⁴

Nevertheless, Fall River persisted in its efforts to save the bay—or to Balkanize the Commonwealth, depending on one's point of view. In October of 1973, while the appeal of the DPU zoning override was still pending, the city amended its general ordinances, as distinct from zoning ordinances, to effectively prohibit construction of the LNG facility on the DPU-approved site. The city council announced that it was taking this action "in the interest of public safety, as it relates to fire and explosion."²⁴⁵ New England LNG brought suit against Fall River when, pursuant to the new ordinance, the city building inspector refused to issue a building permit for construction of the LNG facility.²⁴⁶ Citing its original decision in the controver-

242. 44 Fed. Reg. 31,528 (1979).

243. *Save the Bay, Inc. v. Dep't Public Utilities*, 366 Mass. 667, 685, 322 N.E.2d 742, 758 (1975).

244. *Save the Bay*, 366 Mass. at 686-87, 322 N.E.2d at 759-60.

245. *New England LNG Co. v. Fall River*, 368 Mass. 259, 262-63, 331 N.E.2d 536, 539-40 (1975).

246. *Fall River*, 368 Mass. at 263, 331 N.E.2d at 540.

sy,²⁴⁷ the Massachusetts SJC, in *New England LNG Co., Inc. v. Fall River*²⁴⁸ again held in favor of the supremacy of the state's delegation of authority over the gas facility to DPU. Reciting the state preemption doctrine set forth in *Bloom v. Worcester*,²⁴⁹ the SJC explained that the state statutory scheme must prevail over the city's attempted regulation.²⁵⁰ The Home Rule objection was held inapplicable, and the building permit was ordered to be issued. The total delay in construction of the LNG facility was three and one-half years.

The LNG cases are instructive because they illustrate some likely outcomes of state-municipal scenarios that might arise over HWF siting. Should a municipality refuse to grant an otherwise legitimately required license or permit, the SJC will reverse where it finds the denial "based on a legally untenable ground, . . . unreasonable, whimsical, capricious or arbitrary."²⁵¹ A specially adopted regulation, like Fall River's October, 1973, anti-LNG ordinance, could be struck down summarily as a violation of section 16 of the Siting Act.²⁵² It seems clear that to have any hope of being sustained by reviewing courts, local regulations should deal directly and rigorously with the problem, not simply force it out of the community through building or zoning ordinances. Local hazardous waste regulation must not take a form which would indicate that the community is simply trying to abdicate responsibility for the hazardous waste problem.

V. DOES THE SITING ACT VIOLATE THE HOME RULE PROVISIONS OF THE STATE CONSTITUTION?

The Siting Act clearly constitutes a comprehensive legislative scheme for dealing with the toxic chemical disposal facility siting problem in Massachusetts.²⁵³ As such, it creates an inference of legislative intent to preempt the field. Nevertheless, these statutory

247. *Pereira v. New England LNG Co.*, 364 Mass. 109, 301 N.E.2d 441 (1973).

248. *Fall River*, 368 Mass. at 263, 331 N.E. at 540.

249. *See supra* text and note at note 217.

250. *Fall River*, 368 Mass. at 267, 331 N.E.2d at 543.

251. *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639, 255 N.E.2d 347, 350 (1970). *See also supra* note 187.

252. *See supra* text and note at note 135.

253. Conceptually, the Siting Act and the Hazardous Waste Management Act, MASS. GEN. LAWS ANN. ch. 21C, §§ 1-12 (West 1981), should be considered together as evidence of legislative intent to regulate completely and uniformly all aspects of the hazardous waste problem.

provisions leave room for a certain amount of municipal regulation. The preemption is not total; nor is it always clear.

For instance, the Siting Act authorizes the acquisition of a proposed site by eminent domain;²⁵⁴ yet the terms of the authority granted to the Department of Environmental Management (DEM)²⁵⁵ limit the exercise of eminent domain to certain conditions: "All permits, licenses, and approvals of the city or town wherein the site lies" must have been granted, and a majority of the members of the municipality's governing body must vote in favor of the eminent domain acquisition.²⁵⁶ The Siting Act contemplates that some municipal regulations remain in force. Local regulations still apply, but up to a point that is not determined by the usual measure.

As the cases show, the ordinary standard used to determine state preemption is whether the local ordinance is incompatible with, or frustrates the general purpose of the comprehensive state law. Under the Siting Act, the only condition for total state preemption is that the local regulation be one recently adopted, thereby constituting a zoning change to exclude a facility. Section 16 of the Siting Act sets the effective date of the Act itself as the cut-off date for determining which municipal licensing and permit requirements may be applied to HWFs. The Zoning Amendment sets the date of receipt of a notice of intent by the town as the time limit beyond which the town may not adopt "any zoning change which would exclude the facility. . . ." ²⁵⁷

These preemption contours are very odd. While the typical preemptive statute applies a blanket prohibition equally to all municipalities,²⁵⁸ this one does not. Zoning change, of course, is forbidden any municipality faced with a HWF developer's notice of intent. Section 16, however, is not so evenhanded. One town might have a licensing

254. MASS. ANN. LAWS ch. 21D, § 17 (Michie/Law. Co-op. 1980). *See also* note 132 *supra*.

255. MASS. ANN. LAWS ch. 16, § 19 (Michie/Law. Co-op. 1980).

256. MASS. ANN. LAWS ch. 21D, § 17 (Michie/Law. Co-op. 1980). The Siting Act seems to pay deference to local permit and licensing procedures only in the eminent domain context; compliance with such regulations is not listed among the elements of the Siting Agreement. *Id.* § 12. Section 16 states that "[a]ll permits and licenses required for a hazardous waste facility [in a municipality] shall be granted or denied within 60 days after application . . . or twenty-one days after the establishment of a siting agreement . . . whichever is the later." *Id.* § 16. (emphasis supplied). Nowhere, however, does the Siting Act provide for automatic reversal of the denial of any permit or license, so long as it was required prior to adoption of the Siting Act.

257. MASS. ANN. LAWS ch. 40A, § 9.

258. *See, e.g.,* Bloom v. Worcester, 363 Mass. 136, 155 n.13, 293 N.E.2d 268, 286 n.13 (1973) (citing the example of a statute that prohibits municipalities from offering their employees any group insurance programs other than those authorized by state law).

requirement which clearly frustrates the siting of a HWF; yet according to this statutory scheme its applicability is preserved so long as it predates the Siting Act. Another town might adopt a licensing requirement which is not fatally inconsistent with the Siting Act, but if adopted after July, 1980, the requirement will be invalid as applied to a HWF. No inquiry will be made into its merit or into its ultimate compatibility with the Siting Act. In sum, section 16 discriminates in favor of municipalities which had permit and licensing requirements applicable to HWFs prior to July, 1980. It discriminates against municipalities that had no such requirements.

An article written by Massachusetts Senator Robert Wetmore,²⁵⁹ who was co-chairman of the state's Special Commission on Hazardous Waste comments that the Siting Act "avoids state override of local decisions and focuses instead on making proposed facilities acceptable to communities. In the words of one reporter, it represents 'a blending of political expediency and the latest in academic wisdom.'"²⁶⁰ The Siting Act does avoid the draconian measure of override. As we have seen, though, it may accomplish the same ends in a less direct and predictable manner through its preemptive provisions. The Siting Act deliberately leaves in place existing local regulations, but by freezing those regulations as of the date of the Siting Act, it virtually guarantees that some towns will be left vulnerable by their own regulatory patterns which they will be unable to change.

Of course, section 16 and the Zoning Amendment may be viewed not merely as limitations on local power. In fact, they may be considered as limitations on state power. Just as the state as sovereign can override local zoning regulations,²⁶¹ so can the state overturn local ordinances which conflict with a preemptive statute.²⁶² Indeed, the Massachusetts SJC has declared that an "agency created by the Massachusetts Legislature is immune from municipal zoning regulations (*absent statutory provision to the contrary*)."²⁶³ This would indicate that in addition to the express powers conferred by the Siting Act, the DEM also has zoning override power because the Siting Act

259. R. Wetmore, *Massachusetts Hazardous Waste Facility Siting Act*, submitted to EPA, reprinted in *Environmental News*, Aug. 8, 1980 (Available from Sen. Wetmore's office).

260. *Id.* at 1.

261. *County Comm'r of Bristol v. Conservation Comm'n of Dartmouth*, 1980 Mass. Adv. Sh. 1289, 405 N.E.2d 637.

262. *New England LNG Co. v. Fall River*, 368 Mass. 259, 331 N.E.2d 536 (1975).

263. *County Comm'r of Bristol*, 1980 Mass. Adv. Sh. at 1293, 405 N.E.2d at 641 (emphasis added).

does not explicitly withdraw it. Yet, in adopting the Siting Act, it was apparently the legislative intent that DEM not have zoning override power, even though it is clearly within the authority of the state to confer such power on one of its agencies.

Why was the statute drafted this way? Senator Wetmore's description of the Siting Act²⁶⁴ speaks of "carefully balanced decision-making,"²⁶⁵ and prevention of "the development of an adversarial atmosphere."²⁶⁶ He also says that "political reality required any successful [statute] . . . to avoid strong state override, due to the Commonwealth's deeply ingrained value of strong home-rule."²⁶⁷ Another observer has put it more bluntly: that the current legislature would not have voted to accept the Siting Act had it contained such curtailments of local power.²⁶⁸

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 provisions²⁶⁹ which were deleted before the bill's passage.²⁷⁰ The remaining mandatory arbitration provision may ultimately accomplish the same ends that override would.²⁷¹ 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*.²⁷² 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.

264. Wetmore, *supra* note 259, at 1.

265. *Id.*

266. *Id.* at 2.

267. *Id.* at 3.

268. Interview with Carol Greenleaf, Administrative Assistant to Sen. Carol Amick, in Boston, May 13, 1982.

269. Sanderson Interview, *supra* note 8.

270. *Id.*

271. See *supra* notes 130-32.

272. See, e.g., County Comm'r of Bristol v. Conservation Comm'n of Dartmouth, 1980 Mass. Adv. Sh. 1289, 405 N.E.2d 637 (1980); Village on the Hill, Inc. v. Mass. Turnpike Auth., 348 Mass. 107, 202 N.E.2d 602 (1964).

The actual statutory scheme shows much more respect for the principle of local autonomy that underlies Home Rule. The existing scheme is not without its coercive effect, but at least the compulsion is that the municipality negotiate with the developer, rather than stand by helpless and enraged as the development takes place independently of local ordinances. This is one good reason why the Siting Act as adopted, with its greater respect for local autonomy, would have been more politically palatable than the Siting Act as originally envisioned.

It could be, too, that the state had doubts about its own power to exercise override on behalf of a HWF siting. A state agency can possess the zoning override power only to the extent that it is using that power to perform an "essential government function."²⁷³ Is providing for hazardous waste disposal such a function? A hazardous waste facility is not, after all, a state agency, instrumentality, or a public work. It is the profit-making business of a private developer.

Still, there is power in the analogy of HWFs to public service corporations.²⁷⁴ Even if the analogy by itself is not strong enough to bring HWFs under the public utilities statute, it will probably be enough for courts to justify the state's exercise of extraordinary powers on their behalf. HWFs bear many of the attributes of the public service corporation as described in *Fall River*.²⁷⁵ They are part of an industry licensed by the state, highly regulated by state and federal law, and assisted and supervised by a state agency. They provide a service that a highly industrialized society cannot do without. Waste disposal in its more conventional forms has typically been centrally organized and performed by government. Even without the provision for honoring prior local licensing requirements, the exercise of eminent domain on behalf of a HWF would probably be upheld as a taking for public, and not private, purposes.²⁷⁶

273. *County Comm'r of Bristol v. Conservation Comm'n of Dartmouth*, 1980 Mass. Adv. Sh. 1289, 1293, 405 N.E.2d 637, 641.

274. Whether a hazardous waste facility might be considered a public utility or a public service corporation for purposes of the zoning override provision of MASS. ANN. LAWS ch. 40A, § 3, or any other legal purpose, is a very interesting question. The argument against HWFs being public utilities might include the fact that HWFs are under the jurisdiction of DEM and not that of DPU. Also, the special HWF zoning regulations of ch. 40A, § 9 would not have been necessary if ch. 40A, § 3 already applied. On the other hand, if one were to apply the purely evidentiary, matter-of-fact test used in the *Fall River* case, 368 Mass. 259, 331 N.E.2d 536 (1975), for determining whether a business is a public service corporation, a good case could be made that HWFs, like ordinary waste disposal plants, fit this description.

275. *Fall River*, 368 Mass. 259, 261, 331 N.E.2d 536, 539 (1975).

276. See, e.g., *Village on the Hill, Inc. v. Mass. Turnpike Auth.*, 348 Mass. 107, 202 N.E.2d 602 (1964). The SJC, however, has ruled that "[l]and cannot be taken by eminent domain with

There would seem to be no inherent limit on the state's power to override any local regulations obstructing HWFs, if the state chose to do so. Yet, what the state has chosen to do is to create a statute which exercises discriminatory preemption. What the Siting Act does, with its grandfather clause for in-place local regulations, is to provide more autonomy for municipalities which have already exercised it, while preempting such self-determination for others. This was undoubtedly a political accommodation made to facilitate the passage of the statute as an emergency measure. A HWF is not as innocuous as a water treatment plant or electrical transmission lines. Representatives of communities already zoned to exclude industrial waste disposal would not have voted for passage of a law which appeared to provide for the override of exclusionary zoning by-laws.²⁷⁷

The Siting Act, then, is very different structurally from the Massachusetts "Anti-Snob Zoning" law. That law, relentlessly democratic, was drafted deliberately to introduce low- and middle-income housing into any of the state's municipalities, regardless of efforts they might have made to exclude such construction. The Siting Act, on the other hand, has been drafted so as to pose no threat to municipalities that are currently zoned to exclude industry, and little threat to those with exclusionary licensing and permit regulations. The Siting Act was made politically palatable by just this design. If the selective preemption scheme and effect of the Siting Act is valid, then exclusively zoned and regulated communities will not be threatened by the siting of a HWF. HWFs may only be built in municipalities where industrial land use is already permitted. Furthermore, municipalities which have not passed protective regulations are now precluded from adopting or changing their local regulations so as to allow them to join their more exclusively-zoned neighbors.

the intent to transfer it to private individuals for their own use." 297 Mass. 567, 571, 8 N.E.2d 753, 757 (1937). *But see* *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981). In *Poletown*, a city redevelopment agency took a parcel of land by eminent domain to sell to an auto manufacturer for the purpose of building an assembly plant. The highest court of Michigan sustained the taking, on the grounds that the jobs and tax base provided were a "public benefit," to which private gain by the business corporation was deemed "incidental." While this is not a Massachusetts decision, it does show the lengths to which modern courts are willing to go to accommodate the institutions of our highly industrialized society. *See also* *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

277. What the Siting Act did instead was prohibit zoning change in communities faced with a proposed siting, declaring HWF operation to be a rightful use on any land currently zoned for industry. *See* MASS. GEN. LAWS ANN. ch. 21D, § 17 (West 1981).

The central question is whether a state may discriminate among its political subdivisions in this manner. One could make an argument that the Siting Act violates the Home Rule Amendment because it does not "apply alike" to all municipalities of the Commonwealth. At least two towns are exempt from its application altogether;²⁷⁸ others are not affected because they have no land zoned for industrial use. Towns with regulations predating the Siting Act have more autonomy under that statute than those that do not. The Massachusetts SJC has so far declined to attach any special significance to the word "alike" in the Home Rule Amendment. Instead, the SJC has upheld the validity of both general²⁷⁹ and special²⁸⁰ legislation that place unique burdens on particular municipalities.

This author has been able to discover only two instances in which the Massachusetts SJC has found state legislation to violate the Home Rule Amendment. One of these was a purportedly general bill to end the electoral practice of proportional representation which existed only in the City of Cambridge.²⁸¹ The Massachusetts SJC struck it down as being, in fact, a special law²⁸² which had not been

278. See *supra* note 43.

279. Brown, *supra* note 160, at 45-47 (citing *Opinion of the Justices*, 357 Mass. 831, 258 N.E.2d 731 (1970)). This opinion arose out of a course of special legislative acts authorizing the town of West Springfield to take water from the town of Southwick. Southwick filed a bill, purportedly as Special Legislation, to limit the amount of water which could be drawn. The SJC discussed and upheld the bill as general legislation, finding that the bill "by precisely the same language, affects Southwick and West Springfield and has legal effect in those towns, which constitute 'a class of no fewer than two' towns." 357 Mass. 831, 835, 258 N.E.2d 731, 735 (1970). The opinion does not analyze or explain the requirement that general legislation "apply alike."

280. In *County Comm'r of Bristol v. Conservation Comm'n of Dartmouth*, the justices engage in this analysis:

The special legislation in question in the instant case, St. 1973, c. 412, states as its purpose the construction of a new jail in Bristol County. Since Bristol County represents a class of two or more cities and towns, this section complies with § 8. Section 2 of the statute provides that the county commissioners may take by eminent domain or acquire by purchase 'any land and buildings that may be necessary for said purposes.' This provision is also valid under § 8 since it does not specify the land of any city or town in particular. Thus, the statute satisfies the requirements of § 8 and is valid under the Home Rule Amendment.

1980 Mass. Adv. Sh. 1289, 1293, 405 N.E.2d 637, 641 (1980).

281. *Belin v. Sec'y of the Commonwealth*, 362 Mass. 530, 288 N.E.2d 287 (1972).

282. The court held that the legislation was

phrased in general terms, and is, arguably, potentially applicable to cities in addition to Cambridge at some indefinite future time, is not sufficient to meet the test which § 8 of [the Home Rule Amendment] establishes. When enacted, [the bill] . . . was applicable in fact only to Cambridge. That it was phrased in general or specific terms does not control under § 8 which prescribes a clear and simple test of minimum applicability. In *Opinion of the Justices*, 387 Mass. 831, we pointed out relative to an act

enacted according to the requisite procedures under the Home Rule Amendment.²⁸³ The other was a bill to authorize the transfer to a private university of the corpus of a specific bequest originally made to the City of Boston by Benjamin Franklin.²⁸⁴ The SJC held that it was a piece of special legislation which would require a Home Rule petition from the City of Boston in order to comply with the Home Rule Amendment.²⁸⁵ In neither case did the court find it necessary to construe the "apply alike" requirement. It is unlikely that the SJC could be persuaded that this language provides equal protection of the laws for municipalities in the same manner that the federal constitution requires that equal protection under the law be extended to individuals.²⁸⁶

The question which naturally arises is whether Massachusetts municipalities could raise a claim under the equal protection clause of the United States Constitution. It could be contended that the classification scheme here, which discriminates in favor of existing local regulations, must be rationally related to the state's purposes in enacting the Siting Act in order to pass constitutional muster. The following section will consider whether this statutory scheme of the Siting Act deprives Massachusetts municipalities of the equal protection of the laws in violation of the fourteenth amendment to the United States Constitution.

VI. FEDERAL CONSTITUTIONAL ISSUES IN STATE-MUNICIPAL RELATIONS

This section of the article represents a departure from what has come before. Until now, the inquiry has focused on whether the Siting Act is in violation of the Massachusetts Constitution, specifically its Home Rule Amendment. A review and analysis of existing case

affecting the towns of Southwick and West Springfield that it met the test of a general law within the meaning of the first sentence of art. 89, § 8, and, hence, did not need to be enacted in accordance with the special procedures for special laws there defined. That case involved two towns, a situation quite different from that which confronts us here.

362 Mass. 530, 535, 288 N.E.2d 287, 292 (1972).

283. See *supra* text and note at note 162.

284. *Opinion of the Justices*, 374 Mass. 843 (1972).

285. *Id.* at 850-51.

286. It is not surprising that the SJC should hesitate in the face of such an undertaking. Disparate modes of land use regulation among different municipalities are generally manifestations of variation in economic power, and even the Supreme Court has avoided problems of "economic equal protection." See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975).

law and legal thinking indicates that the Siting Act's restrictions on municipalities' regulatory powers are not violative of the Home Rule Amendment. Thus, any challenge of the Siting Act which adopts the position that it conflicts with Home Rule is likely to be untenable. This section will explore the avenue of federal constitutionality in an effort to discover other possible legal defects in the Massachusetts statute.

The discriminatory preemption scheme of the Siting Act may well be perceived as violative of the equal protection clause. Unfortunately, it has been held that "municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator"²⁸⁷ and that "the power of the State and its agencies over municipal corporations is not restrained by the provisions of the Fourteenth Amendment."²⁸⁸ This principle, while unfailingly applied by the federal courts, seems not to be dictated by any express constitutional provisions. The cases that espouse this doctrine do not ascribe to it textual roots, they simply recite earlier decisions adhering to similar rules.²⁸⁹ Ultimately, the courts conclude only that "the principles announced and applied in these cases have been reiterated and enforced so often that the matter is no longer debatable."²⁹⁰

The principle that is at work here appears to be not one of constitutional law as such, but of federalism. It seems to be a kind of abstention doctrine, akin to that relied upon in the relatively recent United States Supreme Court decision, *National League of Cities v. Usery*.²⁹¹ The plaintiffs in *Usery* were cities and states contesting the propriety of an act of Congress which sought to extend the federal minimum wage requirements to municipal employees. The plaintiffs did not deny that the matter of minimum wages was within the scope

287. *Coleman v. Miller*, 307 U.S. 433, 441 (1939).

288. *Risty v. Chicago, Rock Island & Pacific Ry. Co.*, 270 U.S. 378, 390 (1926). See also *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933), which attacked a Maryland law exempting a railroad from city property taxation. Against an equal protection challenge, Mr. Justice Cardozo presented the Court's opinion that a municipal corporation may assert no privileges or immunities against the state, which is its creator. Note, however, that dicta in some Supreme Court opinions suggest that municipalities might have constitutionally protectable rights in property that they own in their private rather than public and governmental capacity. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); *Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394, 397 (1919).

289. *E.g.*, *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923).

290. *Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394, 399 (1919).

291. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

of the Commerce Clause²⁹² and thus within the plenary power of Congress to regulate generally. They argued, however, that the Constitution barred Congress from applying such legislation against them in their governmental capacity as states. Justice Rehnquist, writing for the majority of five in *Usery*, upheld the contentions of the plaintiffs on the surprising—and seemingly insubstantial—textual basis of the tenth amendment.²⁹³

The dissenting opinions invoked the long-held maxim that the “tenth amendment states but a truism.”²⁹⁴ Commentators²⁹⁵ and courts²⁹⁶ have explained the *Usery* decision not in terms of constitutional compulsion, but of prudential considerations. The *Usery* decision expresses policy based on the recognition that total federal regulatory preemption “would impermissibly threaten the significance of state governments as viable autonomous entities in the federal structure.”²⁹⁷ Similar values undoubtedly lie behind the refusal of the federal courts to hear fourteenth amendment claims of municipalities against states.

It should be noted that while municipalities may not bring such claims against states, residents of municipalities are not barred from complaining that state actions arbitrarily discriminating among municipalities have deprived them, as citizens, of their constitutional rights.²⁹⁸ The cases which established the latter doctrine, however, involved gross, obvious manipulations of municipalities by states for the purpose of adversely affecting the voting rights of individuals. Voting rights are considered so fundamental as to trigger the highest level of judicial scrutiny. In general, the issue of state delegation of power to municipalities has been held to be nonjusticiable.²⁹⁹ Put simply, despite the problems involved in the Siting Act, it would be extremely difficult to sustain the claim that the Act deprives citizens

292. *Id.* at 841.

293. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.” U.S. CONST. amend. X.

294. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 862 (1976) (quoting *United States v. Darby*, 312 U.S. 124 (1940)).

295. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5-22 (1978).

296. *SED, Inc. v. City of Dayton*, 519 F. Supp. 979 (S.D. Ohio 1981).

297. *Id.* at 983.

298. *Baker v. Carr*, 369 U.S. 186 (1962); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). This problem was apparently recognized and provided for by those responsible for the litigation filed in challenge to the Siting Act by the town of Warren, as individual citizens have been joined with the town as parties plaintiff. *See supra* note 46.

299. *See, e.g., Kramer v. Free School District No. 15*, 395 U.S. 621 (1969).

of life, liberty, or property without due process of law or that it violates equal protection or any other substantive constitutional guarantee.

This is not to say that such arguments could not be made. For instance, when a regulation affecting real property decreases the value of that property significantly, it is possible to argue that the regulation amounts to a "taking" for public purposes without due process or compensation to property owners.³⁰⁰ So far, such arguments have met with little success.³⁰¹ It might be possible, too, to make an argument that the interests of a citizenry in good health are infringed by permitting certain kinds of hazardous waste disposal. There is little or no case law to support such contentions, at least as constitutional arguments. At present, these are but theories, the merits of which have not yet been established. As devices in litigation, they are historically premature, and cannot carry the day. It remains to be seen whether municipalities can marshal legal theories with the breadth and depth to support an action in opposition to a hazardous waste facility siting which is conducted in accordance with a state law such as the Siting Act.

VII. WHAT CAN A POOR TOWN DO?

The following section outlines some of the other possible legal theories upon which a municipality might proceed to prevent or control the construction of a hazardous waste facility. At the very least, these approaches will help to ensure that even if construction of a HWF cannot be prevented, the HWF will be located properly and operated as safely as possible. The section will necessarily be sketchy. Each of its subsections could easily be the topic of an entire article beyond the scope of this one; think of it as a map for exploration.

A. *Common Law Remedies: Nuisance*

Hazardous waste disposal may seem to be a modern problem, but it is only a variation on a very old theme. To permit anyone to do absolutely what he likes with his property in creating noise, odors, or

300. *Kiernan v. Portland, Oregon*, 223 U.S. 151 (1911). See *supra* notes 175-76.

301. Massachusetts landowners are not entitled to compensation for diminution of value of land due to the states exercise of its police power. *Locatelli v. City of Medford*, 287 Mass. 560, 192 N.E. 57 (1934). But see *Comm'r of Natural Resources v. Volpe*, 349 Mass. 104, 206 N.E.2d 666 (1965); *United States v. Causby*, 328 U.S. 256 (1946).

danger of fire, would be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of the owners, enforced by the state.³⁰² Uses of land which are harmful or unpleasant to the surrounding community have a long social and legal history. One scholar reports that the first English smoke abatement law was passed in 1273, and that in 1308, someone was executed for using coal in a furnace in violation of a Royal Proclamation.³⁰³ The typical action that came to be brought against the medieval polluter, however, was the assize of nuisance. The remedy granted where nuisance was adjudged was that of abatement, a judicial decree that the offensive activity be ended. By the time of Blackstone, this had become the action on the case for nuisance, and the damages which were granted usually compelled a voluntary abatement, since the defendant would be "ill-natured" to continue an activity which would incur such an ongoing cost.³⁰⁴

Abatement was, and is, a drastic remedy. Consider a suit brought in England in 1757 against the operators of a chemical manufacturing facility "at the parish of Tickenham, near the King's common highway there, and near the dwelling-houses of several of the inhabitants. . . ." ³⁰⁵ The defendants were in the business of producing "acid spirits of sulphur [dilute sulphuric acid], oil of vitriol [concentrated sulphuric acid], and oil of aqua fortis [dilute nitric acid]." The indictment described these substances as "noisome, stinking and offensive liquors," ³⁰⁶ which made the air "impregnated with noisome and offensive stinks and smells; to the common nuisance of all the King's liege subjects. . . ." ³⁰⁷ The report on the evidence offered in this case stated that "the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave them head-aches. . . ." ³⁰⁸ Although the defendants urged that there was no sufficient charge of the harm from their activity, a finding was made against them, and "the nuisance was absolutely

302. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 21 (1927).

303. C. HAAR, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND* 169 (1977).

304. *Id.* at 154, 155 (citing 3 W. BLACKSTONE, *COMMENTARIES* 221).

305. *Rex v. White & Ward*, 1 Burr. Rep. 333, 97 Eng. Rep. 338 (King's Bench 1757).

306. *Id.* These "offensive liquors" were not, of course, without legitimate utility. Sulphuric acid was then used to produce indigo dye, and nitric acid to make ink and to etch metal.

307. *Id.*

308. *Id.*

removed; (the works being demolished, and the materials, utensils and instruments, all sold and parted with;). . . ."³⁰⁹ Upon a promise not to renew the operation, the defendants were each fined only six shillings and eight pence.

As illustrated, abatement was the traditional remedy for a land use deemed to be a common or public nuisance, "the doing of or failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public."³¹⁰ What constitutes a public nuisance is frequently, though not necessarily, defined by statute³¹¹ and such activities are often labeled nuisances *per se*. Unlike the tort of private nuisance,³¹² the action for public nuisance may fairly be described as quasi-criminal in nature, and may still be remedied by an order of abatement.³¹³

One expert on land use law has pointed out that although public and private nuisance law have had separate historical developments and are "far apart conceptually . . . [c]ourts still weave the terms together," and litigation techniques such as the class action "cause even further blurring."³¹⁴ This blurring seems to have been a factor in creating the perception that nuisance was not likely to be a successful avenue for those in pursuit of injunctive or abatement remedies against polluters.³¹⁵ Indeed, actions for private nuisance against those causing harm to land by the discharge of industrial chemicals have been notoriously unsuccessful.³¹⁶

309. *Id.*

310. W. PROSSER, *THE LAW OF TORTS* § 88, at 583 n.29 (4th ed. 1971). Public nuisance must be distinguished from the tort of private nuisance, a use of land which substantially interferes with the use or enjoyment of the land of other private individuals (usually abutters) and not of the general public. *Id.* Injunction can be the remedy granted for private nuisances too, and the same activity can be simultaneously a public and a private nuisance. *See, e.g.,* Wood v. Picillo, 443 A.2d 1244 (R.I. 1982). Private nuisance could be a fruitful theory in actions against hazardous waste disposers; however, it is beyond the scope of this article, which focuses upon municipal remedies. For more on the private nuisance theory see, Comment, *A Private Nuisance Approach to Hazardous Waste Disposal Sites*, 7 OHIO NO. LAW 86 (1980).

311. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 139, §§ 1-20; ch. 111, § 144 (West 1981).

312. *See supra* note 310.

313. *See, e.g.,* Peters v. Township of Hopewell, 534 F. Supp. 1324 (D.N.J. 1982), where the plaintiff successfully brought an action pursuant to 42 U.S.C. § 1983 against a town for maliciously conducting a properly issued order of abatement of a nuisance on his property. Generally, however, the constitutionality of the abatement power has been upheld as a legitimate exercise of the police power. *See* Lawton v. Steele, 152 U.S. 133 (1894).

314. C. HAAR, *supra* note 303, at 125.

315. *See, e.g.,* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

316. *Id.*; Rose v. Socony Vacuum Corp., 54 R.I. 411, 173 A. 627 (1934); Smith v. Staso Mill-

This failure of the nuisance action to yield injunctive relief against pollution by industrial effluents is tied to the equitable nature of the injunctive remedy.³¹⁷ Injunctions are issued in the discretion of the court, not as a matter of right to the prevailing party.³¹⁸ In determining whether to issue an injunction, a court will engage in a balancing test that weighs the harm to the plaintiff against the harm that the injunction would cause the defendant.³¹⁹ When deciding whether to enjoin an alleged nuisance, one consideration which the courts will weigh is the utility of the conduct which is said to create the nuisance.³²⁰

It is easy to see that when this balancing formula is used private landowners suing in nuisance will rarely, if ever, prevail against an industrial defendant, and several cases illustrate the problem. In *Boomer v. Atlantic Cement Co.*,³²¹ an injunction was denied because of the "large disparity in economic consequences of the nuisance and the injunction."³²² The "disparity" noted by the court was between a \$45 million factory employing more than 300 workers, and plaintiffs who had by then suffered damages of \$185,000 from air pollution caused by the operation of the cement company.

*Rose v. Socony-Vacuum Corp.*³²⁴ was an early hazardous waste case in which the defendant was an oil refinery that discharged gasoline and other petroleum and waste products onto its land and into basins and ponds of water there.³²⁵ The polluted water percolated through the soil to the neighboring fifty-seven acre farm of one Manuel Rose, where it poisoned his water well and stream.³²⁶ One hundred and thirty-six of Rose's pigs and 700 of his hens died from drinking the contaminated water, and Rose was forced to obtain drinking water for his animals and his family elsewhere.³²⁷ The high court in Rhode Island sustained the oil company's demurrer to the

ing Co., 18 F.2d 736 (2d Cir. 1927).

317. See C. HAAR, *supra* note 303, at 154-57.

318. *Id.*

319. See, e.g., *Cheney v. Packaging Industries Group, Inc.*, 1980 Mass. Adv. Sh. 1189, 405 N.E.2d 106 (1980); Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

320. See *Bemis v. Clark*, 28 Mass. 452 (1831); RESTATEMENT OF TORTS §§ 822-828.

321. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

322. 26 N.Y.2d at 220, 257 N.E.2d at 871, 309 N.Y.S.2d at 313.

323. C. HAAR, *supra* note 303, at 151 n.10.

324. *Rose*, 54 R.I. 411, 173 A. 627 (1934).

325. 54 R.I. at 413, 173 A. at 628.

326. *Id.*, 173 A. at 628.

327. *Id.*, 173 A. at 628.

complaint,³²⁸ rejecting both of Rose's theories of liability. The court declined to accept the authority of *Rylands v. Fletcher*, which imposes strict liability on landowners who keep on their land things which create hazard upon escape.³²⁹ The court went even further in refusing to find the existence of nuisance in the absence of negligence.³³⁰ Then it looked to the 19th century case law of water rights to determine whether there had been negligence, ultimately finding that since "courses of subterranean water are as a rule indefinite and obscure . . . rights relating to them cannot well be defined. . . ." ³³¹

Although the court in *Rose v. Socony-Vacuum Corp.* found no negligence on the part of the defendant, the concluding paragraphs of its opinion indicate that the court actually was weighing the relative economic benefits and costs of granting relief to the plaintiff in its determination of whether either a nuisance existed or the defendant had been negligent.

It will be observed that in jurisdictions holding that, even though there is no negligence, there is liability for the pollution of subterranean waters, the predominating economic interest is agricultural.

Defendant's refinery is located at the head of Narragansett Bay, a natural waterway for commerce. This plant is situated in the heart of a region highly developed industrially. Here it prepares for use and distributes a product which has become one of

328. 54 R.I. at 411, 173 A. at 627.

329. 54 R.I. at 416, 173 A. at 629 (citing *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330). *Rylands v. Fletcher* laid down the rule that "the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." [1868] L.R. 3 H.L. 335.

Interestingly enough, Massachusetts is one of the minority of American jurisdictions which have adopted this rule, at least where the land use is unusually hazardous. In *Clark-Aiken Co. v. Cromwell Wright Co.*, 367 Mass. 70, 323 N.E.2d 876 (1975), the Massachusetts SJC announced that "[a]fter careful consideration, we conclude that strict liability as enunciated in the case of *Rylands v. Fletcher*, is, and has been, the law of the Commonwealth." 367 Mass. at 73, 323 N.E.2d at 879. The SJC cited with approval the proposition that "One who carries on an abnormally dangerous activity is subject to liability from harm . . . resulting from the activity although he has exercised the utmost care to prevent such harm." 367 Mass. at 89, 323 N.E.2d at 892 (quoting from the proposed RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (Tent. Draft No. 10)). Considering that Massachusetts recognizes this sweeping basis of non-negligence liability for dangerous land uses, it is surprising that any hazardous waste facility developer would have the slightest interest in locating in this Commonwealth.

330. *Rose v. Socony-Vacuum Co.*, 54 R.I. 411, 173 A. 627, 628-29 (1934). Traditionally, nuisance actions have been based on the harmfulness of the land use. Questions of negligence or intention were not relevant.

331. 54 R.I. at 420, 173 A. at 631.

the prime necessities of modern life. It is an unavoidable incident of the growth of population and its segregation in restricted areas that individual rights recognized in a sparse settled state have to be surrendered for the benefit of the community as it develops and expands. If, in the process of refining petroleum, injury is occasioned to those in the vicinity, not through negligence or lack of skill or the invasion of a recognized legal right, but by the contamination of percolating waters whose courses are not known, we think that public policy justifies a determination that such harm is *damnum absque injuria*.³³²

Recent developments in nuisance law, however, indicate that courts are ready to make significant departures from such reasoning, at least in suits brought for public nuisance. In *Village of Wilsonville v. SCA Services, Inc.*,³³³ a village in Illinois recently won an injunction against the continued operation of a hazardous waste disposal landfill. The trial court, concluding that the site constituted a public nuisance, also ordered its operators to "remove all toxic waste buried there, along with all contaminated soil . . . and to restore and reclaim the site."³³⁴ This relief was obtained against a HWF that a toxicologist-consultant to EPA called "the most advanced scientific landfill in the country. . . ."³³⁵

The village had assembled an impressive body of evidence against the HWF in order to prove that it presented a hazard to the health of the citizens of the village, the county, and the state.³³⁶ The trial record in the case comprised over 13,000 pages and included the expert testimony of geologists, mining engineers, a biochemist, and a chemist who also had a degree in environmental health. Evidence was introduced that the chemicals disposed of at the site, which included PCBs, cyanide, paint sludge, asbestos, pesticides, mercury, and arsenic, could cause pulmonary diseases, cancer, brain damage, and birth defects.³³⁷ The plaintiffs introduced no evidence to show that chemicals at the site had in fact caused such health problems. The only testimony as to the present harm created by the facility was that of townspeople who complained of dust, odors, and occasional spills on the streets of chemicals being delivered to the site. The Illinois Supreme Court admitted that these problems alone would not

332. 54 R.I. at 421, 173 A. at 631-32.

333. *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 426 N.E.2d 824 (1981).

334. 86 Ill.2d at 4, 426 N.E.2d at 827.

335. 86 Ill.2d at 9, 426 N.E.2d at 831.

336. 86 Ill.2d at 4, 426 N.E.2d at 827.

337. 86 Ill.2d at 5, 426 N.E.2d at 828.

have justified the granting of the drastic relief given the village, but, when "considered together with the other evidence indicating that the air, water and earth in and around the site will become contaminated, the trial court's relief was not excessive."³³⁸

This other evidence referred to was entirely speculative and based on probabilities. Plaintiff's experts testified as to the possibility of earth subsidence and fractures, a likelihood enhanced by the fact that the landfill had been built on top of an abandoned coal mine. The expert witnesses also testified that chemicals at the site could leach through the soil and contaminate underground water. The trial court deemed this a serious consequence, despite the fact that the village bought its entire water supply from another town and that only one of its seventy-three private wells was used for drinking water.³³⁹ The court also gave great credence to testimony that chemicals at the site could undergo " 'explosive interaction,' resulting in chemical explosions, fires, or emissions of poisonous gases. . . ." ³⁴⁰

The point of this recitation is to show the power of well-assembled scientific evidence. Though the defendant's experts vigorously challenged the testimony and the qualifications of the plaintiff's experts, they did not in the eyes of the court "overcome the natural and logical conclusions which could be drawn from the evidence."³⁴¹ The court found that it was highly probable that the site would "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]. . . . A court does not have to wait for it to happen before it can enjoin such a result."³⁴²

Wilsonville is an Illinois case which has no parallel among Massachusetts decisions. It does, however, have a local counterpart. Only

338. 86 Ill.2d at 13, 426 N.E.2d at 834.

339. 86 Ill.2d at 5, 426 N.E.2d at 828.

340. 86 Ill.2d at 8, 426 N.E.2d at 830. This expert, on cross-examination, was challenged to diagram the "precise chemical formula" which would result in such an interaction. Admitting that no such precision was possible, the expert instead

offered one scenario in which acidic chlorinated degreasers would interact with waste phenolic, releasing the phenolics so that the flash point would be achieved, thereby setting off the paint sludges which, in turn, would achieve the temperature sufficient for the ignition and combustion of liquid PCBs. All of these materials are deposited together in trench No. 8.

86 Ill.2d at 8, 426 N.E.2d at 830.

341. 86 Ill.2d at 9, 426 N.E.2d at 831.

342. 86 Ill.2d at 17, 426 N.E.2d at 837. New York seems also to follow this principle. *See, Town of Preble v. Song Mountain*, 308 N.Y.S.2d 1001 (Sup. Ct. 1970).

recently the Rhode Island Supreme Court, in the case of *Wood v. Picillo*,³⁴³ explicitly overruled the 1934 decision in *Rose v. Socony-Vacuum Co.*³⁴⁴ In *Wood v. Picillo*, counts in public and private nuisance were brought against owners of a pig farm who also maintained a chemical dump on their property.³⁴⁵ Although the *Picillo* dump seems to have been maintained much more casually than the one at issue in *Wilsonville*³⁴⁶ and was a smaller operation, it had other attributes in common with the *Wilsonville* landfill. The attribute which was most damning, it seems, was the nature of the chemicals buried in and leaching from the site. Expert witnesses for the plaintiffs in the *Picillo* case testified that "monitoring wells, and adjacent waters revealed the presence of five chemicals: toluene, xylene, chloroform, III trichloroethane, and trichloroethylene."³⁴⁷ One of plaintiffs' experts testified that the dump site was the "only possible source" of these pollutants.³⁴⁸ Plaintiffs' medical expert stated:

Chloroform is a narcotic and an anesthetic that will induce vomiting, dizziness, and headaches in some persons exposed to it. Trichloroethane and trichloroethylene, . . . are similar to chloroform in chemical structure and in toxic effect. Toluene and xylene are also toxins . . . that may cause irritation of the mucous membranes in the upper respiratory tract . . . [and] also exert chronic or longterm effects on animals and humans. . . . [C]hloroform, trichloroethane, and trichloroethylene are strong carcinogens that cause cirrhosis (cell death) of the liver and hepatoma (cancer of the liver). . . . [T]here is no safe level of human or animal exposure to these chemicals.

* * * *

According to the experts, the chemicals present on defendants' property and in the marsh, left unchecked, would eventually threaten wildlife and humans well downstream from the dump site.³⁴⁹

343. *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982). This case should gratify the author of a student note critical of the *Rose* decision, Note, 14 B.B. L. REV. 865, 867 (1934).

344. *Supra* note 316. See also *supra* text and notes at notes 321-30.

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

346. This Coventry, Rhode Island, landfill dump first called attention to itself in September of 1977, when it "erupted into fifty-foot flames" which firefighters "could not extinguish. . . ." *Id.* at 1245.

347. *Id.* at 1246.

348. *Id.* at 1247.

349. *Id.* at 1246-47.

The court in *Wood v. Picillo* had already taken notice of the wetlands and fish-inhabited waters which lay downstream.³⁵⁰ Although the defendants in *Wood v. Picillo* insisted that the case was controlled by the court's earlier decision in *Rose v. Socony-Vacuum*, the court disagreed, stating:

Since this court decided *Rose v. Socony-Vacuum* in 1934, the science of groundwater hydrology as well as societal concern for environmental protection has developed dramatically. As a matter of scientific fact the courses of subterranean waters are no longer obscure and mysterious. The testimony of the scientific experts in this case clearly illustrates the accuracy with which scientists can determine the paths of groundwater flow. Moreover, decades of unrestricted emptying of industrial effluent into the earth's atmosphere and waterways has rendered oceans, lakes and rivers unfit for swimming and fishing, rain acidic, and air unhealthy. Concerns for the preservation of an often precarious ecological balance, impelled by the spectre of 'a silent spring,' has today reached a zenith of intense significance. Thus, the scientific and policy considerations that impelled the *Rose* result are no longer valid. We now hold that negligence is not a necessary element of a nuisance case involving contamination of public or private waters by pollutants percolating through the soil and traveling underground routes.³⁵¹

The trial court's order enjoining further chemical disposal at the site and ordering defendants to finance cleanup and removal of the toxic wastes was thus upheld.

Illinois and Rhode Island seem to be the only jurisdictions so far to have produced appellate level decisions upholding the nuisance cause of action and its traditional remedies against hazardous waste disposal sites. Nevertheless, no other jurisdiction has yet reached a contrary result on similar facts.³⁵² The question remains: what significance does this have for Massachusetts and its hazardous waste disposal sites?

One consideration that seems important at the very outset is that these cases demonstrate the continued viability of the common law

350. *Id.* at 1246.

351. *Id.* at 1249.

352. See Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584 (1981) (citing CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 96TH CONG. 2D SESS., SIX CASE STUDIES OF COMPENSATION FOR TOXIC SUBSTANCES POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI, NEW JERSEY, AND TEXAS (Comm. Print 1980)). The note states that "[o]f the more than 50 private actions studied in that report, only one had come to judgment; other suits had been settled or were pending as of June 1980." *Costs of Waste*, *supra* note 352, at 584 n.7.

as a means of rectifying problems caused by hazardous waste disposal.³⁵³ Some commentators have argued that the Resource Conservation and Recovery Act (RCRA) preempts a common law theory of recovery against hazardous waste disposal sites.³⁵⁴ It has already been held that RCRA and other federal statutes do not preempt the application of state and local anti-pollution statutes and regulations.³⁵⁵ At least one case, *Nuclear Engineering Co. v. Scott*,³⁵⁶ has specifically held, too, that RCRA does not preempt actions brought under the state common law of nuisance. That case arose as the result of a press conference at which former Illinois Attorney General William Scott announced his intention to bring suit against Nuclear Engineering Company (NEC) for violation of state environmental protection laws and for common law nuisance.³⁵⁷ NEC filed suit in the federal district court, alleging federal question jurisdiction. It charged that Scott's intention to close down NEC and seek an order that wastes stored at its site be removed violated NEC's fourteenth amendment rights and its rights under the Resource Conservation and Recovery Act. The district court held that it did not have jurisdiction to hear the suit.³⁵⁸ This seems a sensible result, especial-

353. It may be necessary to stress here that this discussion is limited to the state, and not federal common law of nuisance, which was originally held to be applicable to interstate pollution actions brought by local government bodies. See *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980). Later, it was held to apply to action brought by the United States for purely intrastate pollution. *United States v. Solvents Recovery Service of New England*, 496 F. Supp. 1127 (D. Conn. 1980). More recent cases, however, have greatly circumscribed this relatively recent and amorphous body of law specifically as it pertains to water pollution. See *Middlesex Cty. Sewerage Auth. v. Nat'l Seaclammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

354. See, e.g., Note, *Allocating the Costs of Hazardous Waste Disposal*, supra note 352, at 593 n.42.

355. See supra note 177.

356. *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 243 (7th Cir. 1981). Commentators have argued for the correctness of this view. See Note, *Hazardous Wastes — Preserving the Nuisance Remedy*, 33 STAN. L. REV. 675 (1981).

357. *Nuclear Engineering Co. v. Scott*, 660 F.2d at 243.

358. As the court explained:

Whether the Illinois action "arises under" federal law is a question that need not long detain us. Illinois' complaint on its face asserts only state law claims. NEC's argument in this regard is, briefly stated, that questions pertaining to provisions of the RCRA and other federal law are inextricably bound up with Illinois' claim and that Illinois has artfully pleaded its claim to avoid any references to federal law. Illinois' claims, however, are predicated upon state law that at most incorporates federal law in certain tangential respects. See, e.g., Ill. Rev. Stat. ch. 11½, §§ 1003(g) and 1012(f). Such state law incorporation of federal law does not fairly allow Illinois' state law claims to be construed as essentially federal in character.

660 F.2d at 249.

ly in light of RCRA's savings clause, which expressly preserves all existing rights under statutory or common law.³⁵⁹

It is clear that RCRA does not *per se* preclude the availability of the common law nuisance action. Does that mean that the suit for abatement of a public nuisance is a potential device that Massachusetts municipalities could use in protecting themselves from the hazards of existing or proposed chemical disposal facilities? A closer look reveals that Massachusetts nuisance law inherently presents four elements which seriously impede such an endeavor. The first of these is the rule that only the Attorney General of the Commonwealth may maintain an action to abate a public nuisance, in the absence of authorizing legislation.³⁶⁰ This doctrine was reiterated in a case in which the Mayor of Cambridge sought to restrain an upstream piggery from polluting the city's water supply.³⁶¹ The three-page opinion in that case, however, predated the Home Rule Amendment by twenty-eight years. There is a good argument to be made that since the state legislature has the *power* to permit municipalities to bring their own suits for public nuisance that this is now one of the independent municipal powers which can be exercised under Home Rule even in the absence of enabling legislation.³⁶²

A second problem is that recent Massachusetts case law has held that liability in nuisance must be "based upon a determination that the interference is intentional and unreasonable or results from conduct which is negligent, reckless, or ultra-hazardous."³⁶³ This requirement would be no bar to the recovery of damages for an existing dump, since a strict liability theory could be resorted to for that problem,³⁶⁴ but such a standard increases the difficulty of proving that a situation exists which merits the granting of an order of injunction or abatement. Particularly if an existing or proposed facility

359. 42 U.S.C. § 6972(f) (1976 & Supp. IV 1980). It should be noted that this provision of RCRA is not imposed on the states. 40 C.F.R. § 123.7(a)(8) (1980).

360. Att'y Gen. v. Boston & Albany R.R., 246 Mass. 292, 140 N.E. 928 (1923).

361. Mayor of Cambridge v. Dean, 300 Mass. 174, 175, 14 N.E.2d 163, 164 (1938).

362. See *supra* text and notes at notes 160-72. It should be noted, too, that there is at least one existing statutory exception to the rule permitting only the Attorney General to bring public nuisance actions. MASS. GEN. LAWS ANN. ch. 214, § 10A permits groups of at least ten state residents (the statute uses the word "persons," which includes businesses, organizations, and individuals) to bring suits to enjoin environmental damage caused by violations of some environmental protection statute or regulation. This is discussed further *infra* text and notes at notes 406-08.

363. Ted's Master Service, Inc. v. Farina Bros. Co., 343 Mass. 307, 178 N.E.2d 268 (1962).

364. See *supra* note 345.

were in compliance with applicable state³⁶⁵ and federal³⁶⁶ regulations for hazardous waste disposal, it would be extremely difficult to prove that the operation was either negligent or ultra-hazardous.³⁶⁷

A third drawback to the utilization of a nuisance action is the reluctance of Massachusetts courts to entertain nuisance actions against a prospective rather than existing nuisance. All of the Massachusetts nuisance cases involve existing nuisance situations.³⁶⁸ Dictum in one opinion suggests that the existence of sufficiently offensive conditions at the time the suit is brought is one of the "vital issues in a bill to enjoin a nuisance."³⁶⁹ This latter statement was made, however, in the context of the more conventional hazards of a town dump. A court might be willing to adjust the requisite degree of likelihood of harm to the magnitude of the harm, should it occur, to account for the peculiar dangers of hazardous waste. The concurring opinion in *Wilsonville* stated that the court there would go so far as to enjoin the initial construction of a facility such as the one in that case, given the seriousness of the threat that it posed.³⁷⁰

Another possible barrier to the bringing of a nuisance suit by a Massachusetts municipality against a HWF might be the Siting Act itself, with its provision for state licensure of HWFs. Can a state-licensed facility constitute a nuisance?³⁷¹ One case has held that

when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the

365. Massachusetts promulgated its new hazardous waste regulations on June 29, 1982. Boston Globe, June 30, 1982, at 17, 24.

366. The federal regulations for hazardous waste disposal are still not forthcoming. On Nov. 13, 1981, a federal district court ordered EPA to issue rules for the land disposal of hazardous waste. On March 15, 1982, however, the Court of Appeals for the First Circuit stayed that order, pending appeal, in light of EPA's "good faith efforts" to promulgate the rules. *Illinois v. Gorsuch*, No. 82-1035 (1st Cir. 1982).

367. This issue is related to the question of whether a licensed land use can constitute a nuisance, discussed *infra* text and notes at notes 371-78.

368. A Lexis search revealed none which were not.

369. *Lenari v. Kingston*, 342 Mass. 705, 710 (1961). See also *Turner v. Oxford*, 338 Mass. 286 (1959). At least one case declined to order an injunction against the building of stables in a residential area, taking the position that it was preferable to wait and see if nuisance conditions would develop. *Mullholland v. State Racing Commission*, 295 Mass. 286, 3 N.E.2d 773 (1936).

370. *Wilsonville*, 86 Ill.2d 1, 24, 426 N.E.2d 824, 845 (1981). There are jurisdictions which grant injunctions against purely prospective nuisances. See, e.g., *Town of Preble v. Song Mountain*, 308 N.Y.S.2d 1001 (Sup. Ct. 1970); *Powell v. Taylor*, 263 S.W.2d 906 (Ark. 1954).

371. Existing case law suggests that the license of a nuisance could be revoked. *Revere v. Riceman*, 280 Mass. 76, 181 N.E. 716 (1932).

public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law.³⁷²

While this principle may be thought to encompass the situation of a hazardous waste facility seeking to locate under the Siting Act, it probably does not create absolute immunity from nuisance suit for a HWF. It is instructive to consider the case in which this broad proposition of law cited above issued—a private nuisance action by the operators of a drive-in movie theater to prevent the expansion of Logan Airport.³⁷³ The Massachusetts SJC disposed of the plaintiffs' claim in a three-page opinion. By contrast, an action for public nuisance against a private developer brought by a municipality on a carefully developed factual record should stand in a much stronger and more respectable position before the court. It would at least merit the serious consideration that the Illinois Supreme Court gave the Village of Wilsonville in its suit. The defendant HWF in *Village of Wilsonville* had been licensed by the Illinois Environmental Protection Agency which also regulated the facility through the issuance of supplemental permits for each delivery of waste to the site.³⁷⁴ The defendant HWF argued that since the plaintiff village could appeal the Illinois EPA granting of permits, they had an adequate remedy at law. The HWF urged that this should preclude the granting of such equitable relief as injunction.

The court in *Village of Wilsonville* rebuffed this argument, pointing out that "plaintiffs are not seeking a review of the issuance of permits but to enjoin a nuisance."³⁷⁵ The court held that since it had subject matter jurisdiction over the abatement of public nuisances which may endanger the general welfare, the plaintiffs were properly before the court and entitled to whatever equitable relief the court found appropriate to award.³⁷⁶ This reasoning suggests that even where a state administrative framework exists, some courts will remain open to suits brought under common law pleadings.³⁷⁷ Even if Massachusetts courts prove so amenable, it is unclear whether they will require that potential plaintiffs first exhaust their administra-

372. *Hub Theater, Inc. v. Mass. Port Auth.*, 370 Mass. 153, 346 N.E.2d 371 (1976).

373. 370 Mass. at 153, 346 N.E.2d at 371.

374. *Wilsonville*, 86 Ill.2d at 50, 426 N.E.2d at 828.

375. 86 Ill.2d at 15, 426 N.E.2d at 837.

376. *Id.*

377. M. BROWN, *supra* note 11, at 238 (reporting that "Missouri . . . residents successfully pursued a temporary restraining order to stop use of the state's first hazardous landfill just over a week after it was first approved by the state").

tive remedies.³⁷⁸ The next section will present an overview of these possible administrative remedies.

B. Administrative Remedies

Humanity should be extremely conservative in its treatment of Earth's ecosystems. For every release of a toxic substance, every plowing under of a field, every filling of an estuary, every cutting down of a forest, every forcing to extinction of a population or a species threatens the integrity of society's life-support systems.*

The many layers of administrative decisionmaking involved in the siting process under the Siting Act³⁷⁹ provide opportunities for the introduction of the kind of evidence necessary for successful nuisance actions—evidence of significant prospective harm which could support a decision not to permit construction of a HWF on a particular site. The development of such evidence will be crucial to any municipality seeking to thwart a proposed HWF siting. The evidence can and should be introduced at several stages of the proceedings required by statute.

The first mandatory determination prerequisite to a siting under the Act is the assignment of the proposed location as a HWF site. This is done either by the local board of health or by the State Department of Environmental Quality Engineering, in either case after a public hearing. The assignment of a site is subject to constraints that

will insure that the facility imposes no significantly greater danger to the public health or . . . safety from fire, explosion, pollution, discharge of hazardous substances, or other . . . factors than the dangers that currently exist in the conduct and operation of other industrial and commercial enterprises in the commonwealth not engaged in the . . . disposal of hazardous waste, but utilizing processes that are comparable.³⁸⁰

Environmental lawyers and the expert witnesses they employ can have a field day with this standard. An argument can be made that it excludes, on its face, the construction of *any* landfill site, since no other "comparable process" is currently being used in the Commonwealth. This statutory measure of risk purports to forbid the intro-

378. See MASS. GEN. LAWS ANN. ch. 21C, § 7 (West 1981).

* Erlich, *Environmental Disruption: Implications for the Social Sciences*, SOC. SCI. Q. (March 1981).

379. See *supra* text and notes at notes 102-36.

380. MASS. GEN. LAWS ANN. ch. 111, § 150B (West 1981).

duction into the state of any enterprises more hazardous than those which already exist here "utilizing processes that are comparable." Scientific expert testimony could be marshaled to show that landfill disposal is *sui generis*, a unique hazard which the state should not suffer to license now simply because illegal dumping has been inflicted on it in the past.

This is not to say that *any* hazardous waste facility could be or should be excluded under this standard. The recycling of waste oil or solvents, for instance, is not terribly different from the manufacture of these substances, enterprises which few are likely to argue should be excluded from the Commonwealth. By contrast, the landfill disposal, or "dumping," of toxic chemicals is a different matter. One local scientist, who spent several years conducting research as an environmental chemist, reports that experts in this field actually consider landfill disposal of chemical waste to be "obsolete."³⁸¹ In light of current knowledge it is "not clear that any [chemical] compound is safe to dump."³⁸² Even relatively degradable substances such as ammonia are dangerous in high concentrations, pose a threat to the water table, and readily enter the food chain in dangerous quantities. Many newer chemicals pose unknown and undefinable hazards since it "costs millions [of dollars] to study any compound for toxicity and 'environmental fate.'"³⁸³ Some substances become even more harmful when dumped in landfill. The pesticide DDT, for instance, breaks down in soil to an even more toxic chemical known as DDE.³⁸⁴ Some of the most dangerous chemicals to dump are PCBs, PBBs, and compounds such as pentachlorophenol (which are contaminated with dioxins, the offending ingredient of Agent Orange). One researcher has speculated that, of all the many types of waste, undifferentiated industrial waste is perhaps the "worst; made up of unknown compounds, and too contaminated to even study."³⁸⁵ The best hope for safe disposal of such waste, he believes, is incineration. While the study of how chemical compounds break down under combustion is still relatively recent, it does seem that some substances can in this manner be reduced to more benign components.

381. Interview with Bradford Gibson, Research Assistant, Dep't of Chemistry, Massachusetts Institute of Technology, in Cambridge, Massachusetts (June 21, 1982). Mr. Gibson was formerly an Environmental Chemist at Stanford Research Institute, Palo Alto, Calif. (now known as SRI International).

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

At the very least incineration reduces the volume of waste and changes uncontrollable water- and soil-borne pollution into more manageable airborne pollution.³⁸⁶

This is just an example of the sort of testimony which could be and should be brought to the siting process. The decisionmaking agency is required under the Siting Act to consider all evidence relevant to the issue of HWF safety brought before it by interested persons. "Any person aggrieved" by the action taken by the agency is given the right of appeal to the superior court. The court may set aside any agency action if it determines

that the substantial rights of any party may have been violated because said decision violated constitutional provisions or was in excess of the statutory authority and jurisdiction of the board of health or was based on an error of law or was made upon unlawful procedure or was unsupported by substantial evidence, or was arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law.³⁸⁷

These determinations, as well as the findings required of the DEQE prior to granting the license for a HWF should provide significant safeguards for a municipality against the construction of a dangerous facility.³⁸⁸ It should be noted, too, that in any adjudica-

386. *Id.*

387. MASS. GEN. LAWS ANN. ch. 111, § 150B (West 1981).

388. MASS. GEN. LAWS ANN. ch. 21C, § 7 (West 1981) provides that the Department of Environmental Quality Engineering:

shall grant a license to construct, maintain and operate a facility on a site it determines that said construction, maintenance, and operation does not constitute a significant danger to public health, public safety, or the environment, does not seriously threaten injury to the inhabitants of the area or damage to their property, and does not result in the creation of noisome or unwholesome odors. In making this determination, the department shall consider, but not be limited to, the following information which the applicant for a license shall submit in such form and manner as the department shall prescribe and require: detailed engineering plans and specifications; a description of maintenance and operating procedures; a description of the applicant's qualifications and experience in constructing, managing, and operating a facility; a plan for closure and post closure care of the facility and site; a statement of the applicant's financial condition; a statement of the amount and types of waste to be received at the facility; the results of chemical analysis of the surface and groundwaters in the area of the site's locus; and a hydrogeological study of the site area, for any proposal to dispose of hazardous waste into or on the land, or for other proposals if the department has sufficient reason to believe that the potentialities exist for groundwater contamination. The applicant shall be required to submit such other information as the department finds to be relevant and useful in making its determination. The department shall, where appropriate in making its determination, further consider such factors including, but not limited to, the following: topography, geological and soil conditions; climate; surface water and groundwater hydrology, including water

tory proceeding as defined by the State Administrative Procedure Act,³⁸⁹ any group of at least ten persons may intervene to help establish the issue of damage to the environment.³⁹⁰ Even where a specific siting assignment or licensing is not being challenged, the legality of the administrative practices and procedures of any municipal, county, or state agency may be determined in a proceeding brought under the state's declaratory judgment act.³⁹¹

C. The Ultimate Municipal Self-Help: Borrowed Federal Supremacy

Dayton, Ohio has adopted municipal ordinances prohibiting the storage of polychlorinated biphenyl (PCBs) within its city limits. The operators of a warehouse in that city which stored PCBs brought suit to challenge the ordinances in the federal district court. In *SED, Inc. v. City of Dayton*,³⁹² the corporation sought a declaratory judgment

run-off and run-on characteristics, wetlands and flooding conditions; drinking water supplies; and compliance with applicable statutes, regulations, and judicial decisions regarding the protection of air, water and land resources.

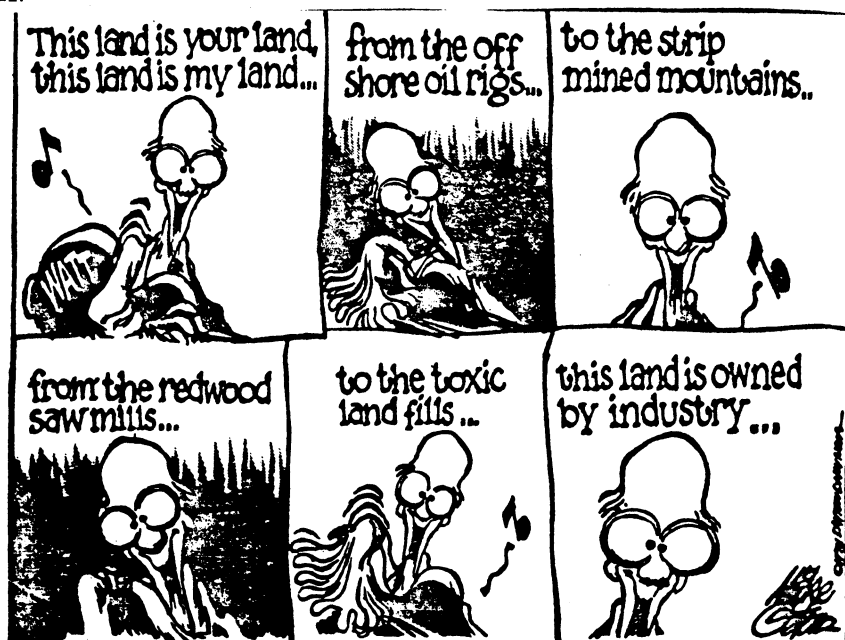
Id.

389. MASS. GEN. LAWS ANN. ch. 30A, § 1 (West 1981).

390. *Id.* § 10A.

391. MASS. GEN. LAWS ANN. ch. 231A, §§ 1-9 (West 1981).

392. *SED, Inc. v. City of Dayton*, 519 F. Supp. 979, 981 (S.D. Ohio 1981). The degree of environmentally protective sentiment among some parts of that city's community might be gauged from the following cartoon which appeared in the Dayton Daily News, Nov. 8, 1981, at B21.



that the ordinances were "unconstitutional and invalid under the supremacy clause of the federal constitution . . . because the area of PCB storage regulation has been expressly pre-empted by federal law."³⁹³ It was uncontroverted that under the federal Toxic Substances Control Act (TSCA) the Administrator of the United States EPA was directed to promulgate rules governing PCBs.³⁹⁴ The city of Dayton, relying on *National League of Cities v. Usery*,³⁹⁵ argued that federal preemption of traditionally local matters of safety, health, and land use would violate the principles of federalism espoused in that case.³⁹⁶ While the federal district court took a much more restrictive view of *Usery* doctrine than did the defendant city, it did agree that TSCA did not preempt the local ordinance. The court found that the ordinance came under one of the specific preemption exemptions contained within TSCA itself: that a local regulation is not preempted by TSCA where it is "adopted under the authority of the Clean Air Act or any other federal law."³⁹⁷ The court accepted and agreed with the city's contention that its ordinance had been adopted under the authority of the Clean Water Act.³⁹⁸

The ultimate validity of the Dayton ordinance is still to be resolved; the opinion described above was only interlocutory.³⁹⁹ Nonetheless, there is good, if limited, authority for upholding certain municipal actions that are taken pursuant to federal statutory provisions. In *City of Tacoma v. Taxpayers of Tacoma*,⁴⁰⁰ the United States Supreme Court upheld the right of a city which held a license issued to it under federal law to construct a power project in direct contravention of state law and in opposition to a referendum vote by the citizens of the state. The power project involved the construction of two dams

393. *SED, Inc., v. City of Dayton*, 519 F. Supp. 979, 981 (S.D. Ohio 1981).

394. 15 U.S.C.A. § 2605(e)(1) (1976 & Supp. IV 1980).

395. 426 U.S. 833 (1976). *See supra* text and notes at notes 291-95.

396. *SED, Inc. v. City of Dayton*, 519 F. Supp. at 983.

397. *SED, Inc. v. City of Dayton*, 519 F. Supp. at 984 (citing 15 U.S.C. § 2617(a)(2)(B)(ii) (1976 & Supp. IV 1980)).

398. 519 F. Supp. at 984.

399. The decision at this stage of the proceedings overruled the plaintiffs' motion for partial summary judgment. It should be kept in mind that the ultimate significance of the case for the Massachusetts HWF situation is limited by the absence in the Ohio case of the state regulation issue. *SED* involves a problem of federal, not state, preemption, and the two have different contours. *See, e.g., United States v. Town of Windsor*, 496 F. Supp. 581 (D. Conn. 1981), which held that a federally subsidized experimental synthetic fuel manufacturing facility had to comply with municipal permit and licensing requirements, despite a defense of preemption.

400. 357 U.S. 320 (1958).

on the Cowlitz River, both of which were to be of a height in excess of that permitted by state statute and necessitated the taking by eminent domain of state-owned land.

The State of Washington challenged the authority of the Federal Power Commission to issue the license to the city, which allegedly "had not complied with applicable state laws nor obtained state permits and approvals required by . . . statute."⁴⁰¹ The state charged that the city, "as a creature of the State . . . *cannot act* in opposition to the policy of the State or in derogation of its laws."⁴⁰² The United States Supreme Court upheld the right of the city to act under its federal license and to exercise federal eminent domain power accordingly. The Court stated that it was "no longer open to question that the Federal Government under the Commerce Clause of the Constitution . . . has dominion, to the exclusion of the States, over navigable waters of the United States."⁴⁰³

Certainly, there will be very few cases in which the federal courts will uphold the right of a municipality to circumvent the laws of the state in which it is located, even where the municipality claims to act under authority of federal law. For courts to routinely uphold such actions would be in derogation of the prudential federalism principles inherent in the abstention doctrine, and in the unwillingness of federal courts to hear constitutional claims against states by their own political subdivisions. A decision such as *City of Tacoma* would seem to vitiate the value of state autonomy within a federal system. Nevertheless, there is probably still a certain amount of space within the federal system for municipalities to successfully use federal statutory authority to provide regulatory options other than those dictated by the states. This should be especially true where municipalities seek to prevent water pollution. The federal definition of navigable waters of the United States is extraordinarily broad, and includes not only interstate watercourses but also "all other waters such as intrastate lakes, rivers, streams, . . . mudflats, sandflats, 'wetlands' . . . the degradation or destruction of which would . . . or could affect interstate . . . commerce including any such waters . . . which are used or could be used for industrial purposes for industries in interstate commerce. . . ."⁴⁰⁴ While this definition does not expressly include aquifers, it does cover virtually any remotely

401. *Id.* at 328.

402. *Id.* at 329.

403. *Id.* at 334.

404. 40 C.F.R. § 122.3(c)(3) (1980).

soggy place; it is tremendously broad in scope.⁴⁰⁵ According to the logic of the court in *SED, Inc. v. Dayton*, municipal ordinances or land use regulations adopted to further federal objectives in the Clean Water Act, for example, may withstand state challenge, thereby preventing or modifying the development of a state-approved hazardous waste facility otherwise inconsistent with such local regulations.

There is precedent, too, for municipalities suing a state under a federal water pollution statute. Several municipalities in Pennsylvania brought suit against that state in federal court under the Water Pollution Control Act (currently the Clean Water Act), and were held to have standing to do so.⁴⁰⁶ The dispute in that case was over disbursement of federal funds given to the state under the statute which were alleged to be owed to the municipalities, and not over a conflict of state and local regulations, but there seems to be no reason why such a suit could not be brought. It has been held, at least, that the eleventh amendment does not bar such a suit.⁴⁰⁷

The construction and operation of a HWF in Massachusetts could quite conceivably involve a potential issue over the degradation of navigable waters of the United States. A newspaper story naming four Massachusetts towns being considered as HWF sites by the California based IT Corporation reported that "the company needs three million gallons of water a day to operate the proposed treatment plant."⁴⁰⁸ Each of these proposed sites was located near a sizeable watercourse: two on the Taunton River, one on the Quaboag River, and one on the Merrimack.⁴⁰⁹ Another article in the press concerning a siting proposal by Pennsylvania's Liqwacon Corporation to process inorganic liquid waste stated that this facility would need 25,000 gallons of water daily.⁴¹⁰ This situation would seem to provide

405. Recent case law upholds this expansive reading of the "navigable waters of the United States." In *Avoyelles Sportsmen's League v. Alexander*, 17 ERC (BNA) 1376 (W.D. La. 1982) it was held that "'wetlands' . . . includes land that supports vegetation tolerant to saturated soil conditions, whether or not inundation occurs regularly." *Id.* at 1377.

406. *Mun. Auth. v. Commw. of Pennsylvania*, 496 F. Supp. 686 (E.D. Pa. 1980).

407. *Mun. Auth. v. Commw. of Pennsylvania*, 496 F. Supp. at 687. *See also* *Maine v. Thiboutot*, 448 U.S. 1 (1980).

The eleventh amendment, U.S. CONST. amend. XI, provides that the federal judicial power does not extend "to any suit . . . prosecuted against one of the United States by citizens of another State. . . ." It has also been construed to prohibit suits in federal courts against states by their own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

408. Blake, *Four Mass. Sites Picked by Waste Disposal Firm*, Boston Globe, Sept. 19, 1981, at 48.

409. *Id.*

410. Blake, *Toxic Waste Facility Siting System Assailed*, Boston Globe, Sept. 16, 1981, at

a proper context for local regulation of HWFs under a federal statute, to protect navigable waters.

Massachusetts, of course, is in a position to obstruct municipal efforts to self-regulate under borrowed federal authority. RCRA provides a procedure under which states may seek federal authorization for a state-developed hazardous waste program.⁴¹¹ A state with an approved program "is authorized to carry out such program in lieu of the Federal program."⁴¹² Any action taken by a state under a hazardous waste program authorized under RCRA has the same force and effect as an action taken at the federal level,⁴¹³ and is thus preemptive of local regulations under the Supremacy Clause.⁴¹⁴ Significantly, at present, Massachusetts does not have final federal authorization for its hazardous waste program. In this circumstance, there still seems to be room for discretion within the system allowing municipalities to create their own hazardous waste regulations. There are several possible sources of authority for such action. There is the exemption from federal regulation under TSCA, for instance, which was relied upon by the City of Dayton in the *SED, Inc.* case.⁴¹⁵ That provision exempts from federal preemption those rules which are adopted by states or their political subdivisions under the authority of the Clean Air Act or any other federal law.⁴¹⁶ Another section

48.

411. Pub. L. 94-580, Sec. 3006(b) (1980). Massachusetts currently has "interim" authorization under this provision.

412. Pub. L. 94-580, Sec. 3006(b)(3) (1980).

413. Pub. L. 94-580, Sec. 3006(d) (1980). A nice question arises as to whether a state hazardous waste program authorized under RCRA might not be preempted (at least theoretically) by a local regulation made pursuant to a federal water pollution statute. The section of RCRA entitled "Application of Act and Integration With Other Acts" states that "[n]othing in this chapter shall be construed to apply to (or to authorize any State . . . or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act, the Safe Drinking Water Act and [other listed statutes]." 42 U.S.C.A. § 6905(a) (Supp. 1980). If this provision is taken literally, then it would mean that a local regulation made pursuant to the Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980) (an "activity . . . subject to" it) would rank higher in the federal statutory hierarchy than a state program authorized under RCRA, and would (theoretically) take precedence over such a program.

414. See *supra* text and note at note 143.

415. See *supra* note 177; text and notes at 35-59. See also *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), where the court noted: "NEC does not dispute that the RCRA does not preempt the body of state law upon which Illinois' claims are based insofar as they seek to impose upon the . . . facility standards more stringent than does the RCRA. See 42 U.S.C. § 6929. See also *Rettig v. Arlington Heights Federal Savings & Loan Ass'n*, 405 F. Supp. 819, 823 (N.D. Ill. 1975)" 660 F.2d at 249 n.10. (citations by the court).

416. 15 U.S.C. § 2617(a)(2)(B)(ii) (1976 & Supp. IV 1980).

of TSCA exempts from federal preemptive control state or local regulations which prohibit the use of a hazardous chemical substance or mixture within that state or locality.⁴¹⁷ RCRA itself explicitly provides that nothing in that Act "shall be construed to prohibit any state or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent" than those imposed by RCRA.⁴¹⁸

Although federal courts do not generally interfere in the division of power between states and municipalities, federal law does introduce a wild card into a game which might otherwise be played with a deck stacked in favor of the states. At least some of the tenth amendment power described in *Usery* is reserved not just to the states, but to "the people" generally.⁴¹⁹ It has been suggested, too, that authority for action to preserve the environment may be found in the ninth amendment,⁴²⁰ which provides that the guaranteed rights of the federal Constitution "shall not be construed to disparage others retained by the people."⁴²¹

Again, the hazardous waste problem is revealed to have yet another layer of dizzying legal complexity. It is difficult to appreciate what the significance of the concept of "borrowed" federal power might be. What does it mean for Massachusetts municipalities? At the very least, it should mean that the problem of siting hazardous waste facilities need not be one in which the state may simply assert its superior authority over subordinate municipalities. There are many federal rights, both constitutional and statutory, involved. The existence of these rights is the necessary predicate for federal court jurisdiction over hazardous wastes issues properly brought before those courts.⁴²² This is important for Massachusetts municipalities because it means that serious hazardous waste issues need not be automatically decided against the municipality in the state courts on the single issue of legislative intent in adopting the Siting Act (if,

417. *Id.* § 2617(a)(2)(B)(iii).

418. 42 U.S.C. § 6929 (1976 & Supp. IV 1980). *See also supra* text and notes at notes 112-14.

419. U.S. CONST., amend. IX.

420. *See* C. HAAR, *supra* note 303, at 519 (citing Kutner, *Neglected Ninth Amendment: The "Other" Rights Retained By the People*, 51 MARQ. L. REV. 121 (1967); Note, 42 TEMP. L. Q. 46 (1968).

421. U.S. CONST., amend. IX. *See* Kutner, *supra* note 420, at 123-25.

422. For a good example of federal jurisdiction improperly invoked, see the discussion of the *Scott* case *supra* text and notes at notes 356-59.

indeed, the state courts would deal with such problems so simplistically).

Consider the following scenario as a sample illustration of this admittedly abstruse point: a Massachusetts municipality (call it "Townie") studies the hazardous waste problem, and pursuant to its various commissions of authority, passes a comprehensive set of hazardous waste disposal regulations. Townie will do so pursuant to every source of power which may be available to it—its independent police powers;⁴²³ any applicable state enabling legislation such as the Wetlands Protection Act,⁴²⁴ for instance; federal authorization under the various pollution control statutes; and retained powers under the ninth and tenth amendments of the federal Constitution. Further, assume that Townie will explicitly invoke these sources of power in the preamble to these regulations. Townie's regulations will include prohibitions on the use or disposal of certain named substances, including PCBs, within Townie's limits, as well as a general ban on the landfill disposal of hazardous chemicals and strict air quality standards for chemical waste incinerators.⁴²⁵

A company that wishes to develop a hazardous waste disposal facility (call it "Dumper, Inc.") assigns Townie as a site under the Siting Act. Townie gives Dumper a copy of its regulations, explaining that any facility would have to be in compliance with them. Dumper files suit in the county superior court, asking for a declaratory judgment that Townie's regulations are invalid under section 16 of the Siting Act. Townie defends on grounds of its rulemaking discretion under the Clean Water Act, as authorized by TSCA.⁴²⁶ The declaratory judgment is issued nonetheless, and is upheld by the Massachusetts SJC.

Townie may now appeal to the federal district court for review,⁴²⁷ since the highest court of the state has decided against the validity of its express rulemaking authority under the federal statute. The

423. See *supra* text and notes at notes 168-69.

424. MASS. GEN. LAWS ANN. ch. 131, § 40A (West 1981).

425. The Massachusetts Public Interest Research Group is still skeptical about incineration. MASSPIRG Environmental Program Coordinator Raymond Dougan has said that "[t]he widespread interest in burning of hazardous wastes as fuel poses an especially dangerous situation. . . . If properly incinerated, some of these wastes are rarely incinerated thoroughly, sending toxic and carcinogenic compounds up smokestacks. . . ." Masscitizen, *supra* note 4, at 8. MASSPIRG contends that all burning of hazardous waste should be prohibited, except when the resulting emissions are no worse than those from burning fossil fuels. *Id.*

426. 15 U.S.C. §§ 2617(a)(2)(b)(ii) & (iii) (1976 & Supp. IV 1980).

427. See 28 U.S.C. § 1257 (1978).

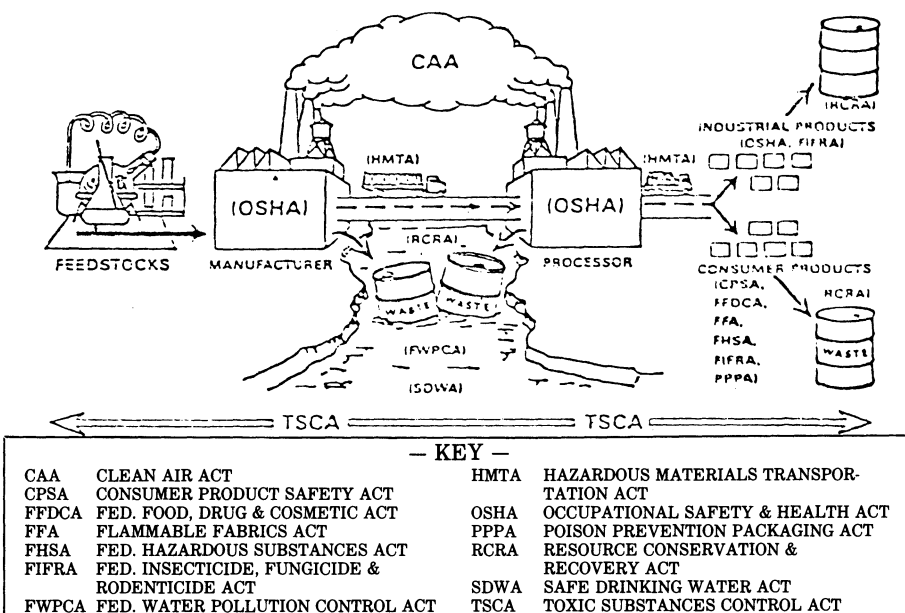
federal district court will now have a very important, and quintessentially federal, task before it. It will have to clarify the limits of authority under hierarchical federal anti-pollution statutes.⁴²⁸ It will also need to determine the relationship between the two major hazardous substances regulatory statutes, TSCA and RCRA.⁴²⁹ It is not possible to predict, in the absence of the facts which would create the controversy, how Townie would fare in its efforts to prevent Dumper from operating a chemical waste landfill. The adoption of enlightened federal regulations forbidding this activity could make the

428. See *supra* note 413. RCRA's provision for integration with other federal acts, 42 U.S.C. § 6905(a), subordinates its application in case of conflicts to the other named federal statutes, including the Water Pollution Control Act and the Safe Drinking Water Act. This seems to indicate the clear intention of Congress that the value of rational disposal of hazardous waste should not be promoted at the cost of compromising the safety of the nation's water supply.

429. TSCA and RCRA, both adopted in 1976, make absolutely no textual reference to each other. While reconciling these statutes is far beyond the scope of this article, it should be noted that this is an important task which will ultimately have to be undertaken if this country is going to have coherent environmental protection laws.

The following diagram illustrates the coverage provided the various Federal legislative authorities affecting a chemical's life cycle.

LEGISLATIVE AUTHORITIES AFFECTING THE LIFE CYCLE OF A CHEMICAL



Source: EPA Journal, July/August 1979.

If the federal government wants to assert that the states have dispositive authority over hazardous waste under RCRA, then it must explain the relative rules of all other applicable federal statutes—at least four others, by this diagram.

whole problem moot.⁴³⁰ Indeed, since RCRA expressly provides that state and local hazardous waste disposal regulations must at a minimum meet the federal standards, courts will not be able to judge the adequacy of any regulations until federal standards are adopted. Further, with the increasing development of comprehensive federal schemes and the emphasis on cooperative federal-state pollution control efforts, it is unlikely that federal courts will interpret local regulations so as to upset the predominantly federal and state sources of regulation. It makes basic sense, though, that a municipality which educates itself about environmental problems and adopts regulations rationally related to the achievement of intelligent environmental goals will be better able to protect its interests through state and federal regulatory programs than one which uses "crude measures,"⁴³¹ such as restrictive zoning, or one which takes no action at all.

VIII. CONCLUSION

Although the Siting Act involves the disparate, perhaps even arbitrary treatment of Massachusetts municipalities, the Act does not appear to violate the provisions of the Home Rule Amendment. State courts consistently have upheld the plenary power of the state to impose unequal burdens on its subdivisions through general laws. Neither the Home Rule Amendment nor the federal Constitution have been interpreted so as to require any form of "equal protection" for municipalities; for the courts to so decide would alter profoundly the structure of American governmental authority as well as eliminate accepted economic differences among cities and towns. If HWF sitings are to be challenged successfully, it will not be through head-on confrontation between local and state authorities. The outcome will turn on case-by-case evaluation, through administrative determinations and tort law actions. In this scenario federal statutes should not be overlooked as possible sources of substantive municipal powers.

Hazardous chemical wastes pose genuine dangers to the environment and to human health. Like ionizing radiation, many hazardous

430. See *supra*, note 366 (federal regulations have not yet been promulgated). See also REPORT TO CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, EPA IS SLOW TO CARRY OUT ITS RESPONSIBILITY TO CONTROL HARMFUL CHEMICALS (CED-81-1, Oct. 28, 1980); COMPTROLLER GENERAL OF THE UNITED STATES, HAZARDOUS WASTE FACILITIES WITH INTERIM STATUS MAY BE ENDANGERING PUBLIC HEALTH AND THE ENVIRONMENT (CED-81-158, Sept. 28, 1981).

431. See, e.g., *Earth Management, Inc. v. Heard County*, 248 Ga. 442 (1981).

chemicals are capable of damaging the DNA of human cells, causing mutations that can result in cancer or birth defects.⁴³² Now that these effects are becoming more widely known, communities are rightly fearful of the substances that produce them. It is understandable that a municipality would want to keep such contaminants from reaching its soil and its water; but there is great irony in all this.⁴³³ Hazardous wastes are not something imported from outer space to bedevil an innocent populace. They are simply part of the substantial volume of garbage generated by a wealthy industrial society. They are as American as risk-taking and wastefulness generally. As long as Americans consume limitless quantities of hair dryers and cassette players, gasoline and soda pop, tires and batteries, no-iron fabrics and disposable plastic containers, Americans will produce corresponding quantities of hazardous chemical waste.

For decades, the consuming public has contributed to the hazardous waste problem in almost total ignorance of its vicious cycles of byproducts—waste from the process of manufacturing goods, waste of the goods themselves, and mounting garbage, some of it insidiously dangerous. More careful choice of resource commitments will diminish the amount of waste; but an industrial society will inevitably produce some hazardous wastes. Even with perfect knowledge of the environmental consequences of consumption habits, it would be difficult to change them; it might not be desirable ultimately.

Citizens of municipalities seeking to protect themselves from hazardous waste problems must realize that the price of really “solving” the problem will be fewer goods at higher prices. Locating a waste dump in the next town, or the one down the river or in the next state, is not a “solution.” All the waters on the planet are ultimately connected in the same cycles. All chemical contamination eventually reaches and accumulates in the food chain.⁴³⁴ With this in mind, the

432. L. CASSARET & J. DOULL, *supra* note 55, at 454-56.

433. Consider the situation created by the Woburn dump:

In the northeastern corner of Woburn sits Industriplex, an industrial development covering roughly 300 acres. For 150 years industries have used and dumped chemicals there. These chemical wastes are potentially hazardous for people working on or living near the site.

Industriplex is south of Wilmington, north of route 128 and west of route 93, which separates it from Reading, so that Wilmington and Reading are potentially affected as well as Woburn. Most of the land is, or was at one time, wetlands and the headwaters of the Aberjona River. The Aberjona runs into the Mystic, and if these materials enter the river water, every town along both rivers could be affected.

Woburn Odor Project, Dep't of Urban and Environmental Policy, Tufts University, Medford, MA 02155 (undated flyer).

434. Consider the following media coverage of one study.

hazardous waste facility siting problem looks less like a contest that can be "won" by the side with the cleverest lawyers. Excluding a chemical dump from particular municipal limits will not keep chemicals themselves from leaching into the water supply. Percolating underground waters, for instance, do not honor municipal boundaries. Massachusetts municipalities which are now "safe" from HWF development because they have no industrial zoning have not escaped the hazardous waste problem. The city or town that takes action to prevent a facility from locating there may be perfectly justified in feeling that it would be unfair to take on the burden of chemical waste disposal for the entire state; but it is no more "fair" to impose this hazard on any other town, nor is it "fair" that Massachusetts' PCBs should all be shipped to Alabama for disposal, as they are now.⁴³⁵

Perhaps the fundamental factor underlying the state versus local conflict is our scientific and technical inability to deal with hazardous wastes in a manner which is uniformly safe and responsible. Chemical wastes must go somewhere. They can be stored, buried, recycled, or burned. No single treatment method is decidedly best for all wastes in all situations. Currently, there are relatively safe methods of hazardous waste disposal—methods that are no more dangerous than the industrial process that produced the chemicals in the first instance. These methods are much more expensive than landfill dumping and have not yet been widely implemented.⁴³⁶

A new study confirms that about 97 percent of Michigan's 9.2 million residents are still contaminated by polybrominated biphenyls almost a decade after the chemical entered the state's food chain. The finding published today in the *Journal of the American Medical Assn.*, follows other studies showing that the human body is almost incapable of excreting the chemical and that highly exposed individuals continue to suffer medical problems. The PBB contamination began in 1973, when several thousand pounds of PBB, a synthetic chemical used to render products such as television and radio casings fire resistant, was accidentally mixed into dairy cattle feed.

Boston Globe, April 16, 1982, at 6.

435. Past problems vividly illustrate that the refusal of various authorities to participate actively in the responsible disposal of wastes eventually affects us all. There is no way for a community to insulate itself by abdicating responsibility. For example, at the end of the Vietnam War, the U.S. Government found itself with a large quantity of surplus Agent Orange to dispose of. This justly infamous herbicide is contaminated, as an inevitable consequence of the manufacturing process, with a substance known as 2, 3, 7, 8 tetrachlorodibenzo-p dioxin, or simply "dioxin." Along with plutonium, dioxin is one of the two most toxic substances known to man. T. WHITESIDE, *THE PENDULUM AND THE TOXIC CLOUD: THE COURSE OF DIOXIN CONTAMINATION* 2-3 (1978). The federal government approached several states with proposals to make a final resting place for the left-over Agent Orange. None would have it. The load of remaining barrels was finally buried at sea, leaving a legacy of poisonous wastes which will accumulate and may pollute our ocean resources.

436. New York Times, March 13, 1983, sec. 3 at 1, 17.

Unfortunately, landfill dumping of hazardous chemicals remains the predominant method of disposal. Many scientists feel that landfill dumping is obsolete, unreasonably dangerous, and an unacceptable disposal method. Certainly, the recent hazardous waste incidents, including hauling spillages, landfill leaching problems, and ground water pollution, have been sufficient to raise grave doubts about our ability to control volatile hazardous wastes through conventional waste disposal practices. The idea that there is "failsafe" landfill technology to prevent leakage, explosion, or container decay is fast becoming discredited.⁴³⁷ In this light, local opposition to the proposed siting of a hazardous waste facility does not seem merely parochial localism; rather, it may well be premised on legitimate and universal concerns for safety and health.

Ultimately, the testing ground for the problem of hazardous waste disposal should not be obscured by a contest between local and state authority. Nevertheless, municipalities are properly concerned about the dangers of hazardous waste sites and the ability to protect and develop their communities as they see fit. While they remain largely untested, the administrative procedures of the Siting Act appear to provide the opportunity for municipalities to participate in the siting process so as to foster and protect local concerns. Municipalities must actively and vigorously participate in the siting process, possibly seeking reform where administrative procedures prove inadequate to respect legitimate community concerns. It is in this spirit of constructive cooperation that the problem of hazardous waste disposal and treatment must be addressed by all parties concerned.

437. See M. BROWN, *supra* note 11 (discussing the analogous problems of nuclear waste disposal); Shapiro, *Nuclear Waste*, The New Yorker, Oct. 19, 1981, at 53-139.