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# DEFUSING THE "NOT IN MY BACK YARD" SYNDROME: AN APPROACH TO FEDERAL PREEMPTION OF STATE AND LOCAL IMPEDIMENTS TO THE SITING OF PCB DISPOSAL FACILITIES

WILLIAM L. ANDREEN†

*Because polychlorinated biphenyls (PCBs) present severe environmental hazards, Congress enacted a special provision in the Toxic Substances Control Act (TSCA) requiring the Environmental Protection Agency to establish proper PCB disposal methods. Responding to local fears, however, some communities have passed ordinances that either directly or indirectly ban local siting of PCB disposal facilities. If allowed, such local action would jeopardize the federal regulatory scheme. Professor Andreen contends that, although the language in TSCA is phrased inartfully, the legislative history demonstrates that Congress clearly intended the federal regulatory scheme to establish minimum standards for safe PCB disposal. Congress, however, preserved the authority of state and local governments to set more stringent disposal standards that are consistent with the congressional goal of safe PCB disposal. He argues that state or local action imposing a siting ban is inconsistent with this congressional goal and is thereby impliedly preempted, unless unique local conditions necessitate a ban as a matter of safety.*

In 1976 Congress enacted the Toxic Substances Control Act (TSCA)<sup>1</sup> in response to growing evidence of the dangers that toxic chemicals pose to public health and the environment. TSCA directs the Administrator of the United States Environmental Protection Agency (EPA) to regulate all chemicals that present "an unreasonable risk of injury to health or the environment."<sup>2</sup> Because Congress was especially concerned with the hazards presented by polychlorinated biphenyls, commonly called PCBs,<sup>3</sup> Congress included a provi-

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1. Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2629 (1982)) [hereinafter cited as TSCA § —, 15 U.S.C. § —].

2. TSCA § 6(a), 15 U.S.C. § 2605(a).

3. PCBs are synthetic chemicals that belong to a group of organic chemicals known as chlorinated hydrocarbons. PCBs were produced in the United States from 1929 until 1977 for a variety of commercial purposes. Because they have a high boiling point, chemical stability, and low electrical conductivity, PCBs were used as cooling liquids in electrical transformers and capacitors, and as heat transfer and hydraulic fluids. PCBs are hazardous to health, however, even at extremely low levels. Tests on laboratory animals have shown that PCBs can cause cancers, tumors, reproductive

sion that expressly ordered the Administrator of the EPA to promulgate a rule prescribing PCB disposal methods.<sup>4</sup> That rule, which became effective April 18, 1978, established a comprehensive regulatory scheme for the proper disposal of PCBs.<sup>5</sup>

Although the disposal rule provides the technical criteria for constructing safe PCB disposal facilities, attempts to locate such facilities often have encountered local opposition. Local citizens, fueled by fear that a disposal facility, regardless of its design, will turn into a ruinous dump,<sup>6</sup> typically have responded

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failures, birth defects, gastric and liver disorders, eye disorders, skin lesions, swollen limbs, and other health problems. Since they decompose slowly, PCBs remain in the environment for decades after their release. PCBs also are absorbed readily and stored in the fatty tissues of all organisms. The concentration of PCBs in the fatty tissues of organisms will increase over time by a process known as bioaccumulation, even if the exposure to PCBs is low. Bioaccumulation may result in significant concentrations of PCBs at the end of the food chain, namely, human consumption. Office of Pesticides and Toxic Substances, EPA, Toxic Information Series TS-793 (1980); see 42 Fed. Reg. 6532, 6533-43 (1977).

4. TSCA § 6(e)(1)(A), 15 U.S.C. § 2605(e)(1)(A).

5. EPA Disposal and Marking Rule for PCBs, 43 Fed. Reg. 7150 (1978) (codified at 40 C.F.R. §§ 761.1, .3, .40 to .180 (1984)). Theoretically, the disposal of PCBs also could be regulated under the Resource Conservation and Recovery Act. The Solid Waste Disposal Act, *amended by* Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1982)), *amended by* Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 96 Stat. 3221 (to be codified at 42 U.S.C. §§ 6901-6991i) [hereinafter cited as RCRA § —, 42 U.S.C. § —].

Enacted into law ten days after TSCA, RCRA authorizes the EPA to establish a complex system for regulating hazardous waste. RCRA §§ 3001-3019, 42 U.S.C. §§ 6921-6939a; see J. QUARLES, *FEDERAL REGULATION OF HAZARDOUS WASTE: A GUIDE TO RCRA* (1982). RCRA requires the EPA to issue regulations that identify and list those materials that are deemed to be "hazardous waste." RCRA § 3001, 42 U.S.C. § 6921. The EPA also must promulgate regulations establishing "standards" governing "owners and operators of facilities for the treatment, storage, or disposal of hazardous waste." RCRA § 3004, 42 U.S.C. § 6924. When the EPA promulgated its final rule designating those materials that are "hazardous waste" under RCRA, the agency stated that it had decided not to regulate the disposal of PCBs pursuant to RCRA. 45 Fed. Reg. 33004, 33086 (1980). That decision was reiterated in 1982 when the EPA denied a citizen's petition submitted under § 21 of TSCA, 15 U.S.C. § 2620, that requested the EPA to transfer the control of PCBs from TSCA to RCRA's authority. As a result, the disposal of PCBs continues to be regulated under TSCA. 47 Fed. Reg. 2379, 2380 (1982); see also 49 Fed. Reg. 49784, 49789-90 (1984) (Responding to a rulemaking petition from the State of Michigan, the EPA again declined to list PCBs as "hazardous waste" under RCRA.).

The discharge of PCBs into waters of the United States has been regulated by the EPA under the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)) (also known as the Federal Water Pollution Control Act) [hereinafter referred to as the Clean Water Act]. Section 307 of the Clean Water Act, 33 U.S.C. § 1317 (1982), authorizes the EPA to establish effluent limitations or effluent standards, or both, for "toxic pollutants." In 1977 the agency promulgated effluent standards for PCBs that prohibited their discharge into waters of the United States from PCB manufacturers and from the manufacturers of electrical capacitors and electrical transformers. 42 Fed. Reg. 6555 (1977) (codified at 40 C.F.R. § 129.105 (1984)). This rulemaking withstood a legal challenge in *Environmental Defense Fund v. EPA*, 598 F.2d 62 (D.C. Cir. 1978).

The emission of PCBs as an air pollutant could be regulated under the Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)). Under Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982), the EPA is empowered to set emission standards for hazardous air pollutants "at the level which . . . provides an ample margin of safety to protect the public health." The EPA, however, has not proposed or promulgated emission standards for PCBs. See D. CURRIE, *AIR POLLUTION: FEDERAL LAW AND ANALYSIS* § 3.26 (1981 & Supp. 1984).

6. This fear stems from a number of factors including health and safety concerns, anxiety about declining property values, the stigma attached to an area that is used as a dump site, concern resulting from the poor management records of many disposal facilities in the past, and concerns

with a resounding "not in my back yard."<sup>7</sup> On occasion such fear has prompted demonstrations and even acts of civil disobedience in efforts to block the construction of an unwanted disposal facility.<sup>8</sup> More often, however, communities averse to local siting of PCB disposal facilities have taken less dramatic but more potent action by enacting ordinances that directly or indirectly ban PCB disposal in that community.<sup>9</sup>

However much sympathy one might have for such angry and frightened

about the developer's liability for the postclosure stage of the operation. S. BOYLE, AN ANALYSIS OF SITING NEW HAZARDOUS WASTE MANAGEMENT FACILITIES THROUGH A COMPENSATION AND INCENTIVES APPROACH 1 (1982); see D. MORELL & C. MAGORIAN, SITING HAZARDOUS WASTE FACILITIES: LOCAL OPPOSITION AND THE MYTH OF PREEMPTION 22-24 (1982).

7. See F. ANDERSON, D. MANDELKER, & D. TARLOCK, ENVIRONMENTAL PROTECTION 603 (1984); Alm, "Not in My Backyard": Facing the Siting Question, 10 EPA J. 8, 9 (Oct. 1984); Wolf, Public Opposition to Hazardous Waste Sites: The Self-Defeating Approach to National Hazardous Waste Control Under Subtitle C of the Resource Conservation and Recovery Act of 1976, 8 ENVTL. AFF. L. REV. 463, 476 (1980); see also Tarlock, Anywhere But Here: An Introduction to State Control of Hazardous Waste Facility Location, 2 UCLA J. ENVTL. L. & POL'Y 1, 3 (1981) ("[C]ommunities throughout the country are using their powers to allocate land uses to exclude these facilities.").

8. For example, residents of Warren County, North Carolina staged a long series of protest marches and demonstrations in the fall of 1982 seeking to halt the operation of a PCB disposal facility in the county. N.Y. Times, Sept. 28, 1982, at A16, col. 5; N.Y. Times, Sept. 23, 1982, at A23, col. 5; N.Y. Times, Sept. 21, 1982, at A10, col. 1; N.Y. Times, Sept. 18, 1982, at A6, col. 6; N.Y. Times, Sept. 17, 1982, at A19, col. 1; N.Y. Times, Sept. 16, 1982, at A18, col. 1; N.Y. Times, Sept. 14, 1982, at A20, col. 3. The residents were particularly worried about possible groundwater contamination from the facility. N.Y. Times, Oct. 10, 1982, at L31, col. 1; N.Y. Times, Sept. 25, 1982, at A17, col. 1. The facility was a component of a Superfund-financed cleanup executed by the State of North Carolina of about 32,000 cubic yards of soil contaminated with PCBs by "midnight dumpers." N.Y. Times, Sept. 16, 1982, at A18, col. 1. During the course of the protests, approximately 523 people were arrested for attempting to block trucks loaded with PCB-contaminated soil from entering the disposal facility. TIME, Nov. 1, 1982, at 29.

9. At least four jurisdictions have enacted ordinances that ban the storage or disposal of PCBs within their borders. The city of Dayton, Ohio enacted ordinances that prohibited the storage of PCBs within the city limits. DAYTON, OHIO, REVISED CODE OF GENERAL ORDINANCES §§ 97.01-.09, 97.97-.99 (1980). These ordinances became the subject of controversy in *SED, Inc. v. City of Dayton*, 515 F. Supp. 737 (D. Ohio 1981). See *infra* notes 107-27 and accompanying text. Warren County, North Carolina barred all PCB storage or disposal within the county. Warren County, N.C., Ordinance Prohibiting the Storage and Disposal of PCB's (Aug. 21, 1978). The validity of this ordinance was litigated in *Warren County v. State of North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981). See *infra* notes 144-72 and accompanying text. Union County, Arkansas also enacted an ordinance that prohibited disposal of PCBs. Union County, Ark., Ordinance 38 (Sept. 12, 1978). Finally, the city of Chickasaw, Alabama prohibited the storage and disposal of PCBs for longer than 24 hours. Chickasaw, Ala., Ordinance 1040 (Feb. 28, 1984).

Another community has passed an ordinance that purported to ban partially the storage and disposal of PCBs within its jurisdiction. Logan Township, New Jersey prohibited the "location" of PCBs in "environmentally sensitive" areas within the township. Logan Township, N.J., Ordinance Prohibiting the Location of Polychlorinated Biphenyls in Environmentally Sensitive Areas in the Township of Logan, County of Gloucester, State of New Jersey (Dec. 7, 1983). The definition of "environmentally sensitive" areas is expansive and conceivably could encompass much, perhaps all, of the township. *Id.*

The ordinances that seem to ban indirectly PCB disposal or storage have taken various forms. Chemical Waste Management, Inc. encountered several ordinances that posed obstacles to its plan to dispose of PCBs aboard incinerator ships in the Gulf of Mexico. The plan involved using a port facility to load the PCBs onto the ships within the city limits of Mobile, Alabama. See Birmingham Post-Herald, May 23, 1984, at E2, col. 1. The city of Mobile consequently passed an ordinance prohibiting the construction of plants, facilities, or structures that process or store hazardous waste, including PCBs, within the 500-year flood plain that encompassed the waterfront area of the city. Mobile, Ala., Ordinance 65-122 (Dec. 13, 1977) (amended Feb. 21, 1984). The ordinance appears to have obstructed Chemical Waste Management's plan to place PCB storage tanks at its port facility,

host communities, the unrestricted passage of such bans could have dire consequences. If all PCB disposal bans were successful in preventing the siting of PCB disposal facilities, few communities, if any, would be amenable to their construction. Any community in which a PCB disposal facility was located would likely become stigmatized as the nation's dumping ground. Such a community, moreover, would assume an inordinate share of the responsibility in solving what is essentially a national problem. Under these circumstances it is difficult to conceive of any community that would acquiesce in the siting of a PCB disposal facility within its borders if it had the choice.<sup>10</sup>

Congress clearly did not foresee a proliferation of disposal bans when it passed TSCA. Rather, it envisioned the construction and operation of safe PCB disposal facilities that would eliminate the environmental contamination caused by improper disposal of PCBs.<sup>11</sup> Local bans, however, may not be directed so much at preventing improper disposal as they are designed to prohibit all PCB disposal.<sup>12</sup> If given effect, such bans would aggravate an existing shortage in the availability of safe disposal facilities<sup>13</sup> and thereby frustrate a vital purpose of TSCA because large quantities of PCBs could not be disposed of in a proper manner. Local prohibitions, therefore, might produce a perverse result: the encouragement of secret dumping of PCBs in an unregulated and dangerous manner.<sup>14</sup> One evil at which TSCA was aimed thus will go uncured unless those bans that are unrelated to the need for safe disposal are preempted by the federal regulatory scheme.<sup>15</sup>

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which would have accepted and stored PCBs while the incinerator ships were at sea. See Current Developments, 13 ENV'T REP. (BNA) 2214-15 (Apr. 8, 1983).

In addition, the city of Chickasaw, Alabama, which is adjacent to the planned port facility in Mobile, enacted ordinances that forbade trucks carrying PCBs to use a particular street, placed a weight limitation on another street for trucks similarly laden, and imposed numerous other restrictions on the transportation of PCBs through the city. Chickasaw, Ala., Ordinance 1040 (Feb. 28, 1984); Chickasaw, Ala., Ordinance 964 (Oct. 20, 1981). These ordinances have been challenged in *Chemical Waste Management, Inc. v. City of Chickasaw*, No. 84-0459-H-S (S.D. Ala. filed Apr. 4, 1984). Among other contentions, Chemical Waste Management alleged that the ordinances were preempted by TSCA. *Id.*

10. The local benefits of increased tax revenues and new jobs rarely outweigh the local costs resulting from potential health and environmental risks, the noise and congestion caused by increased traffic, and the stigma attached to being a site for hazardous waste disposal. Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 268-69 (1982); see D. MORELL & C. MAGORIAN, *supra* note 6, at 56-62.

11. See *infra* notes 260-64 and accompanying text.

12. See, e.g., *infra* note 172 and accompanying text.

13. See *infra* note 82 and accompanying text.

14. See *infra* notes 268-73 and accompanying text.

15. An analogous problem with siting hazardous waste facilities exists under RCRA. See Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307, 324-27 (1982). With regard to RCRA, the EPA has suggested that inadequate disposal capacity will lead to transportation of waste over longer distances, thereby increasing the likelihood of spills, on-site stockpiling of waste, and illegal dumping due to increased disposal cost. EPA Standards for Hazardous Waste Land Disposal Facilities (RCRA), 46 Fed. Reg. 12,414, 12,415-16 (1981); see Davidson, *An Analysis of Existing Requirements for Siting and Permitting Hazardous Waste Disposal Facilities and a Proposal for a More Workable System*, 34 AD. L. REV. 533, 533-34 (1982).

TSCA contains an explicit preemption provision.<sup>16</sup> With a few clearly delineated exceptions, it preempts state and local regulatory requirements on the date certain federal rules or orders become effective. Congress, however, excluded state and local disposal requirements from the ambit of the general preemption provision<sup>17</sup> and also provided that federal disposal rules may not require anyone to act in violation of state or local requirements.<sup>18</sup>

Although some commentators have suggested that Congress intentionally drafted TSCA in this manner to impose a form of reverse preemption whereby state and local disposal requirements preempt federal law,<sup>19</sup> the EPA has contended that Congress only meant to give state and local governments the flexibility to impose requirements more stringent than required by federal law. The agency, however, belatedly recognized that efforts to ban PCB disposal would frustrate the national program for safe PCB disposal. Thus, the EPA has argued more recently that all outright bans are void as obstacles to achieving one of the primary purposes of TSCA.<sup>20</sup> Additionally, a number of trial courts have had an opportunity to grapple with this issue. Their efforts have produced an erratic, inconsistent pattern of analysis.

This Article seeks to explain the sources of this confusion and to advance a suggested method of analysis. Part I explores those features of TSCA and its regulatory scheme that are crucial to an understanding of the issue. Part II discusses and critiques the administrative and judicial interpretations concerning the effect of the federal PCB disposal rule on state and local disposal requirements.

Finally, Part III of the Article argues that the legislative history of TSCA demonstrates that Congress intended the federal PCB disposal rule to set minimum standards for safe disposal, thereby preempting by implication less stringent state and local requirements. Congress, however, preserved the power of state and local governments to tailor more stringent requirements that are consistent with the goal of safe disposal. Nevertheless, total bans—and those requirements that impose practically unattainable conditions, resulting in constructive bans—obstruct the national goal of safely disposing of PCBs; consequently, they ordinarily are preempted by implication. Such bans, constructive or actual, may be saved from preemption only when they serve to ensure safe PCB disposal. Realistically, therefore, a ban may be given effect only on a showing that some unique local geological or physical condition justifies a ban on safety grounds.

## I. THE TOXIC SUBSTANCES CONTROL ACT

TSCA<sup>21</sup> authorizes the EPA to review each new chemical before it is mar-

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16. TSCA § 18, 15 U.S.C. § 2617.

17. TSCA § 18(a)(2)(B), 15 U.S.C. § 2617(a)(2)(B).

18. TSCA § 6(a)(6), 15 U.S.C. § 2605(a)(6).

19. R. DRULEY & G. ORDWAY, *THE TOXIC SUBSTANCES CONTROL ACT* 68-69 (rev. ed. 1981).

20. See *infra* notes 63-70, 80-88 and accompanying text.

21. For thorough discussions of TSCA, see R. DRULEY & G. ORDWAY, *supra* note 19; Gaynor,

keted,<sup>22</sup> as well as all existing chemicals,<sup>23</sup> to determine whether they may "present an unreasonable risk of injury to health or the environment."<sup>24</sup> If the review indicates "there is a reasonable basis to conclude" that the chemical "presents or will present an unreasonable risk," the EPA must promulgate regulations under section 6 to "protect adequately against such risk."<sup>25</sup> Engrafted onto this statutory scheme is a provision that singles out PCBs for special regulatory treatment.<sup>26</sup>

#### A. Manufacturing and Processing Notices for New Chemicals

Section 5 is designed to provide the Administrator of the EPA with the information necessary to determine whether a "new chemical substance" or a "significant new use" for an existing chemical poses an unreasonable risk and thus must be regulated under section 6.<sup>27</sup> Subject to some minor exemptions,<sup>28</sup> any person who manufactures a new chemical<sup>29</sup> or manufactures or processes a chemical for a significant new use<sup>30</sup> must notify the Administrator of the EPA at least ninety days prior to manufacturing or processing. These premanufacturing notices must contain certain information on the effect that the chemical or its use will have on health and the environment.<sup>31</sup>

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*The Toxic Substances Control Act: A Regulatory Morass*, 30 VAND. L. REV. 1149 (1977); Note, *The Toxic Substances Control Act of 1976: An Introductory Background and Analysis*, 4 COLUM. J. ENVTL. L. 35 (1977).

22. TSCA § 5, 15 U.S.C. § 2604.

23. TSCA § 4, 15 U.S.C. § 2603.

24. TSCA § 6, 15 U.S.C. § 2605.

25. TSCA § 6(a), 15 U.S.C. § 2605(a).

26. TSCA § 6(e), 15 U.S.C. § 2605(e).

27. TSCA § 5, 15 U.S.C. § 2604.

28. On a proper showing of safety, manufacturers or processors may obtain exemptions either for test marketing purposes or when a chemical is an intermediate product. TSCA § 5(h)(1), (5), 15 U.S.C. § 2604(h)(1), (5). Exemptions also may be granted when test data would be duplicative of other data received or being developed, or when the Administrator determines by rule that the chemical will not present an unreasonable risk. TSCA § 5(h)(2), (4), 15 U.S.C. § 2604(h)(2), (4). Notice is not required for small quantities that are used in scientific research, provided certain conditions are met. TSCA § 5(h)(3), 15 U.S.C. § 2604(h)(3).

29. To qualify as a "new chemical substance," the chemical must not appear on the inventory list required under § 8(b). TSCA § 8(b), 15 U.S.C. § 2607(b). This section requires that the Administrator compile, update, and publish a list of each chemical manufactured or processed in the United States. A chemical for which a notice is submitted under § 5 must be placed on the list as of the first date it was manufactured or processed in the United States. *Id.*

30. The Administrator designates by rule whether a use is a "significant new use" after considering the following: the expected "volume of manufacturing and processing" of the chemical; the extent the use changes the type, form, and magnitude of human or environmental exposure; and the anticipated methods of manufacturing, processing, distribution, and disposal. TSCA § 5(a)(2), 15 U.S.C. § 2604(a)(2).

31. Notices must provide any information on the effect of the chemical or its use on health or the environment that either is in the possession or knowledge of the person giving notice or is reasonably ascertainable. The notices also must include proposed uses, data on the volume to be produced, estimates of human exposure, and the proposed manner of disposal, insofar as these are known or reasonably ascertainable to the person giving notice. TSCA §§ 5(d), 8(a)(2), 15 U.S.C. §§ 2604(d), 2607(a)(2).

If the chemical is on the Administrator's "suspect list" of substances or uses that may present an unreasonable risk, TSCA § 5(b)(4), 15 U.S.C. § 2604(b)(4), the person giving notice must submit data that he believes demonstrate that the substance or its use will not present any unreasonable risk of injury. TSCA § 5(b)(2), 15 U.S.C. § 2604(b)(2).

When the information provided is inadequate to evaluate what may be an unreasonable risk, the Administrator is authorized either to issue a proposed administrative order that is effective at the end of the notification period or to seek a court order limiting or prohibiting the manufacture, processing, distribution, use, or disposal of the chemical.<sup>32</sup> The Administrator may proceed by administrative or judicial action to protect against unreasonable risk if sufficient information indicates that the chemical will present such a risk before a section 6 rule can take effect.<sup>33</sup>

### *B. Test Rules for New and Existing Chemicals*

The most thorough testing requirements for potentially dangerous chemicals are found in section 4 of TSCA.<sup>34</sup> Whenever a new or existing chemical may pose a risk to health or the environment and insufficient data exist to determine reasonably its effect on health or the environment, TSCA directs the Administrator to promulgate a rule requiring the manufacturer or processor to engage in intensive testing to obtain more data.<sup>35</sup> Failure to comply with such a testing rule can result in civil or criminal penalties or a court order compelling specific performance and other relief.<sup>36</sup> If the EPA receives test data or other

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32. Before issuing such a proposed administrative order, the Administrator must determine that, in the absence of sufficient information, the manufacture, processing, distribution in commerce, use, or disposal of the substance may present an unreasonable risk of injury to health or the environment or that significant human or environmental exposure to the substance is anticipated. If a manufacturer or processor objects to the Administrator's order, the Administrator may seek injunctive relief (or the Administrator may seek such relief in the first instance). A district court is directed to issue the injunction if it finds that the information available to the Administrator is insufficient and that the substance may present an unreasonable risk, or that substantial exposure to humans or the environment may occur. TSCA § 5(e), 15 U.S.C. § 2604(e).

33. A proposed rule may be issued under § 5(f) that limits the amount of a substance that is manufactured, processed, or distributed, imposes prohibitions or restraints on the commercial use or disposal of a substance, or requires certain additional safeguards such as warnings and instructions. Such a proposed rule becomes effective when published. The Administrator, however, cannot prohibit the manufacture of the substance by rule under § 5(f). The Administrator, on the other hand, may issue a proposed order, effective at the expiration of the notification period, to prohibit manufacturing, processing, and distribution as well as uses and methods of disposal. Finally, the Administrator may seek injunctive relief. A district court must issue an injunction prohibiting manufacture, processing, or distribution on a finding that the chemical presents an unreasonable risk. TSCA § 5(f), 15 U.S.C. § 2604(f).

34. TSCA § 4, 15 U.S.C. § 2603.

35. TSCA § 4(a), 15 U.S.C. § 2603(a). A rule issued under subsection (a) must include standards for testing that are to be reviewed at least every 12 months. Once a testing rule is promulgated for a particular chemical substance, any person who manufactures or processes that substance, or intends to do so, must submit the required data unless exempted from doing so by the Administrator. TSCA § 4(b), (c), 15 U.S.C. § 2603(b), (c).

The Administrator may grant such an exemption when the testing either would duplicate data already submitted for an equivalent substance or duplicate data for an equivalent substance that is being developed pursuant to a rule under § 4. TSCA § 4(c), 15 U.S.C. § 2603(c).

Section 4(e) establishes a committee to recommend a priority list of chemicals to which the Administrator should give attention. The Administrator must initiate a testing rule within 12 months after the chemical is included on the priority list, or he must publish in the Federal Register the reasons for not doing so. TSCA § 4(e), 15 U.S.C. § 2603(e).

36. Under § 16, the Administrator can impose by order a civil penalty for failure to comply with a testing rule. The order may be challenged in a court of appeals. If the civil penalty is not paid, it may be recovered in a district court action. In addition to, or in lieu of, a civil penalty, a criminal penalty may be sought for willful or knowing failure to comply with a testing rule. TSCA



information indicating that the chemical may present a significant risk of serious harm to human health, the Administrator must initiate action under TSCA to prevent or reduce that risk.<sup>37</sup>

### C. Regulation

Section 6 provides the Administrator with the authority to regulate harmful chemicals.<sup>38</sup> When premanufacturing notices, testing results, or other information indicate that the manufacture, processing, distribution, use, or disposal of a chemical "presents or will present an unreasonable risk of injury," the Administrator must promulgate one or more regulatory "requirements" to protect health and the environment.<sup>39</sup> These requirements may include bans or quotas on the manufacture, processing, or distribution of the chemical.<sup>40</sup> The Administrator also may stipulate labeling requirements, monitoring and testing, prohibitions or restraints concerning commercial use, notice requirements, and the like.<sup>41</sup> Finally, the Administrator may promulgate a rule under section 6(a)(6) "prohibiting or otherwise regulating any manner or method of disposal" of the chemical.<sup>42</sup>

Congress mandated specific regulatory controls for PCBs in section 6(e)<sup>43</sup> and ordered the Administrator by July 1, 1977, to "prescribe methods" to dispose of PCBs and to require that PCBs be marked with warnings and certain instructions.<sup>44</sup> Congress also provided for the phased withdrawal of PCBs. As of January 1, 1978, the manufacture, processing, distribution, or use of PCBs "in any manner other than in a totally enclosed manner" was prohibited.<sup>45</sup> Additionally, all manufacture was prohibited after January 1, 1979, and all processing and distribution was prohibited after July 1, 1979.<sup>46</sup> The Administrator may grant exemptions from the final 1979 bans when no unreasonable risk would result and good faith efforts were made to develop a chemical substitute.<sup>47</sup> In addition, the final bans do not apply to the distribution in commerce of PCBs

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§ 16, 15 U.S.C. § 2615. A district court also may compel compliance with a testing rule. TSCA § 17(a), 15 U.S.C. § 2616(a).

Section 7(a) allows the Administrator to commence a civil action in district court for seizure of an "imminently hazardous chemical substance." TSCA § 7(a), 15 U.S.C. § 2606(a). The Administrator also may seek other relief from the district courts, *id.*, such as an order requiring notification of risks, recall, repurchase, or replacement of the substance. TSCA § 7(b)(2), 15 U.S.C. § 2606(b)(2). A chemical is "imminently hazardous" if it could cause serious or widespread injury before a rule could be promulgated under § 6. TSCA § 7(f), 15 U.S.C. § 2606(f).

37. Such action may include either a § 6 rule or a civil action for seizure or other necessary relief if the chemical presents an imminent hazard. TSCA § 7, 15 U.S.C. § 2606; *see supra* note 36.

38. TSCA § 6, 15 U.S.C. § 2605.

39. TSCA § 6(a), 15 U.S.C. § 2605(a).

40. TSCA § 6(a)(1)-(2), 15 U.S.C. § 2605(a)(1)-(2).

41. TSCA § 6(a)(3)-(5), (7), 15 U.S.C. § 2605(a)(3)-(5), (7).

42. TSCA § 6(a)(6), 15 U.S.C. § 2605(a)(6).

43. TSCA § 6(e), 15 U.S.C. § 2605(e).

44. TSCA § 6(e)(1), 15 U.S.C. § 2605(e)(1).

45. TSCA § 6(e)(2), 15 U.S.C. § 2605(e)(2).

46. TSCA § 6(e)(3)(A), 15 U.S.C. § 2605(e)(3)(A).

47. TSCA § 6(e)(3)(B), 15 U.S.C. § 2605(e)(3)(B).

that were "sold for purposes other than resale" before July 1, 1979.<sup>48</sup>

#### D. PCB Disposal Rule

The original EPA disposal rule for PCBs was published on February 17, 1978.<sup>49</sup> In its present form, the rule regulates the disposal of any chemical substance that contains fifty parts per million or more of PCBs.<sup>50</sup> The rule establishes particular disposal methods depending on the form of PCBs—liquid, contaminated soil, dredged materials, and so on—and the concentration of PCBs in the substance.<sup>51</sup> Incineration and placement in a chemical waste landfill are the two forms of disposal most often specified,<sup>52</sup> and elaborate requirements and safety precautions governing both types of disposal are set forth in the rule.<sup>53</sup> The EPA must approve all incinerators<sup>54</sup> and landfills<sup>55</sup> prior to their use.

#### E. Preemption

Congress attempted to reconcile TSCA's broad regulatory impact with the interests of state and local governments in section 18,<sup>56</sup> which states that TSCA generally does not preempt state or local regulation of chemical substances.<sup>57</sup> Section 18, however, contains two significant exceptions. First, once the Admin-

48. TSCA § 6(e)(3)(C), 15 U.S.C. § 2605(e)(3)(C).

49. EPA Disposal and Marking Rule for PCBs, 43 Fed. Reg. 7150 (1978). The EPA has amended the rule on numerous occasions. See 43 Fed. Reg. 33918 (1978); 44 Fed. Reg. 31514 (1979); 44 Fed. Reg. 54296 (1979); 45 Fed. Reg. 20473 (1980); 47 Fed. Reg. 19526 (1982); 47 Fed. Reg. 22098 (1982); 47 Fed. Reg. 37342 (1982); 47 Fed. Reg. 46980 (1982); 47 Fed. Reg. 54436 (1982); 48 Fed. Reg. 4467 (1983); 48 Fed. Reg. 5729 (1983); 48 Fed. Reg. 13181 (1983); 48 Fed. Reg. 15125 (1983); 49 Fed. Reg. 25239 (1984).

50. 40 C.F.R. § 761.1(b) (1984). The original rule excluded PCBs in concentrations below 500 parts per million (ppm) from the ambit of regulation. 43 Fed. Reg. 7150, 7157 (1978). This was amended to 50 ppm because the agency recognized that adverse effects result from concentrations lower than 500 ppm. 44 Fed. Reg. 31514, 31516 (1979).

51. 40 C.F.R. § 761.60 (1984).

52. *Id.*

53. 40 C.F.R. § 761.70 (1984) establishes comprehensive requirements that an incinerator used for burning PCBs must satisfy. For example, requirements for incinerating liquid PCBs include specified combustion temperatures, continuous measurement of combustion temperatures, 99.9% combustion efficiency, and monitoring and recording of combustion products and incineration operations. *Id.* § 761.70(a). In addition, the agency may impose other requirements "to ensure that operation of the incinerator does not present an unreasonable risk of injury to health or the environment from PCBs." *Id.* § 671.70(d)(4)(ii).

Thorough technical requirements for chemical waste landfills used for PCB disposal are specified in 40 C.F.R. § 761.75 (1984). Those requirements concern requisite soil conditions, use of synthetic membrane liners when necessary, acceptable hydrologic conditions, flood protection, topography, monitoring systems, leachate collection, supporting facilities, and landfill operations. *Id.* § 761.75(b). As with incineration, the EPA may impose additional requirements to ensure safe operation. *Id.* § 761.75(c)(3)(ii).

54. *Id.* § 761.70(d).

55. *Id.* § 761.75(c). Additional provisions regulate matters such as temporary storage of PCBs that have been designated for disposal. *Id.* § 761.65 (storage for disposal); *id.* § 761.180 (records and monitoring). Neither industry nor environmental groups sought judicial review of the disposal rule. See *Environmental Defense Fund v. EPA*, 636 F.2d 1267, 1269 n.3 (D.C. Cir. 1980).

56. TSCA § 18, 15 U.S.C. § 2617.

57. TSCA § 18(a)(1), 15 U.S.C. § 2617(a)(1).

istrator has issued a testing rule for a chemical under section 4, no state or local government may require testing of that chemical for similar purposes.<sup>58</sup> Second, with the express exception of disposal requirements described in section 6(a)(6), once a rule or order is prescribed by the Administrator under section 5 (premanufacturing notices) or section 6 (regulation), a state or locality may not impose a requirement for that substance that is designed to protect against the same risk. Such preemption, however, does not occur if the state or local requirement is identical to the federal requirement, is adopted under the auspices of another federal statute, or prohibits the use of the substance in that territorial jurisdiction.<sup>59</sup>

In the event a state or local requirement is preempted by section 18, the affected government can apply for an exemption from federal preemption. The Administrator may grant the exemption if the state or local requirement would not cause violations of certain requirements prescribed under TSCA, provides a significantly higher degree of protection than exists under TSCA, and does not unduly burden interstate commerce.<sup>60</sup>

Section 18, however, does not expressly preempt state or local disposal requirements for a particular chemical on the issuance of a federal disposal rule under section 6(a)(6) for that substance.<sup>61</sup> Section 6(a)(6), moreover, states that federal disposal rules "may not require any person to take any action which would be in violation of any law or requirement" of any state or local government.<sup>62</sup>

## II. THE ERRATIC COURSE OF INTERPRETATION

### A. EPA's Approach

When the original PCB disposal rule was promulgated in 1978, the EPA maintained that state requirements governing PCB disposal were entirely exempt from preemption as long as those requirements were not less stringent than those prescribed by the EPA.<sup>63</sup> The agency elaborated on the reasoning that led to this conclusion in the Support Document that accompanied the PCB disposal rule.<sup>64</sup>

The Support Document indicated that section 18 gives preemptive effect to all federal rules issued under section 6 except for disposal rules issued under section 6(a)(6).<sup>65</sup> The PCB disposal rule, however, was promulgated under section 6(e),<sup>66</sup> which—without reference to 6(a)(6)—ordered EPA to prescribe dis-

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58. TSCA § 18(a)(2)(A), 15 U.S.C. § 2617(a)(2)(A).

59. TSCA § 18(a)(2)(B), 15 U.S.C. § 2617(a)(2)(B).

60. TSCA § 18(b), 15 U.S.C. § 2617(b).

61. TSCA § 18(a)(2)(B), 15 U.S.C. § 2617(a)(2)(B).

62. TSCA § 6(a)(6)(B), 15 U.S.C. § 2605(a)(6)(B).

63. EPA Disposal and Marking Rule for PCBs, 43 Fed. Reg. 7150, 7153 (1978). Logically, this statement also would apply to local requirements for PCB disposal.

64. See EPA, PCB Marking and Disposal Regulations, Final Action—Support Document (undated) (copy on file in North Carolina Law Review office) [hereinafter cited as Support Document].

65. *Id.* at 39-42.

66. 43 Fed. Reg. 7150 (1978).

posal methods for PCBs.<sup>67</sup> As a matter of literal interpretation, one could assert that the PCB disposal rule generally would preempt state law under section 18.

The EPA rejected such a literal approach. Instead, the agency determined that in enacting TSCA Congress intended to recognize the "inherent interests" of state and local governments in the disposal of toxic chemicals.<sup>68</sup> The EPA perceived this congressional intent so clearly that it read section 6(e) as incorporating by implication the same limitations on federal preemption that would apply to any section 6(a)(6) disposal rule.<sup>69</sup> Consequently, although section 18 preemption does not apply to the PCB disposal rule, the EPA viewed the reference to state and local requirements in section 6(a)(6) as applicable: the federal PCB disposal rule may not require anyone to violate state or local law. The agency, nevertheless, did not believe that this language protected all state disposal restrictions from federal preemption. The agency therefore declared that state restrictions less stringent than those contained in the federal rule were preempted since Congress only intended to allow states to establish more stringent disposal requirements.<sup>70</sup>

The extreme naivete of part of the agency's original position soon became apparent. Thus, when the disposal rule was amended and republished in May 1979, the EPA announced in the preamble that it was reconsidering the advisability of its broad declaration that states had an unconditional right to set standards more restrictive than federal standards. It expressed concern that actions by state and local governments to prohibit the disposal of PCBs would obstruct the national policy of safely disposing of toxic waste:<sup>71</sup>

While EPA has always believed that States should have the right to set pollution control standards more restrictive than the Federal 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.<sup>72</sup>

The EPA stopped short of revising its prior policy pronouncement, however, and instead declared that the issue would be considered further at another time.<sup>73</sup>

Later in 1979, Michigan requested an opinion from the EPA on which portions of the Michigan statute and regulations governing PCBs<sup>74</sup> were preempted by the federal PCB disposal rule.<sup>75</sup> The EPA did not address the question of

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67. TSCA § 6(e)(1), 15 U.S.C. § 2605(e)(1); see Support Document, *supra* note 64, at 40.

68. Support Document, *supra* note 64, at 40.

69. *Id.* at 40-41.

70. *Id.* at 41-42.

71. 44 Fed. Reg. 31514, 31528 (1979).

72. *Id.*

73. *Id.*

74. MICH. COMP. LAWS ANN. § 299.351-.360 (West 1984); MICH. ADMIN. CODE R. 299.3301-.3319 (1979).

75. See Letter from D. Bickart, Deputy General Counsel of the United States Environmental Protection Agency, to Howard Tanner, Director of the Michigan Department of Natural Resources 1 (Nov. 7, 1979) (copy on file in North Carolina Law Review office).

state disposal bans in its response since Michigan had not attempted to prohibit disposal.<sup>76</sup> The Agency, however, took the occasion to distinguish between the preemptive effect of the federal disposal rule on state disposal standards and the effect on state standards controlling the storage of PCBs designated for disposal. The EPA's position was that, unlike the state's disposal standards, the Michigan standards pertaining to storage of PCBs designated for disposal were preempted expressly under section 18.<sup>77</sup> Arguably, the EPA was trying to limit possible damage to the federal PCB disposal program by removing storage from the preemption scheme for disposal. Thus, the portion of the federal disposal rule governing temporary storage prior to disposal would have more preemptive effect than the rest of the disposal rule.

It is impossible to justify this interpretation because the EPA's only statutory authority to regulate the storage of PCBs prior to disposal is the authority that arises as an incident of disposal.<sup>78</sup> Because the EPA chose to regulate this type of storage pursuant to its authority to prescribe the PCB disposal rule,<sup>79</sup> both the disposal and storage standards contained in that rule should be given the same preemptive effect.

The EPA finally addressed the issue of PCB disposal bans in a March 1980 unpublished memorandum from the Assistant Administrator for Pesticides and Toxic Substances.<sup>80</sup> The memorandum noted that several local ordinances banning the disposal of all PCBs had been enacted since the agency had expressed its concern about such bans in the preamble to the amended disposal rule in May 1979.<sup>81</sup> These bans were aggravating a serious shortage in the availability of PCB disposal facilities.<sup>82</sup> No PCB incinerators had been approved for general use when the memorandum was written; moreover, fewer than a dozen states had approved PCB landfills within their borders.<sup>83</sup> Consequently, the ordinances "threaten[ed] to impede substantially, if not totally frustrate, the national PCB disposal program established by the PCB regulation. In fact, the ordinances [were] specifically designed to curtail further the limited number of EPA-approved disposal facilities."<sup>84</sup>

According to the EPA, Congress could not have intended for section 6(a)(6)(B) to be read so broadly that it would frustrate the PCB disposal pro-

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76. *Id.* at 1-9.

77. *Id.* at 8 (analysis of Michigan Department of Natural Resources rule on storage of PCBs intended for disposal, MICH. ADMIN. CODE R. 299.3315 (1979)).

78. See TSCA § 6(e), 15 U.S.C. § 2605(e).

79. The storage-for-disposal regulations, 40 C.F.R. § 761.65 (1984), were promulgated pursuant to § 6(e)(1) of TSCA, 15 U.S.C. § 2605 (e)(1), which authorizes disposal and marking rules for PCBs. 43 Fed. Reg. 7150 (1978).

80. Memorandum from S. Jellinek, Assistant Administrator for Pesticides and Toxic Substances, United States Environmental Protection Agency, to Regional Administrators: State and County Ordinances Banning PCB Disposal 1 (March 24, 1980) (copy on file in North Carolina Law Review office) [hereinafter cited as Jellinek Memorandum].

81. *Id.*

82. *Id.* at 2.

83. *Id.*

84. *Id.*

gram that Congress mandated in section 6(e).<sup>85</sup> Rather, the EPA contended that Congress had intended to permit state and local governments to impose tighter disposal restrictions "if specific local geological or other physical conditions dictate variations from general, federally imposed requirements."<sup>86</sup> Those requirements "must be practically attainable, and they must not have been enacted to prevent entirely the disposal of PCBs in an area."<sup>87</sup>

In view of this interpretation, the EPA announced that it would continue to issue approvals to PCB landfills and incinerators satisfying federal standards regardless of any applicable state or local bans. The agency nonetheless indicated that it welcomed comments from state and local governments concerning local geological and other physical conditions that might necessitate special restrictions. If appropriate for safety purposes, the EPA would consider imposing more stringent disposal restrictions in its approval of specific disposal facilities.<sup>88</sup>

The EPA, however, went too far in declaring that all disposal bans are per se void. The legislative history of TSCA<sup>89</sup> reveals that Congress sought to eliminate the hazards associated with indiscriminate disposal of PCBs by requiring the Administrator of the EPA to prescribe safe disposal methods.<sup>90</sup> If routinely given effect, enactment of PCB disposal bans by state or local governments would obstruct this congressional design by severely constricting the availability of safe disposal sites.<sup>91</sup> Nevertheless, some locales inherently may be so ill-suited for safe PCB disposal that peculiar geological or other physical conditions would justify total prohibitions on PCB disposal. The EPA should have recognized this possibility and acknowledged that disposal prohibitions in those instances would not frustrate the goal of safe disposal. Such bans, however, deserve close scrutiny to determine whether unique local conditions that justify a ban actually exist.<sup>92</sup>

Contrary to the EPA's position, such scrutiny is not necessary for all state or local requirements that are more stringent than federal standards. By excluding disposal rules from express preemption, Congress gave states and localities the right to impose more stringent requirements. As long as those restrictions do not impede realization of the goal of safe disposal, close scrutiny of special local conditions is neither necessary nor appropriate.<sup>93</sup> On the other hand, more stringent requirements that in practice are not attainable amount to constructive bans. Such constructive bans should undergo the same scrutiny that actual bans receive to determine if the restrictions are justified.<sup>94</sup>

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85. *Id.*

86. *Id.* at 2-3.

87. *Id.* at 3.

88. *Id.*

89. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE TOXIC SUBSTANCES CONTROL ACT (Comm. Print 1976) [hereinafter cited as LEGISLATIVE HISTORY].

90. *See infra* notes 260-64 and accompanying text.

91. *See infra* notes 268-73 and accompanying text.

92. *See infra* text accompanying note 274.

93. *See infra* text accompanying notes 266-67 & 274.

94. *See infra* text accompanying note 274.

### B. Judicial Construction and Misconstruction

The various judicial approaches to this question reveal tremendous confusion over the scope and application of federal preemption to state and local regulation of PCB disposal. The five courts that have analyzed the question have done so in a multitude of conflicting ways, reaching radically different results.

*City of Middletown v. Hartford Electric Light Co.*<sup>95</sup> was the first case to address the issue. Hartford Electric Light Company (HELCO) planned to incinerate mineral oil contaminated with PCBs in a high efficiency boiler located at its electric generating station in Middletown, Connecticut.<sup>96</sup> The city sought to enjoin the incineration,<sup>97</sup> claiming that HELCO had failed to obtain a state permit for the disposal of PCBs.<sup>98</sup>

The court examined whether the EPA rule governing PCB disposal had preempted the Connecticut statute,<sup>99</sup> which required a state-issued permit. The court recognized that state requirements concerning a particular chemical are preempted expressly once rules or orders for that chemical are promulgated by the EPA under sections 5 or 6 of TSCA, except for disposal rules issued under section 6(a)(6). Since the Administrator had issued the final PCB disposal rule, a crucial issue was whether that rule constituted a section 6(a)(6) disposal rule. If so, the express preemption language of section 18(a)(2) would not apply.<sup>100</sup>

95. No. 33133 (Super. Ct. Middlesex Jud. Dist. Conn. Jan. 22, 1981), *aff'd on other grounds*, 473 A.2d 787 (Conn. 1984).

96. HELCO intended to burn annually approximately 30,000 gallons of PCB-contaminated mineral oil. HELCO's plan was to transport the mineral oil to the Middletown generating station from other HELCO facilities where the material had been used as insulating fluid in electrical transformers and switch gears. The mineral oil then would have been used as fuel oil in one of HELCO's boilers. *City of Middletown v. Hartford Elec. Light Co.*, 473 A.2d 787, 788 (Conn. 1984).

97. *City of Middletown*, slip op. at 2. Soon after the suit was filed, the EPA approved HELCO's plan pursuant to TSCA. EPA, 5 Bimonthly Report on PCB Activities and Policies, Table 1 (March 3, 1982).

98. *City of Middletown v. Hartford Elec. Light Co.*, 473 A.2d 787, 789 (Conn. 1984). The Connecticut Department of Environmental Protection, however, had informally approved the incineration plan. *City of Middletown*, slip op. at 14.

The complaint also alleged that the incineration of PCBs by HELCO would constitute a trespass and would violate both local zoning restrictions and local wetland regulations, *id.* at 10, and that HELCO had neglected to obtain a state certificate of environmental compatibility for the modification of a power generating facility. *See id.* at 11. The court dismissed these four claims without any discussion of federal preemption. *Id.* at 20-21, 32-34.

Furthermore, the city charged that HELCO's plan violated the Connecticut Environmental Protection Act and that HELCO had failed to obtain a Connecticut solid waste facility permit, air pollution permit, water pollution permit, toxic waste disposal permit, and hazardous waste permit. *City of Middletown v. Hartford Elec. Light Co.*, 473 A.2d 787, 789, 791 (Conn. 1984). Those claims were dismissed on the basis of federal preemption as well as on other grounds. *City of Middletown*, slip op. at 28-31; *City of Middletown v. Hartford Elec. Light Co.*, 473 A.2d 787, 792 (Conn. 1984).

99. CONN. GEN. STAT. ANN. § 22a-467 (West Supp. 1982) (formerly CONN. GEN. STAT. ANN. § 25-54vv (West Supp. 1981)) provides:

No person . . . shall dispose of the compound PCB or any item, product or material containing the compound PCB by any means other than a means approved by the commissioner [of environmental protection] which will result in the destruction of the compound PCB except in accordance with a permit issued by the commissioner under the provisions of sections 22a-208, 22a-430, or 22a-454.

The Commissioner had not adopted any implementing regulations as of the date of the decision. *City of Middletown*, slip op. at 26.

100. *See id.* at 24-25.

In answering this question, the *City of Middletown* court reasoned that section 6(a)(6) authorized the issuance of disposal rules only upon a finding by the Administrator that a particular chemical presented an unreasonable risk: a finding that lies in the Administrator's discretion. On the other hand, in section 6(e) Congress mandated the promulgation of the PCB disposal rule; thus, the Administrator had no discretion in deciding whether to regulate the disposal of PCBs.<sup>101</sup> The court concluded that this difference indicated that Congress did not intend the PCB disposal rule to be subject to the exclusion from section 18 preemption applicable to section 6(a)(6) disposal rules.<sup>102</sup> Apparently, the court thought that the explicit congressional command to regulate PCB disposal would be frustrated if those regulations were not given express preemptive effect under section 18(a)(2).<sup>103</sup>

The court's analysis and conclusion were misguided. As the EPA had recognized,<sup>104</sup> in enacting TSCA Congress wanted to protect the strong interests of states and localities concerning the disposal of toxic chemicals within their jurisdictions. Consequently, Congress excluded disposal rules from the ambit of section 18 preemption. Although Congress did not specifically exclude the provision mandating the PCB disposal rule from section 18 preemption, the rule imposed the same types of disposal requirements described in section 6(a)(6) that were excluded. Moreover, the legislative history reveals no congressional intent to treat the preemption of state and local PCB disposal restrictions differently from other disposal restrictions. Congress' failure to refer to the PCB disposal rule in drafting the exclusion from express preemption is not sufficient reason to ignore the otherwise clear expression of congressional intent,<sup>105</sup> as the *City of Middletown* court did.<sup>106</sup>

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101. *Id.* at 25.

102. *Id.* at 25-26.

103. *See id.* at 25. The court also dismissed this claim for lack of standing. *Id.* at 28-31.

104. *See supra* notes 68-69 and accompanying text.

105. *See infra* notes 210-53 and accompanying text.

106. Having reached the wrong conclusion, the court incorrectly analyzed the question as one of express preemption under § 18. In doing so, the court compounded the problem by misconstruing, at least in part, the scope of § 18's express preemption. Although the express preemption provided by § 18(a)(2)(B) does not apply to the federal PCB disposal rule, an examination of the court's application of that subsection is necessary because § 18(a)(2)(B) gives express preemptive effect to other federal rules and orders issued under §§ 5 and 6 and because some courts may err and apply it in the case of the PCB disposal rule.

The court found that none of the enumerated exceptions to preemption provided in § 18(a)(2)(B) applied. The state disposal provision was not identical to the federal rule; the provision was not adopted under the authority of federal law; and it did not prohibit the use of PCBs. *City of Middletown*, slip op. at 26-27. In addition, the State had not applied to the Administrator of the EPA for an exemption from preemption pursuant to § 18(b). Consequently, the court held that the state statute was preempted on the date the federal disposal rule became effective. *Id.* at 27.

The court, without elaboration, also held that § 18(a)(2)(B) preemption prevented it from exercising jurisdiction over PCB disposal pursuant to "any other state environmental statute." *Id.* at 28. Thus, the court held that the city could not proceed against HELCO for "unreasonable pollution" under the Connecticut Environmental Protection Act or challenge the failure to obtain permits under other state environmental statutes. *Id.*

It is not clear, however, that the court even had to address whether § 18(a)(2)(B) preempted those other state statutes. In dismissing the cause of action predicated on trespass, the court stated that the evidence had failed "to establish that any ascertainable amount of pollutants will be produced as a result of the proposed burning program of [HELCO]." *Id.* at 32. The state supreme



A federal district court in *SED, Inc. v. City of Dayton*<sup>107</sup> also found that section 18 controlled the preemption of state and local restrictions on PCB disposal.<sup>108</sup> The court's logic, however, differed radically from the reasoning of the Connecticut court. The controversy involved SED's operation of a Dayton, Ohio warehouse in which PCBs were stored.<sup>109</sup> Possibly in reaction to SED's operation, the Dayton City Commission enacted several ordinances prohibiting the storage of PCBs within the city limits.<sup>110</sup> SED brought suit primarily seeking a declaratory judgment that the ordinances were invalid because TSCA had preempted local regulation pertaining to the storage of PCBs.<sup>111</sup>

In opposing SED's motion for summary judgment, the city argued<sup>112</sup> that its ordinances were not preempted expressly by section 18 because the city's ban

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court therefore affirmed the dismissal for "factual insufficiency" of the count alleging a violation of the state Environmental Protection Act. *City of Middletown v. Hartford Elec. Light Co.*, 473 A.2d 787, 792 (Conn. 1984). For the same reason, the other state environmental permitting statutes may not have applied to HELCO's incineration plan.

Even if one or more of these permitting statutes were implicated by the incineration plan, the court's broad conclusion regarding preemption was rash. For example, if the plan would have resulted in the discharge of water pollutants, a state water pollution permit probably would have been required by state law. That statute could fall within the § 18(a)(2)(B)(ii) exception to preemption for state laws adopted under the authority of any other federal law. Congress intended this exception to apply to state and local requirements adopted under either the authority of other federal law or state or local authority that had been expressly preserved by federal law. LEGISLATIVE HISTORY, *supra* note 89, at 407, 461. Consequently, the state's authority to regulate the discharge of water pollutants, if preserved by the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982), would not be preempted by TSCA. Section 510 of the Clean Water Act expressly preserves the authority of states to impose standards that equal or exceed federal requirements. 33 U.S.C. § 1370 (1982).

Finally, the cause of action available under the Connecticut Environmental Protection Act for "unreasonable pollution" was not preempted by TSCA. The Connecticut Act simply grants standing to all persons who seek to protect the state's environment through declaratory and injunctive relief. Such a general remedy is not a regulatory requirement that is applicable to PCBs in the context of § 18 and, therefore, is not preempted expressly by § 18. *See also infra* note 137 (§ 18 only preempts certain state regulatory requirements).

107. 519 F. Supp. 979 (S.D. Ohio 1981).

108. *Id.* at 987-88.

109. *Id.* at 981.

110. *Id.* The prohibition was enforceable through civil and criminal penalties. In addition, the ordinances declared that storage of PCBs in the city constituted a public nuisance for which the city attorney was authorized to file an action seeking injunctive relief. DAYTON, OHIO, REV. CODE OF GEN. ORDINANCES, §§ 97.01-.09, 97.97-.99 (1980).

111. *SED*, 519 F. Supp. at 981. SED also sought a preliminary injunction to restrain the city from prosecuting a nuisance action in state court. *SED, Inc. v. City of Dayton*, 515 F. Supp. 737, 738-39 (S.D. Ohio 1981). SED's fears were well justified. Shortly after the case was filed, the city initiated an action against SED requesting over two million dollars in damages and an injunction based on public nuisance. *See id.* at 740. SED's motion for a preliminary injunction, however, was denied on the basis of the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), which prohibits a federal court from enjoining proceedings in a state court except as authorized by Congress, or when necessary to protect its jurisdiction, or to protect or effectuate its judgment. *Id.* at 743. The court then ordered SED to file a motion for summary judgment on the preemption issue. *Id.* at 744.

112. The city also asserted that TSCA's preemption provision was unconstitutional to the extent that it infringed on the power of local governments to act in local matters of safety, health, and land use—powers that traditionally have rested in the exclusive jurisdiction of states and their political subdivisions. In support of this proposition, the city relied on *National League of Cities v. Usery*, 426 U.S. 833 (1976). *SED*, 519 F. Supp. at 982. In *National League of Cities* the Supreme Court held unconstitutional a federal statute that would have extended minimum wage and maximum hours regulation to nearly all employees of state and local governments. The Court stressed notions of state sovereignty and concluded that this kind of federal regulation would interfere with the employment decisions of these governments in discharging their duties to administer law and provide

on storage fell within the exclusion from express preemption for local restrictions on the disposal of toxic waste.<sup>113</sup> According to the city, the storage of PCBs for disposal constituted "disposal" for purposes of TSCA.<sup>114</sup>

The court accepted the city's proposition. In doing so, it noted that because TSCA does not expressly define "disposal," the court must look to EPA's PCB disposal rule. That rule defines "disposal" to include "actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items."<sup>115</sup> The court found that this definition was comprehensive enough to include "any activity after the last use" of the PCB that was related to its ultimate disposition.<sup>116</sup> Such activities necessarily would include storage prior to disposal.<sup>117</sup>

A second issue still remained: Was the exclusion from express preemption for section 6(a)(6) disposal rules applicable as well to the PCB disposal rule promulgated under section 6(e)? Referring to the language of section 18(a)(2)(B), the court determined that the federal PCB disposal rule imposed disposal requirements similar to those described in section 6(a)(6).<sup>118</sup> Consequently, the court should have concluded that the city's storage ban was not preempted expressly under section 18 and then should have explored the question of implied preemption.

The *SED* court, however, did not follow that line of analysis.<sup>119</sup> Instead, the court devised a unique analysis of section 18 and concluded that the express

public services. *National League of Cities*, 426 U.S. at 842-52. Thus, Congress had displaced constitutionally the states' freedom to shape the form of their own "integral operations." *Id.* at 852.

The court in *SED* concluded that the express preemption provision in TSCA was not unconstitutional by distinguishing *National League of Cities* based on Justice Blackmun's concurrence. *SED*, 519 F. Supp. at 983-84. Justice Blackmun's opinion emphasized that the Court's holding "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater." *National League of Cities*, 426 U.S. at 856. Because Justice Blackmun was the swing vote in the five-to-four decision in *National League of Cities*, the court in *SED* believed that his opinion limited the implications that could be drawn from the broad language in the Court's plurality opinion. *SED*, 519 F. Supp. at 983-84.

By a five-to-four vote the Supreme Court subsequently overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135, 4143 (Feb. 19, 1985). Justice Blackmun wrote the majority opinion. The *Garcia* Court held that "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" was "unsound in principle and unworkable in practice." *Garcia*, 53 U.S.L.W. at 4140.

113. *SED*, 519 F. Supp. at 984.

114. *Id.* at 985.

115. 40 C.F.R. § 761.3 (1984).

116. *SED*, 517 F. Supp. at 985 n.5.

117. *Id.* The court's conclusion on this point, which differed from the position taken by the EPA, was correct. See *supra* notes 74-79 and accompanying text.

118. *SED*, 519 F. Supp. at 986-87. This conclusion is consistent with the EPA's interpretation that § 6(a)(6) implicitly is incorporated into § 6(e). Support Document, *supra* note 64, at 40-41.

119. The court rejected the EPA's initial position, see *supra* notes 63-70 and accompanying text, that state and local requirements respecting PCB disposal are not preempted as long as those requirements are more stringent than the federal rule. *SED*, 519 F. Supp. at 985-86. The court was dissatisfied with the agency's interpretation because it could find no literal statutory language supporting preemption of less restrictive state and local disposal requirements. Despite the limited nature of its dissatisfaction with the EPA's position, the court spurned the agency's interpretation in full—including the view that express preemption under § 18(a)(2)(B) simply does not govern the question of federal preemption of state and local disposal requirements. *Id.* at 986.

preemption provided by section 18 was, nonetheless, applicable to the storage ban. The court interpreted section 18(a)(2)(B) as being comprised of three separate parts. According to the court, the first part merely describes the administrative action that triggers express preemption: a rule or order prescribed under section 5 or section 6 for a chemical but not a rule imposing section 6(a)(6) disposal requirements. The second part of the subsection then defines the scope of express preemption: "[N]o State or political subdivision of a State may . . . establish or continue in effect, any requirement which is applicable to such substance or mixture . . . ." <sup>120</sup> The last part provides the three exceptions to express preemption for identical requirements, requirements adopted under other federal law, or prohibitions of certain uses. <sup>121</sup>

According to the court's interpretation, if the EPA had only promulgated the PCB disposal rule, express preemption would not have been "triggered." Since EPA also had promulgated other section 6 rules for the manufacture and use of PCBs, however, express preemption had been triggered, subject only to the three enumerated exceptions found in the last part of section 18(a)(2)(B). <sup>122</sup> The court noted that if Congress had desired to create an exception for PCB disposal requirements, it would have described the scope of express preemption in the second portion of section 18(a)(2)(B) in terms of activities as well as substances. <sup>123</sup> Moreover, since Congress could have added disposal requirements as a fourth enumerated exception to express preemption <sup>124</sup> but did not, the application of the maxim *expressio unius est exclusio alterius* suggested that local disposal requirements were not excepted from express preemption once section 18 preemption had been triggered. <sup>125</sup>

This interpretation directly contradicted Congress' intent. TSCA was designed to give states and localities more latitude in regulating disposal. <sup>126</sup> The *SED* court construed out of existence the language in sections 18(a)(2)(B) and 6(a)(6)(B) that exclude state and local disposal requirements from express preemption. <sup>127</sup>

120. *SED*, 519 F. Supp. at 987 (quoting TSCA § 18(a)(2)(B), 15 U.S.C. § 2617(a)(2)(B)).

121. *Id.*

122. *Id.*

123. *Id.* at 987-88. The *SED* court noted that Congress could have included language that provided: "[N]o State . . . may . . . establish . . . any requirement prohibiting or regulating manufacturing, processing, or distribution in commerce, which is applicable to such substance." *Id.* at 988 n.6.

124. *Id.* at 987-88.

125. *Id.* at 988 n.7.

126. *See infra* notes 213-19 and accompanying text.

127. After incorrectly holding that § 18(a)(2)(B) express preemption was applicable, the court addressed the city's claim that the ordinances were exempt from express preemption by virtue of § 18(a)(2)(B)(ii) because they had been adopted under the authority of the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982). The city argued that the ordinances were authorized by the Clean Water Act since they restricted the addition of pollutants to waters of the United States. *SED*, 519 F. Supp. at 988-89. Although *SED* did not plan to discharge PCBs, such a discharge was a possibility, albeit remote, whether by accident or an act of God. Thus, according to the court, the ordinances restricted "potential accidental 'discharges' under the terms of the [Clean Water Act]." *Id.* at 989.

The court recognized that it would create a "gaping hole" in the express preemption otherwise provided by [§ 18(a)(2)(B)] if it accepted the city's argument. *Id.* Local governments could claim

that virtually all local regulation concerning toxic substances furthers the purpose of the Clean Water Act in abating water pollution in some way, however far-fetched. Under this analysis, such actions thus would constitute "an exercise of local government power 'under authority of' the Clean Water Act." *Id.* The court, nonetheless, found that this interpretation of § 18(a)(2)(B)(ii) was consistent with congressional intent. *Id.*

Citing § 9 of TSCA, 15 U.S.C. § 2608, the court declared that Congress intended the EPA to use its authority under the Act only as a "last resort" with preference given to existing controls under other federal environmental legislation. *Id.* at 989-90. The court understood that the Dayton storage ban did not directly concern § 9 since the possible duplication of federal action was not involved. The court, however, believed that the intention to use TSCA only as a "last resort," in order to not unduly disrupt the existing environmental regulatory scheme, was carried over (or passed down) to the state level" via § 18(a)(2)(B)(ii)'s exception to preemption. *Id.* at 990. Thus, state regulation, otherwise preempted, is saved from preemption provided it "serves the purposes of other existing federal environmental legislation, even if only remotely or incidentally . . ." *Id.*

The court concluded that the Dayton storage ban furthered an objective of the Clean Water Act by preventing water pollution. *Id.* at 989-91. Furthermore, the court found that the Clean Water Act acknowledged the right of local governments to establish water pollution requirements that were no less stringent than federal requirements under the Clean Water Act. *Id.* at 990-91; *see also supra* note 106 (§ 510 of Clean Water Act expressly preserves such right). The court, therefore, held that § 18(a)(2)(B)(ii) excepted the storage ban from express preemption. *Id.* at 991.

This Article contends that § 18(a)(2)(B) confers no express preemptive effect on the PCB disposal rule. The court in *SED*, however, held otherwise and then committed another error in its subsequent application of § 18(a)(2)(B). It is necessary to analyze this error because some courts either may reject the thesis of this Article or may confront the problem of applying § 18(a)(2)(B) to rules or orders that fall within that subsection's scope—for example, federal rules concerning the manufacture or use of toxic substances.

The court's analysis completely misconstrued the impact of § 9 on the interpretation of § 18(a)(2)(B)(ii). Congress did not intend TSCA to be used only as a "last resort" for regulating PCB disposal; it expressly ordered the Administrator of the EPA to regulate PCB disposal under the authority of TSCA and to do so quickly. TSCA § 6(e)(1), 15 U.S.C. § 2605(e)(1). Moreover, § 9 does not require the Administrator to defer to other statutory authority administered by the EPA (such as the Clean Water Act) if the Administrator determines that "it is in the public interest to protect against such risk [to health or the environment posed by a chemical] by action taken under [TSCA]." TSCA § 9(b), 15 U.S.C. § 2608(b). The exercise of that discretion is not subject to judicial review. LEGISLATIVE HISTORY, *supra* note 89, at 698.

In enacting § 9 Congress sought to avoid duplication of effort and outright conflicts with other federal statutory schemes by simplifying and coordinating environmental protection as much as possible. LEGISLATIVE HISTORY, *supra* note 89, at 167, 179, 697. Nevertheless, Congress passed TSCA to fill a need that had not been met by existing federal environmental legislation. Even though the Clean Water Act, for example, could regulate the discharge of PCBs to waters of the United States, no legal structure existed to control comprehensively the manufacture, use, and land disposal of chemicals that posed a risk to health and the environment. The establishment of such control was the overriding purpose of TSCA. *See infra* notes 260-64 and accompanying text. TSCA, therefore, took a coordinate position among the preexisting federal environmental statutes.

In view of their coordinate positions, each federal environmental statute, including TSCA, should be viewed as occupying the core of its respective environmental field. The extension of one statute's authority into a field dominated by another statute might compromise the statutory scheme that Congress intended to apply in that core area. In addition, such intrusion would complicate effective compliance with the law. Consequently, if a local requirement were intended to regulate water pollution and did so, then out of regard for the purposes and policies of the Clean Water Act, that requirement should not be expressly preempted by virtue of § 18(a)(2)(B)(ii). On the other hand, if a local requirement were not related reasonably to the purposes of the Clean Water Act, then preemption of that requirement by TSCA would not constitute any disregard for the Clean Water Act. So construed, § 18(a)(2)(B)(ii) furthers Congress' intent to harmonize environmental law.

The *SED* court, however, did not attempt to harmonize TSCA's regulatory scheme with that of the Clean Water Act. The court emasculated TSCA out of misplaced, erroneous deference to the Clean Water Act. The storage of PCBs at the *SED* warehouse did not involve the discharge of PCBs into waters of the United States; thus, the Clean Water Act was not applicable directly to the situation. Even if Dayton's ordinances somehow represented the exercise of a local government's authority preserved by the Clean Water Act, the relationship between the ordinance and the federal statute was strained beyond reason. Although the Dayton ordinances someday might prevent the accidental

In *Chappell v. SCA Services, Inc.*<sup>128</sup> the United States District Court for the Central District of Illinois adopted a third approach in analyzing TSCA's impact on the validity of state and local law governing PCB disposal. *Chappell* was a class action brought on behalf of the residents of Wilsonville, Illinois. The residents sought damages for an alleged public and private nuisance created by a chemical waste landfill of SCA Services (SCA) located near Wilsonville.<sup>129</sup> The landfill served as a repository for various chemical substances including PCBs.<sup>130</sup> One issue was whether TSCA preempted a suit based on state nuisance law.<sup>131</sup>

SCA removed the case to federal district court, claiming that the district court had federal question jurisdiction because TSCA had preempted state law.<sup>132</sup> Plaintiffs moved to remand the case to state court,<sup>133</sup> but SCA resisted remand, arguing that the district court possessed jurisdiction on removal as a result of SCA's defense that TSCA had supplanted state nuisance law.<sup>134</sup> The court rejected SCA's proposition for two reasons. First, a defense of federal preemption provided no basis for removal jurisdiction because plaintiffs' claims were premised solely on state common-law nuisance.<sup>135</sup> Second, TSCA did not preempt state common-law nuisance actions regardless of whether a preemption defense conferred removal jurisdiction.<sup>136</sup>

After a detailed discussion of how TSCA related to state law, the court determined that the express preemptive effect that section 18 gives to certain EPA rules promulgated under TSCA does not extend to section 6(a)(6) rules relating to disposal of toxic chemicals.<sup>137</sup> According to the court, section

discharge of PCBs into waters of the United States, the likelihood of such an occurrence is remote. The court in essence elevated local requirements only peripherally concerned with clean water above the strong congressional interest in regulating toxic substances. Because TSCA's core area of regulation was involved directly and the Clean Water Act's field of concern was implicated only tangentially, if at all, the coordination of environmental regulation envisioned by Congress demanded preemption of the storage ban.

128. 540 F. Supp. 1087 (C.D. Illinois 1982).

129. *Id.* at 1089. In addition to SCA, plaintiffs sued James Andrews and Earthline Corporation. Andrews had created Earthline to operate the landfill and later sold Earthline to SCA. Plaintiffs sought compensatory damages from SCA for personal and property damages resulting from the maintenance of the nuisance. They also requested punitive damages from SCA on the grounds that it had acted with "reckless indifference" to plaintiffs' safety and had misrepresented to them the nature of the chemical wastes to be deposited at the landfill. Finally, plaintiffs sought compensatory and punitive damages based on the allegation that all three defendants had conspired to create and maintain the nuisance. *Id.* at 1089-90.

130. *Id.* at 1089. The landfill had been the subject of extensive prior litigation. The Village of Wilsonville had filed suit in state court requesting injunctive relief to abate a public nuisance allegedly caused by the landfill. See *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1, 6, 426 N.E.2d 824, 826-27 (1981). After a lengthy trial, the trial court concluded that the landfill constituted a nuisance. *Id.* at 6, 426 N.E.2d at 827. The decision was affirmed on appeal. 77 Ill. App. 3d 618, 396 N.E.2d 552 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

131. *Chappell*, 540 F. Supp. at 1096.

132. *Id.* at 1090, 1094-95.

133. *Id.* at 1089.

134. See *id.* at 1095.

135. *Id.* at 1095-96. The court noted that many cases had reached a contrary conclusion. *Id.* at 1095 n.3.

136. *Id.* at 1096.

137. *Id.* at 1096-97. The court did not have to analyze § 18 in such depth, however, because

6(a)(6)(B) lends additional support to this conclusion by expressly providing that federal disposal rules may not require anyone to violate state law or requirements.<sup>138</sup> The court, moreover, found its conclusion consistent with the EPA's published interpretation<sup>139</sup> that state requirements governing PCB disposal were not preempted as long as those requirements were no less stringent than the federal rules.<sup>140</sup> This result contrasts sharply with *SED*, in which the court rejected the EPA's interpretation. In *SED* the court held that once express preemption is triggered by a section 5 or a section 6 rule—other than a section 6(a)(6) disposal rule—all state and local requirements are expressly preempted, including disposal requirements.<sup>141</sup> Recognizing this conflict with *SED*, the *Chappell* court indicated that it would defer to the EPA's interpretation when its interpretation was as reasonable as any other.<sup>142</sup> The exclusion of disposal rules from the preemption scheme contained in section 18 thus was held to be absolute.<sup>143</sup>

*Warren County v. State of North Carolina*<sup>144</sup> was the first decision to confront the consequences of a total ban on PCB disposal. The case illustrates the conflict between local fear and the need for safe and regulated disposal sites for PCBs. It also represents the clearest and most accurate judicial interpretation of Congress' purposes in drafting TSCA.

During the summer of 1978, liquid wastes containing PCBs were spilled

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§ 18 only preempts certain state regulatory requirements. Thus, it does not apply to state common-law remedies.

138. *Id.* at 1098.

139. *See supra* notes 63-70 and accompanying text.

140. *Chappell*, 540 F. Supp. at 1098.

141. *SED*, 519 F. Supp. at 986-88. This conclusion in *Chappell* also conflicts with the decision in *City of Middletown*, slip. op. at 24-26.

142. *Chappell*, 540 F. Supp. at 1098.

143. *See id.* The court also looked to the citizen suit provision of TSCA for guidance in determining that TSCA does not preempt state common-law nuisance actions. *Id.* at 1098-1100. The citizen suit provision grants standing to "any person" who commences a suit in federal district court seeking to restrain violations of TSCA and its regulations and to compel the Administrator to perform mandatory duties under the Act. TSCA § 20(a), 15 U.S.C. § 2619(a). The provision also states in a subsection commonly known as the "savings clause" that it does not restrict any right a person might have to seek enforcement of TSCA or other relief under any other statute or under the common law. TSCA § 20(c)(3), 15 U.S.C. § 2619(c)(3). A straightforward reading of the citizen suit provision, therefore, indicates that state common-law remedies are available unless preempted by another provision of TSCA. Because such preemption is not otherwise prescribed by the Act, the court ruled that TSCA did not preclude suits seeking damages for state common-law nuisance. *See Chappell*, 540 F. Supp. at 1099-1100.

In doing so, the court found that the Supreme Court's decision in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), did not compel a different result. *Chappell*, 540 F. Supp. at 1099. In *Milwaukee* the State of Illinois had sued the city of Milwaukee, under the federal common law of nuisance, to abate interstate water pollution. *Milwaukee*, 451 U.S. at 308-10. Despite a "savings clause" in the Clean Water Act similar to TSCA's, the Supreme Court held that the regulatory program established by the Clean Water Act was so comprehensive that it had supplanted the need for a federal common law of nuisance. *Milwaukee*, 451 U.S. at 317. The *Chappell* court found that holding inapposite to the *Chappell* facts. *Chappell*, 540 F. Supp. at 1099. First, although the "savings clause" of the Clean Water Act meant that the citizen suit provision did not revoke the federal common law of nuisance, the other provisions of that Act did supplant it. In *Chappell*, however, the other provisions of TSCA did not preempt this state cause of action. *See id.* Furthermore, the Supreme Court's decision was limited solely to whether a federal statute had preempted federal common law; it did not address the availability of relief under state common law. *Id.*

144. 528 F. Supp. 276 (E.D.N.C. 1981).

illegally along approximately 210 miles of highway in North Carolina. After conducting an investigation which determined that the soil along those highways contained high concentrations of PCBs, the State of North Carolina prepared a plan for the collection and disposal of the contaminated soil in a landfill. The State chose a site in Warren County and submitted an application to the Regional Administrator of the EPA for approval of the landfill pursuant to TSCA.<sup>145</sup> The EPA convened a public hearing in Warren County following receipt of the application. Oral comments were made and addressed, and written comments were accepted. After the State submitted further data, the EPA approved the conceptual design for the landfill in June 1979.<sup>146</sup>

Warren County instituted suit in state court to enjoin North Carolina and the owners of the landfill site from using the site for PCB disposal.<sup>147</sup> The county argued that the landfill would violate a county ordinance banning the disposal of PCBs in Warren County.<sup>148</sup> The state court issued a preliminary injunction restraining PCB disposal at the proposed site,<sup>149</sup> and the case was removed to federal district court<sup>150</sup> after the Regional Administrator of the EPA was added as a defendant.<sup>151</sup>

In ruling on defendants' motions for summary judgment,<sup>152</sup> the district court addressed the validity of the county ordinance.<sup>153</sup> The county contended that its ordinance was not preempted by TSCA by virtue of section 6(a)(6)(B), which states that federal disposal rules may not require anyone to act in violation of any state or local law or requirement.<sup>154</sup> The county also asserted that section 18(a)(2)(B)(ii) expressly authorized it to prohibit the *use* of PCBs.<sup>155</sup>

The county's arguments were contradictory. If section 6(a)(6)(B) applied

145. *Id.* at 281.

146. *Id.*

147. *Id.* at 280. A number of state officials also were named as defendants. *Id.*

148. *Id.* The county also challenged the landfill on the basis of nuisance, failure to prepare a state Environmental Impact Statement (EIS), the propriety of the State's choice of the landfill site, and the EPA's approval of it. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* The complaint was amended at that time to add a claim grounded on the EPA's failure to prepare a federal EIS. *Id.*

152. *Id.* at 280-81.

153. *Id.* at 288-90. The ordinance provided:

WHEREAS, polychlorinated biphenyls, (hereinafter referred to as PCB's) are highly toxic substances, which are imminently dangerous to human health and life and are widely distributed in the environment; and . . .

WHEREAS, Warren County is peculiarly unsuited for the disposition of PCB's because there is a generally high ground water table in the county and most of the soils of the county are highly permeable, so that there is a substantial likelihood that if stored or disposed of in the county, PCB's would eventually seep into the ground water supply, where they would constitute an extreme danger to human health and life; . . .

BE IT NOW THEREFORE enacted and ordained by the County of Warren that . . .

No PCB's, or substances or materials containing a measurable amount (other than a trace) of PCB's shall be stored, dumped, or otherwise disposed of within the boundaries of Warren County.

Warren County, N.C., Ordinance Prohibiting the Storage and Disposal of PCB's (Aug. 21, 1978).

154. *Warren County*, 528 F. Supp. at 288.

155. *See id.* at 288-89.

to the EPA's disposal rule, the express preemption of section 18 would not apply. Moreover, even assuming that section 18 applied, the exception to express preemption for use bans<sup>156</sup> could not sanction a disposal ban. The statute clearly distinguishes between rules relating to the use of a chemical and rules governing disposal of the chemical.<sup>157</sup> The court, however, discussed neither the inherent contradiction of plaintiff's argument nor the inapplicability of the section 18(a)(2)(B)(ii) exception.<sup>158</sup>

Instead, the court apparently assumed that local PCB disposal rules were not preempted expressly by section 18 and were authorized, to a certain extent, by section 6(a)(6)(B).<sup>159</sup> According to the court, Congress intended state and local governments to retain "some leeway to impose more stringent disposal requirements than those provided for by federal regulation."<sup>160</sup> The question, however, was whether "Congress intended to confer upon counties and other local governments the authority to totally frustrate the PCB disposal program through the implementation of total disposal bans."<sup>161</sup>

To answer this question the *Warren County* court reviewed the EPA's position presented in the preamble to the May 1979 revised PCB disposal rule.<sup>162</sup> In that rulemaking, the EPA expressed its concern that PCB disposal prohibitions could impede the national goal of safely disposing of PCBs.<sup>163</sup> Apparently, the Jellinek Memorandum of March 1980<sup>164</sup> also was consulted, for the court characterized the EPA's interpretation of TSCA as authorizing only state and local disposal requirements that were consistent with national objectives.<sup>165</sup> In other words, TSCA does not preempt local requirements "reasonably dictated by local [geological] or other physical conditions."<sup>166</sup>

After reviewing this material, the court held that the supremacy clause of the Constitution prohibited a county from enacting an ordinance that totally frustrated a congressionally legislated plan to protect the nation.<sup>167</sup> Recognizing the impact that upholding such a local ban would have, the court noted:

Were the Court to approve this ordinance, no doubt the other ninety-nine counties in North Carolina would quickly enact identical bans. What, then, would North Carolina do with the PCB laced soil? Surely our neighbors in Virginia and Tennessee, South Carolina and Georgia

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156. TSCA § 18(a)(2)(B)(ii), 15 U.S.C. § 2617(a)(2)(B)(ii).

157. Compare TSCA § 6(a)(5), 15 U.S.C. § 2605(a)(5) (authorizing rules for the commercial use of chemical substances) and TSCA § 6(e)(2), 15 U.S.C. § 2605(e)(2) (mandating rules applicable to the use of PCBs) with TSCA § 6(a)(6), 15 U.S.C. § 2605(a)(6) (authorizing rules for the disposal of chemical substances) and TSCA § 6(e)(1)(A), 15 U.S.C. § 2605(e)(1)(A) (mandating rules for the disposal of PCBs).

158. See *Warren County*, 528 F. Supp. at 288-90.

159. See *id.* at 288-89.

160. *Id.* at 289.

161. *Id.*

162. See *supra* notes 71-73 and accompanying text.

163. *Warren County*, 528 F. Supp. at 289.

164. Jellinek Memorandum, *supra* note 80.

165. *Warren County*, 528 F. Supp. at 289.

166. *Id.*

167. *Id.* at 289-90.



would also object to our carrying such wastes into their states.<sup>168</sup>

Consequently, the court held the ordinance void "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Toxic Substances Control Act . . . ."<sup>169</sup>

The court reached the correct result, and its analysis, for the most part, was perceptive, but it adhered too closely to the EPA's position<sup>170</sup> that all disposal bans necessarily are void. A few locations in the United States may be inappropriate for safe PCB disposal because of unique local geographic or physical conditions; in those settings a local ban to guarantee safe disposal is justified.<sup>171</sup>

Recognizing that many, but not necessarily all, disposal bans frustrate TSCA would not have affected the court's holding that the ordinance in question was void. In *Warren County* the county failed to prove that a ban was necessary as a matter of safety. Unsupported conclusions recited in the ordinance regarding high groundwater and permeable soil conditions did not constitute an adequate showing; every other county in North Carolina easily could do likewise. Moreover, the county failed to demonstrate that EPA's approval of the landfill site was arbitrary or capricious on scientific and technical grounds.<sup>172</sup> Consequently, Warren County's ordinance hindered safe PCB disposal insofar as it bore no relation to special local conditions that would have justified a ban.

The dispute over the effect of the federal PCB disposal rule on state law surfaced most recently in *Chemical Waste Management, Inc. v. Broadwater*.<sup>173</sup> Chemical Waste Management (CWM) operates a chemical waste landfill near Emelle, Alabama, which has been approved by the EPA for the disposal of PCBs.<sup>174</sup> In January 1984 the EPA began an administrative action against CWM alleging that it had violated regulations governing PCB storage<sup>175</sup> by failing to remove certain PCBs from storage and dispose of them within the requi-

168. *Id.* at 290.

169. *Id.* The court dismissed as moot the action against the landowners and the Treasurer of North Carolina because the State already had purchased the landfill site. *Id.* at 280 n.4. In addition, the court granted summary judgment for the State and the EPA on all other counts of the complaint. *Id.* at 296.

In *Twitty v. North Carolina*, 527 F. Supp. 778 (E.D.N.C. 1981), *aff'd*, 696 F.2d 992 (4th Cir. 1982), three Warren County citizens who owned land adjacent to the disposal site also sued the State and the EPA seeking to enjoin use of the site for PCB disposal. They alleged, in part, that the disposal of PCBs would violate the Warren County ordinance. *Id.* at 780. On the same day that the district court rendered its decision in *Warren County*, the same court granted summary judgment for defendants in *Twitty*, holding that the ordinance was preempted by TSCA. *See id.* at 781.

170. *See supra* notes 80-88 and accompanying text.

171. *See supra* text accompanying notes 89-92. Since disposal bans could frustrate the national goal of safe disposal so easily, such bans should be scrutinized closely to determine if some unique local condition justifies the ban. *See infra* text accompanying note 274.

172. *Warren County*, 528 F. Supp. at 287-88.

173. No. CV 84-G-1208-W (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction), *order modified in part*, (Sept. 17, 1984) (order granting modification of preliminary injunction), *appeal dismissed as moot*, 758 F.2d 1538 (11th Cir. 1985).

174. *Id.* at 1, 7.

175. PCBs must be disposed of within one year after they are stored. 40 C.F.R. § 761.65(a) (1984).

site time period.<sup>176</sup> The EPA and CWM subsequently entered into a consent agreement that set forth a schedule for the disposal of those PCBs. The agreement also stipulated penalties for noncompliance.<sup>177</sup> The Alabama Department of Environmental Management (ADEM) apparently was not pleased by the terms of that agreement.

Three months after the consent agreement was signed, ADEM issued its own order against CWM based on violations of state regulations<sup>178</sup> that essentially incorporated the TSCA storage requirements.<sup>179</sup> The state order required CWM to submit a plan for the disposal of all PCB articles and containers stored at its facility, file progress reports on its disposal plan, and cease receiving any additional PCBs at its Emelle facility until it had complied with the storage rule.<sup>180</sup> The order thus prohibited, at least temporarily, the disposal of further PCBs at the landfill.

CWM filed suit to overturn the state order<sup>181</sup> and also sought a preliminary injunction to prevent its enforcement.<sup>182</sup> In support of its request for preliminary relief, CWM argued that the state order was preempted by the federal disposal rule promulgated under TSCA.<sup>183</sup> The United States District Court for the Northern District of Alabama issued the preliminary injunction, finding that CWM likely would prevail on the merits of its preemption argument.<sup>184</sup>

Notwithstanding congressional intent,<sup>185</sup> the agency's interpretation,<sup>186</sup> and the analysis of three other federal courts,<sup>187</sup> the court held that the PCB disposal rule, unlike section 6(a)(6) disposal rules, was not excluded from section

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176. *In re* Chemical Waste Management, Inc., TSCA Docket No. 84-H-03, at 2 (EPA March 23, 1984) (consent agreement and compliance schedule).

177. *Id.* at 4-10. Before a consent agreement will dispose of an administrative proceeding, it must be approved by the Regional Administrator (or an EPA judicial officer, 40 C.F.R. § 22.04 (1984)) in the form of a consent order. 40 C.F.R. § 22.18(c) (1984).

This particular consent agreement never was approved. After the Attorney General of Alabama intervened in the administrative proceeding, the matter was referred to an administrative law judge. *In re* Chemical Waste Management, Inc., TSCA Docket No. 84-H-03, at 8 (EPA Dec. 19, 1984) (consent agreement and order). The EPA, CWM, and the Alabama Attorney General entered into a new consent agreement on December 19, 1984 establishing, among other things, a schedule for disposal, a \$300,000 TSCA civil penalty, and stipulated penalties in the event of noncompliance. *Id.* at 8-11, 31-33. The latest consent agreement was approved by the administrative law judge. *Id.* at 39.

178. Ala. Dept. of Pub. Health, Envtl. Health Admin., Div. of Solid and Hazardous Waste, Hazardous Waste Management Regulations, § 4-235.06 (1980).

179. *In re* Chemical Waste Management, Inc., Order No. 84-012-RW (ADEM April 16, 1984).

180. *Id.* at 3-5.

181. Verified Complaint for Declaratory and Injunctive Relief, Chemical Waste Management, Inc. v. Broadwater, No. CV 84-G-1208-W (N.D. Ala. May 11, 1984).

182. Motion for Preliminary Injunction, Chemical Waste Management, Inc. v. Broadwater, No. CV 84-G-1208-W (N.D. Ala. May 11, 1984).

183. Chemical Waste Management, Inc. v. Broadwater, No. CV 84-G-1208-W at 4 (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction).

184. *Id.*

185. See *infra* notes 210-53 and accompanying text.

186. See *supra* notes 63-70 and accompanying text.

187. See *Chappell*, 540 F. Supp. at 1096-98; *Warren County*, 528 F. Supp. at 288-90; *SED*, 519 F. Supp. at 986-87.

18(a)(2)(B) preemption because the PCB rule was adopted under section 6(e).<sup>188</sup> Thus, the court adopted the analysis that had caused the court in *City of Middletown*<sup>189</sup> incorrectly to examine the question as one of express preemption under section 18(a)(2)(B). None of the exceptions to section 18(a)(2)(B) preemption was available: the state's order was not adopted under the authority of another federal law; it did not prohibit use of PCBs in Alabama; and it was not identical to federal requirements under TSCA because the order exceeded the scope of the federal storage rule by prohibiting the further receipt of PCBs at Emelle, pending compliance. As a result, the court declared that the state action could not escape express preemption under section 18(a)(2)(B).<sup>190</sup>

In the alternative, the court found that the state's temporary prohibition on the disposal of further PCBs conflicted with federal law.<sup>191</sup> Relying on *Warren County*, the court concluded that the state order "completely frustrates the national goal that the public and the environment be protected from the harmful effects of PCBs through uniform federal regulations."<sup>192</sup>

The ban imposed by ADEM was invalid unless the state agency could have justified it on the basis of a unique local geological or other physical condition that presented a safety hazard.<sup>193</sup> The case, however, illustrates a situation in which less drastic state enforcement measures could survive as long as courts properly hold that the section 6(a)(6) exception from express preemption also applies to the section 6(e) PCB disposal rule.<sup>194</sup> Contrary to the court's implication that uniform federal standards must prevail,<sup>195</sup> Congress envisioned a more flexible approach in the case of disposal. In view of that intent, states should not be prevented from imposing stiffer civil penalties or more stringent compliance schedules than the EPA does. Congress expressly permitted more stringent state requirements as long as those requirements do not frustrate the goal of safe PCB disposal.<sup>196</sup>

Analysis of the cases makes clear that the courts have not developed a uniform approach to this preemption question. Both the *City of Middletown* and the *Chemical Waste Management* courts believed that section 18(a)(2)(B) expressly preempted state and local law dealing with PCB disposal because the federal PCB disposal rule was not excluded specifically from the ambit of section 18(a)(2)(B) preemption.<sup>197</sup> The court in *SED* rejected that analysis only to find

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188. *Chemical Waste Management, Inc. v. Broadwater*, No. CV 84-G-1208-W at 6 (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction).

189. No. 33133, slip op. at 25-26 (Sup. Ct. Middlesex Jud. Dist. Conn. Jan. 22, 1981).

190. *See* *Chemical Waste Management, Inc. v. Broadwater*, No. CV 84-G-1208-W at 6 (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction).

191. *Id.* at 7.

192. *Id.*

193. *See infra* text accompanying note 274.

194. *See infra* notes 210-53 and accompanying text.

195. *Chemical Waste Management, Inc. v. Broadwater*, No. CV 84-G-1208-W at 7 (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction).

196. *See infra* text accompanying notes 266-67.

197. *Chemical Waste Management, Inc. v. Broadwater*, No. CV 84-G-1208-W at 4-6 (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction); *City of Middletown*, slip op. at 24-26.

that section 18(a)(2)(B)'s express preemption was applicable to PCB disposal since other federal PCB rules had "triggered" its operation.<sup>198</sup> On the other hand, the courts in *Chappell* and *Warren County* determined that section 18(a)(2)(B) did not expressly preempt state or local law pertaining to PCB disposal.<sup>199</sup> *Warren County* went a step further, however, and held that a local ban on PCB disposal was preempted impliedly due to its frustration of the overall purpose of TSCA.<sup>200</sup> In short, the cases provide no consistent analytical basis to determine whether a particular state or local law that prohibits or restricts PCB disposal is preempted.

### III. THE EXTENT OF FEDERAL PREEMPTION OVER THE DISPOSAL OF PCBs

The relationship of the federal PCB program to state and local law is controlled by the doctrine of preemption, which is a significant aspect of federalism.<sup>201</sup> Congress may preempt state law by an explicit statutory declaration to that effect;<sup>202</sup> in the absence of specific statutory language, however, preemption also may be implied when it is implicit in the "structure and purpose" of the statute.<sup>203</sup> Implied preemption occurs either when Congress clearly has created a federal regulatory structure "so pervasive" that it leaves "no room for the States to supplement it" or when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>204</sup> Even when Congress has not expressly or impliedly foreclosed state or local law altogether, state or local regulation is invalid "to the extent

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198. *SED*, 519 F. Supp. at 986-88.

199. *Chappell*, 540 F. Supp. at 1096-98; *Warren County*, 528 F. Supp. at 288-89.

200. *Warren County*, 528 F. Supp. at 289-90. The district court in *Chemical Waste Management* also determined that a state ban on PCB storage obstructed the intent of TSCA. *Chemical Waste Management, Inc. v. Broadwater*, No. CV 84-G-1208-W at 7 (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction).

201. See generally Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 623-24 (1975) (an important judicial mechanism for shaping governmental authority within the federal system).

The doctrine arises from the supremacy clause of the Constitution, which states that the Constitution and laws of the United States shall be the supreme law of the land. U.S. CONST. art. VI, cl. 2. The invalidation of a state statute because it conflicts with a federal statute represents an application of the preemption doctrine that is grounded on this constitutional foundation. *Swift & Co. v. Wickham*, 382 U.S. 111, 125 (1965); see *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). The commerce clause of the Constitution, U.S. CONST. art. I, § 8, cl. 3, also may restrict the ability of state and local governments to regulate PCBs. For example, a state law that interferes with the flow of commerce may be held invalid in certain situations. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-29 (1977) (invalidating a New Jersey statute that prohibited the importation of most liquid or solid waste that originated or was collected outside of New Jersey). This Article, however, is exclusively concerned with the preemption of state and local law by TSCA and its regulatory scheme.

202. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

203. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

204. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); accord *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Congressional intent to preempt, however, must be "clear and manifest." *Rice*, 331 U.S. at 230.

that it actually conflicts with federal law."<sup>205</sup> Such a conflict exists when compliance with both federal and state or local law is physically impossible<sup>206</sup> or when state or local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>207</sup>

### A. Express Preemption

For the most part, TSCA is an exclusively federal program; Congress expressly preempted states and localities from performing a major role in most of the regulatory functions. With a few exceptions, once the Administrator of the EPA promulgates regulatory restraints to protect against an unreasonable risk of harm from the manufacture, processing, distribution, or use of a particular chemical, state and local governments are barred from regulating that chemical against the same risk. Unlike the other major federal environmental statutes,<sup>208</sup> TSCA does not exclude more stringent state regulation from the scope of this preemption. States that adopt more stringent programs must obtain the permission of the Administrator to escape preemption.<sup>209</sup>

TSCA, however, does not preempt expressly any form of state or local regulatory action pertaining to the disposal of PCBs. This conclusion may seem to ignore the language in section 18(a)(2)(B)<sup>210</sup> that expressly preempts most state and local law that is inconsistent with federal rules issued under section 6 (except for section 6(a)(6) disposal rules). Because the PCB disposal rule was promulgated under section 6(e)(1) rather than section 6(a)(6),<sup>211</sup> two courts have found that section 18(a)(2)(B)'s express preemption language applies to the federal PCB disposal rule.<sup>212</sup> Nevertheless, such a literal reading of the statutory text fails to implement the scheme envisioned by Congress when it enacted this complex legislation.

The Senate version of TSCA did not contain an exclusion from section 18(a)(2)(B) preemption for section 6(a)(6) disposal rules;<sup>213</sup> its genesis was in the

205. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); accord *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

206. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); accord *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

207. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); accord *DeCanas v. Bica*, 424 U.S. 351, 363 (1976); *Perez v. Campbell*, 402 U.S. 637, 649 (1971). For a comprehensive examination of preemption, see Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515; see also Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392 (1976) (federal preemption of state legislation concerning nuclear power).

208. The Clean Water Act, the Clean Air Act, and RCRA explicitly preempt state requirements that are weaker than federal requirements, but do not expressly preempt more stringent state requirements. Clean Water Act § 510, 33 U.S.C. § 1370 (1982); RCRA § 3009, 42 U.S.C. § 6929 (1982); Clean Air Act § 116, 42 U.S.C. § 7416 (1982); see J. BONINE & T. MCGARITY, *THE LAW OF ENVIRONMENTAL PROTECTION* 364 (1984).

209. TSCA § 18, 15 U.S.C. § 2617.

210. TSCA § 18(a)(2)(B), 15 U.S.C. § 2617(a)(2)(B).

211. 43 Fed. Reg. 7150 (1978).

212. *Chemical Waste Management, Inc. v. Broadwater*, No. CV 84-G-1208-W at 4-6 (N.D. Ala. May 24, 1984) (mem. to order granting preliminary injunction); *City of Middletown*, slip op. at 24-26.

213. LEGISLATIVE HISTORY, *supra* note 89, at 286-87.

House bill that was reported by the Committee on Interstate and Foreign Commerce.<sup>214</sup> The Committee indicated that the exclusion in section 18(a)(2)(B) recognized "the traditional role of the State and local governments in providing for the protection of their citizens."<sup>215</sup> The language inserted by the House Committee in section 6(a)(6)(B) reinforced this exclusion from TSCA's express preemption provision. Mindful of "the inherent interests of the States and political subdivisions respecting disposal of hazardous chemicals within their jurisdiction,"<sup>216</sup> the Committee restricted the Administrator of the EPA to impose "only those disposal requirements which do not violate any law of a State or a political subdivision of a State."<sup>217</sup> The full House passed the bill containing the Committee's language in both sections 6 and 18<sup>218</sup> with only a minor alteration in the wording of section 6(a)(6)(B).<sup>219</sup>

The House Committee bill contained no provision specifically requiring the EPA to take action to control PCBs;<sup>220</sup> Representatives Dingell and Gude offered an amendment on the House floor to add section 6(e) to the bill.<sup>221</sup> The proposed amendment was criticized by several representatives who contended that one particular chemical should not be singled out for action.<sup>222</sup> Representative Dingell, however, stated that it was "entirely proper for Congress to set priorities for action in any piece of legislation" and that control of PCBs should be given such prompt attention.<sup>223</sup> He explained that the following "perils" of PCBs to humans were well known: "[PCBs can cause] numbness and pain in the extremities, reduced sensitivity to pain and/or heat, slowed nervous reaction, acne-like skin eruption, temporary failure of eyesight, sense of weakness and cancer of the liver."<sup>224</sup> Moreover, the presence of PCBs in the environment is ubiquitous; according to Representative Dingell, PCBs are found in fish, cattle, fowl, and mother's milk.<sup>225</sup> Because PCBs do not degrade readily and do accumulate in the food chain,<sup>226</sup> Representative Dingell implied that the dangers

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214. *Id.* at 380-81, 461.

215. *Id.* at 461.

216. *Id.* at 440.

217. *Id.* at 440-41.

218. *Id.* at 642, 655.

219. *Id.* at 579.

220. *Id.* at 297-405.

221. *Id.* at 580-81.

222. *Id.* at 582-84 (remarks of Representative McCollister); *id.* at 585-86 (remarks of Representative Eckhardt).

223. *Id.* at 509.

224. *Id.* at 508. See generally NAT'L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, CRITERIA FOR A RECOMMENDED STANDARD: OCCUPATIONAL EXPOSURE TO POLYCHLORINATED BIPHENYLS (PCBs) 27-125 (DHEW (NIOSH) Pub. No. 77-225, 1977) (lengthy treatment of the biologic effects of exposure to PCBs).

225. LEGISLATIVE HISTORY, *supra* note 89, at 581; see EPA, PCB MANUFACTURING, PROCESSING, DISTRIBUTION IN COMMERCE AND USE BAN REGULATION, PROPOSED RULE—SUPPORT DOCUMENT/VOLUNTARY DRAFT ENVIRONMENTAL IMPACT STATEMENT 28-29 (1978) (describing the widespread distribution of PCBs).

226. LEGISLATIVE HISTORY, *supra* note 89, at 581-82; see 42 Fed. Reg. 6532, 6538-41 (1977) (detailed description of the persistence of PCBs and their tendency to accumulate in the environment).

posed by PCB contamination would multiply unless speedily checked.<sup>227</sup> The amendment was passed on the strength of this kind of argument.<sup>228</sup>

The Senate bill reported by the Committee on Commerce, like the House Committee bill, required no specific measures to control PCBs.<sup>229</sup> Senator Nelson, however, sponsored an amendment on the Senate floor to add section 6(e) requiring the EPA to regulate PCBs in an expeditious manner.<sup>230</sup> The amendment was adopted,<sup>231</sup> and the Senate bill that was sent to conference contained no exclusion from section 18(a)(2)(B) preemption for section 6(a)(6) disposal rules.<sup>232</sup>

The conference combined the Senate and House versions of section 6(e), resulting in a final text that retained elements of each.<sup>233</sup> The House conferees prevailed on the issue of excluding disposal rules from express preemption. Thus, the substitute bill included the House language excluding section 6(a)(6) disposal rules from the ambit of section 18(a)(2)(B) preemption.<sup>234</sup> The substitute also contained section 6(a)(6)(B) as drafted in the House.<sup>235</sup> Neither the conference report<sup>236</sup> nor the House<sup>237</sup> and Senate<sup>238</sup> floor considerations of the conference report discussed either why the Senate accepted the House language or the implications for the PCB disposal rule. The conference substitute was passed by both houses<sup>239</sup> and was signed into law.<sup>240</sup> Consequently, whatever light the legislative history sheds on the intended relationship between the PCB disposal rule and section 6(a)(6) must be found in the action of the House.

The House action reveals that it would be tenuous, at best, to assume that Congress intended to create a dichotomous situation in which the PCB disposal rule would have express preemptive effect while other disposal rules would lack such effect. This conclusion is compelled by several indications that the House intended to treat the PCB disposal rule like a section 6(a)(6) disposal rule for preemption purposes. Thus, TSCA should not expressly preempt state or local PCB disposal requirements that conflict with the federal rule.

Representative Dingell, who cosponsored the PCB amendment in the House, realized that section 6(e) was unique in mandating regulatory action for one specific chemical.<sup>241</sup> He apparently resolved this incongruity with section 6(a)'s more general regulatory scheme by treating section 6(e) as a form of spe-

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227. See LEGISLATIVE HISTORY, *supra* note 89, at 581-82.

228. *Id.* at 590.

229. *Id.* at 57-154.

230. *Id.* at 233-34.

231. *Id.* at 240.

232. LEGISLATIVE HISTORY, *supra* note 89, at 286-87.

233. LEGISLATIVE HISTORY, *supra* note 89, at 690; *compare id.* at 279 (Senate version) and *id.* at 645 (House version) with *id.* at 25 (final bill).

234. *Compare id.* at 644 (House version) with *id.* at 38-39 (final bill).

235. *Id.* at 688; *compare id.* at 642 (House version) with *id.* at 21 (final bill).

236. *Id.* at 688-90, 707-08.

237. *Id.* at 741-54.

238. *Id.* at 721-41.

239. *Id.* at 740.

240. *Id.* at 53.

241. *Id.* at 509.

cific regulation falling within the general framework of section 6(a). "This amendment defines PCB's to be bad, hazardous, and dangerous, and it mandates a program for their gradual removal . . ." <sup>242</sup> In essence, the House made a section 6(a) type of determination that PCBs presented "an unreasonable risk of injury to health or the environment" <sup>243</sup> that necessitated the imposition of certain restraints authorized by section 6(a). In other words, section 6(e) merely established a priority for EPA action that would guarantee the prompt regulatory restraints envisioned in section 6(a). <sup>244</sup>

The House also demonstrated its intent when it excluded section 6(a)(6) disposal rules from express preemption under section 18 and drafted section 6(a)(6)(B) to acknowledge that fact. The House Committee that reported TSCA stated that excluding disposal from express preemption recognized both the "traditional role" of state and local governments in protecting their citizens and their "inherent interests" concerning the disposal of toxic waste. <sup>245</sup> Thus, the limitation on express preemption not only is embodied in TSCA, but it also represents a broad policy decision to allow state and local governments some control over the siting of disposal facilities within their borders.

If the House had intended to carve out an exception to this clearly expressed policy in the case of PCB disposal, some discussion of that intent would be expected during the course of legislative consideration. Such discussion especially was likely since TSCA, as drafted by the House Committee, <sup>246</sup> would have given no express preemptive effect to any PCB disposal rule under section 6(a)(6). The legislative history, however, provides no indication that the House intended to give the PCB disposal rule special treatment with regard to express preemption. <sup>247</sup> On the other hand, after section 6(e) was grafted onto the House version of section 6, <sup>248</sup> Representative Broyhill, one of TSCA's sponsors, stated, "[T]here is nothing in this act that affects the right of States to act in their authority over disposal of hazardous . . . chemicals . . ." <sup>249</sup> The authors of section 6(e) did not contradict him. <sup>250</sup>

It is not difficult to explain why section 18(a)(2)(B) contains no language excluding the PCB disposal rule from express preemptive effect: The section 18(a)(2)(B) exclusion language was drafted in committee, <sup>251</sup> whereas the specific PCB provision, section 6(e), was added on the floor. <sup>252</sup> Consequently, it is not

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242. LEGISLATIVE HISTORY, *supra* note 89, at 582.

243. TSCA § 6(a), 15 U.S.C. § 2605(a).

244. See LEGISLATIVE HISTORY, *supra* note 89, at 508-09.

245. *Id.* at 440, 461. Regardless of whether the Committee was referring to the traditional responsibility of states and localities for land-use planning or the primary responsibility of state and local governments to protect human health, it is plain that the House endorsed the rationale. See *supra* notes 218-19 and accompanying text.

246. LEGISLATIVE HISTORY, *supra* note 89, at 297-405.

247. *Id.* at 580-626, 667-719, 741-54.

248. *Id.* at 590.

249. *Id.* at 626.

250. *Id.*

251. See *supra* note 214 and accompanying text.

252. See *supra* notes 220-28 and accompanying text.



surprising that section 18(a)(2)(B)'s exclusion language does not anticipate the promulgation of a PCB disposal rule under section 6(e) rather than section 6(a)(6). In view of the legislative history, it must be assumed that Congress either inadvertently failed to change the relevant language in section 18(a)(2)(B) after section 6(e) was added, or believed that the generic limitation applicable to disposal rules would apply by implication to the PCB disposal rule.

The legislative history demonstrates that Congress did not intend to give express preemptive effect to any disposal rule. Therefore, mechanistic application of section 18(a)(2)(B) preemption to the federal PCB disposal rule would usurp congressional power and result in the "destruction of the legislative purpose."<sup>253</sup> That legislative purpose, not a literal interpretation of TSCA, should be given expression by the courts.

### B. Implied Preemption

Congress' refusal to give broad preemptive effect under section 18 to the federal PCB disposal rule was an acknowledgement that states and localities have an important role to play in the location and operation of toxic waste disposal facilities.<sup>254</sup> Nevertheless, that role is not unlimited because Congress set out to achieve certain well-defined goals, such as the safe and proper disposal of toxic chemicals like PCBs.<sup>255</sup> As a result, the role of state and local governments in the disposal of PCBs is limited by implication to situations in which their actions do not frustrate this fundamental goal of TSCA.

Two basic limitations must be inferred to preserve TSCA's integrity. First, Congress ordered the Administrator of the EPA to establish disposal methods for PCBs<sup>256</sup> to prevent unreasonable risk of harm to health or the environment.<sup>257</sup> Giving effect to less stringent disposal methods obviously would compromise the goal of safe PCB disposal; consequently, less stringent state or local PCB disposal requirements are preempted by implication. As Congress intended,<sup>258</sup> however, states and local governments retain the flexibility to impose more stringent disposal requirements than those established by the EPA. A logical limit to more stringent state or local requirements must exist, nonetheless, because safe disposal of PCBs depends on the the availability of facilities at which PCBs may be properly disposed. The imposition of a disposal ban or requirements so severe as to amount to a constructive ban serve to undercut the goal of safe disposal by exacerbating the existing shortage of safe facilities. Such a shortage would hamper attempts to clean up sites at which PCBs have been disposed improperly and might lead to more illegal dumping. Thus, all forms of disposal bans are impliedly preempted unless some unique local geological or

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253. 2A N. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 47.38 (Rev. Sands 4th ed. 1984).

254. See *supra* notes 214-19 and accompanying text.

255. See *infra* notes 260-264 and accompanying text.

256. TSCA § 6(e), 15 U.S.C. § 2605(e).

257. See *infra* notes 260-62 and accompanying text.

258. See *infra* text accompanying notes 266-67.

physical condition dictates that a particular ban is necessary to prevent environmental injury.<sup>259</sup>

The first limitation on the freedom of state and local governments to set PCB disposal requirements stems from the implied preemption of state and local requirements that are less stringent than the federal PCB disposal requirements. This recognition of the TSCA PCB disposal rule as an absolute minimum standard is crucial to the effective functioning of the legislative design.

Congress stated, with utmost clarity, that the purpose of TSCA was to protect human health and the environment from the harmful effects of toxic chemicals.<sup>260</sup> Such protection was considered necessary because existing federal law

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259. It can be argued that TSCA §§ 18(a)(2)(B) and 6(a)(6)(B), 15 U.S.C. §§ 2617(a)(2)(B) and 2605(a)(6)(B), which explicitly exclude disposal rules from the scope of express preemption, preclude courts from inferring any preemption for disposal rules. Moreover, § 18(a)(1), 15 U.S.C. § 2617(a)(1), supports that contention somewhat by stating that nothing in TSCA, except as otherwise provided in § 18(a)(2), "shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture." Nevertheless, a literal application of those provisions would frustrate an overriding objective of Congress in enacting TSCA—safe PCB disposal.

American courts long have recognized that the literal reading of statutory language may stifle true legislative intent. *Lynch v. Overholser*, 369 U.S. 705, 710 (1962). "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers . . ." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). Consequently, when the literal interpretation of statutory language produces results clearly at variance with the legislation's purpose, courts have implemented the purpose rather than the literal meaning. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940); *Ozawa v. United States*, 260 U.S. 178, 194 (1922); *United States v. National Marine Eng'rs' Beneficial Ass'n*, 294 F.2d 385, 391 (2d Cir. 1961); see also 2A N. SINGER, *supra* note 253, at § 46.07 (collecting cases to the same effect). According to Judge Learned Hand, courts must place themselves, as far as possible,

in the position of the legislature that uttered [the words of the statute], and decide whether or not [the legislature] would declare that the situation that has arisen is within what it wished to cover. Indeed, at times the purpose may be so manifest as to override even the explicit words used.

*Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959). In short, "common sense and evident statutory purpose" must govern statutory construction. *United States v. Brown*, 333 U.S. 18, 25 (1947).

The congressional goal of proper PCB disposal could be circumvented in two ways if TSCA were read to preclude inferring some limited preemption for the PCB disposal rule. First, a state or local government could enact and enforce disposal requirements that are weaker than the federal disposal rule. Second, those governments could impose actual or constructive bans on PCB disposal when those bans are unrelated to the objective of safe disposal. Such bans would intensify needlessly the shortage of available disposal capacity and might lead to more "midnight dumping." See *infra* notes 268-73 and accompanying text. Thus, it is not reasonable to ascribe to Congress the intent to preclude those forms of implied preemption necessary to implement faithfully the congressional scheme for controlling the disposal of PCBs. See *infra* notes 260-65, 268-74 and accompanying text. Rather, the only reasonable accommodation between the words and the policy of TSCA is to ascribe to Congress the intent only to preclude implied preemption of state and local requirements that are at least as stringent as the federal rule and that do not constitute actual or constructive bans on disposal. Such an interpretation provides state and local governments with some leeway to control PCB disposal while also ensuring a safe and effective PCB disposal program. See *infra* text accompanying notes 265-67. James Willard Hurst felt that, "Those who would properly apply a statute must seek to fulfill the substance of its policy within the framework of its text—an effort that calls for wisdom in not exalting either to exclusion or regard for the other." J. HURST, *DEALING WITH STATUTES* 46 (1982).

260. The Report of the Senate Committee on Commerce stated that, "The purpose of S. 3149 is 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." *LEGISLATIVE HISTORY, supra* note 89, at 157. In its report, the House Committee on Interstate and Foreign

had failed to protect adequately against many of the risks created by the widespread use of toxic chemicals in our society.<sup>261</sup> Congress noted that one significant deficiency in federal law was that the existing statutory authorities did not govern comprehensively the disposal of these substances. The Report of the House Committee on Interstate and Foreign Commerce pointedly referred to the disposal of PCBs as an illustration of the dangers posed by the lack of adequate federal control over disposal.

Under the Federal Water Pollution Control Act [the Clean Water Act], the Administrator of the Environmental Protection Agency has authority to control the discharge of PCBs into the waters. However, there is no means for regulating other avenues through which the environment is exposed to PCBs. For example, an estimated three-fourths of the amount of discarded PCBs have been disposed of in landfills. Under existing law there is no authority to deal with such disposal and even though water emissions may be restricted, environmental exposure through seepage from landfills will continue to occur.<sup>262</sup>

Consequently, Congress took action in TSCA to plug this gap by authorizing the EPA to issue necessary disposal rules<sup>263</sup> and mandating the issuance of a federal rule prescribing safe methods for the disposal of PCBs.<sup>264</sup>

The EPA's PCB disposal rule partially fulfills the regulatory scheme as conceived by Congress. It seeks to protect human health and the environment by regulating the pernicious effects that result from the improper disposal of PCBs.

Commerce declared, "The overriding purpose of the bill is to provide protection of health and the environment through authorities which are designed to prevent harm." *Id.* at 415.

261. The Senate Report described TSCA as "designed to fill a number of regulatory gaps which currently exist." *Id.* at 157. As the House Report explained:

Present authorities for protecting against and regulating hazardous chemicals are fragmented and inadequate. Although there are a number of Federal laws which now provide some authority for regulation (e.g., the Clean Air Act, the Federal Water Pollution Control Act [the Clean Water Act], the Occupational Safety and Health Act of 1970, and the Consumer Product Safety Act) conspicuous gaps exist in the protection provided by such laws.

*Id.* at 414.

For example, a study by the Council on Environmental Quality (CEQ), which served as the impetus for the original TSCA legislation introduced in the 92d Congress, *id.* at 159, pinpointed the inadequacies of controls aimed solely at air and water pollution.

Most toxic substances are not exclusively air or water pollutants but can be found in varying quantities in air, water, soil, food, and industrial and consumer products. The multiplicity of ways by which man can be exposed to these substances makes it difficult for the media-oriented authorities to consider the *total* exposure of an individual to a given substance, a consideration necessary for the establishment of adequate environmental standards.

COUNCIL ON ENVIRONMENTAL QUALITY, TOXIC SUBSTANCES v (1971). Consequently,

[r]ather than dealing with pollutants as they appear in air, in water, and on land, [TSCA] represents a systematic and comprehensive approach to the problem. It relies on understanding the flow of potentially toxic substances throughout the entire range of activity—from extraction to production to consumer use and to disposal.

*Id.* at vii; see also Note, *supra* note 21, at 37-39 (discussing the findings and impact of the CEQ's study on toxic substances).

262. LEGISLATIVE HISTORY, *supra* note 89, at 414.

263. TSCA § 6(a)(6), 15 U.S.C. § 2605(a)(6).

264. TSCA § 6(e)(1)(A), 15 U.S.C. § 2605(e)(1)(A).

Congress could not have intended state and local disposal requirements to provide less protection; to do so would undermine the disposal controls that Congress believed were vital to safeguard health and the environment. Since the conflict between the federal PCB disposal rule and less stringent state or local requirements is irreconcilable, the state or local requirements are impliedly preempted because they thwart one of Congress' purposes in enacting TSCA.<sup>265</sup>

TSCA, however, grants state and local governments the leeway to impose tighter restrictions on the disposal of PCBs by excluding such restrictions from the scope of express preemption.<sup>266</sup> Congress apparently envisioned a partnership to control PCB disposal. Although the federal government would set the minimum standards, states and localities could create their own regulatory programs designed to ensure safety in disposal activities. Permitting this kind of involvement is reasonable since state and local governments are more aware of local conditions than the federal government. The siting of PCB disposal facilities, moreover, involves a land-use decision that traditionally has been a function of state and local governments.<sup>267</sup> Nevertheless, this leeway must have its limit; allowing states and localities to enact bans or constructive bans on the disposal of PCBs, unless absolutely necessary for public safety, would obstruct an important underlying purpose of TSCA: the proper disposal of PCBs.

The availability of adequate disposal capacity is a necessary precondition to the safe disposal of PCBs. When the federal disposal rule was proposed in 1977, approximately 1.2 billion pounds of PCBs existed in the United States: 758 million pounds were still in use; 150 million pounds were loose in the environment; and 290 million pounds were located in landfills and dumps that the EPA had not approved.<sup>268</sup> A tremendous demand therefore existed for adequate disposal facilities. This demand will continue as PCBs still in use are retired from service and as PCBs that were disposed of improperly are transferred to more satisfactory facilities. The EPA already has expressed alarm over what it terms "a grave national shortage of disposal sites for PCBs."<sup>269</sup>

The imposition of a single disposal ban by a state or local government would aggravate the existing shortage by restricting the number of available sites. Moreover, the problem would intensify if the successful imposition of a disposal ban in one jurisdiction inspired officials elsewhere to impose similar bans. Little inspiration would be required: local opposition to new disposal facilities is nearly universal,<sup>270</sup> and local officials (if not state officials) can be expected to respond to that opposition and endeavor to halt the construction of new facilities.<sup>271</sup> Furthermore, state or local officials could try to force some

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265. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

266. TSCA §§ 18(a)(2)(B), 6(a)(6)(B), 15 U.S.C. §§ 2617(a)(2)(B), 2605(a)(6)(B).

267. See Florini, *supra* note 15, at 327.

268. Proposed EPA Disposal and Marking Rule for PCBs, 42 Fed. Reg. 26564 (1977).

269. Jellinek Memorandum, *supra* note 80, at 2.

270. See D. MORELL & C. MAGORIAN, *supra* note 6, at 2-3; Bacow & Milkey, *supra* note 10, at 266-67.

271. See Florini, *supra* note 15, at 327; Wolf, *supra* note 7, at 485.

existing facilities to close. Consequently, the magnitude of the problem could become more severe as existing disposal facilities either exhausted their capacity or were compelled to close, and new facilities were either unavailable or inadequate to satisfy the demand for proper disposal.

Any shortage in available disposal facilities—especially a severe shortage—would cause the fees at available facilities to rise.<sup>272</sup> In addition, the capacity at existing facilities might not meet the demand. Therefore, some PCBs awaiting safe disposal would be kept in storage or left in environmentally deficient dumps and landfills. All of these difficulties arising from the shortage could encourage illegal dumping.<sup>273</sup>

The imposition of state and local disposal restrictions that are not reasonably attainable also would constrict the availability of adequate disposal capacity. Such unreasonable restrictions would include mandating the use of nonexistent or prohibitively expensive technology or the stipulation of certain locally unattainable geologic, hydrologic, or geographic conditions for landfills. The list would be limited only by the ingenuity of state or local officials. All those restraints that could not be reasonably met should be seen for what they are—constructive bans on PCB disposal.

Giving effect to an actual or constructive disposal ban would defeat the congressional goal of safe disposal of PCBs unless the ban clearly was related in an objective manner to the goal of safe disposal. Because bans normally would present an obstacle to achievement of this goal, the test for determining a ban's relationship to safe disposal should be designed to ferret out those bans that are grounded on insubstantial or imaginary safety justifications.<sup>274</sup> It therefore would be reasonable to require that a ban be justified on the basis of a unique local condition—geologic, hydrologic, geographic, or physical—that necessitates the ban from a safety perspective. Unless a ban satisfies this test, a court should find it in irreconcilable conflict with a vital objective of TSCA and thus preempted.

#### IV. CONCLUSION

Congress enacted the Toxic Substances Control Act as a comprehensive measure to ensure that the public and the environment are protected from the dangers presented by toxic chemicals. Finding that PCBs were especially hazardous, Congress mandated a precise schedule for their regulation. Of crucial importance to the regulatory design for PCBs is the control of disposal methods. Congress intended that PCBs would be disposed of in a manner that would safe-

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272. See Florini, *supra* note 15, at 326.

273. See *id.* at 327.

274. Cf. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). In *Kassel* the Supreme Court invalidated an Iowa statute that banned the use of certain large trucks within the state. "[W]here, as here, the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause. *Id.* at 671.

guard adequately the public and the environment from risk of further environmental degradation.

Congress also recognized that state and local governments were entitled to enter into a partnership with the federal government and share some of the responsibility for regulating PCB disposal; the shares, however, by necessity are not equal. Since the federal PCB disposal rule is intended to prescribe safe and adequate methods for PCB disposal, any state or local requirements that are less stringent would compromise that purpose. The courts therefore should find such requirements impliedly preempted by the federal rule. This limitation does not disrupt the partnership: states and localities may act to protect their citizens by imposing disposal requirements that are stricter than those ordinarily imposed by the EPA.

The partnership, however, would disintegrate if some states or localities refused to share in the national responsibility for the proper disposal of PCBs. Effectuation of the national goal of safe PCB disposal depends on the availability of disposal facilities. If any state or local government has the unilateral power to prevent the construction of federally approved disposal facilities, then every other state or local government in the nation would possess the same ability. The likely proliferation of bans—both actual and constructive—would aggravate the hazards Congress sought to alleviate by enacting TSCA. Instead of protecting the public, those obstructions might have the paradoxical result of encouraging illegal disposal and “midnight dumping.”

Nevertheless, some disposal bans could complement the objective of safe disposal when a ban is necessary, based on unique local conditions, to prevent environmental injury. Aside from those rare instances, prohibitive state and local actions clearly frustrate the goal of safe disposal and, consequently, should be held preempted by implication.

The nature of the partnership provided in TSCA should enable state and local officials to work cooperatively with the federal government in an effort to provide for safe disposal of PCBs. TSCA gives states and localities the option to impose tighter restrictions and even disposal bans when those bans are justified on an objective basis. TSCA, however, does not give any jurisdiction the right to refuse, out of hand, to share in solving this national disposal problem. All levels of government therefore have a role to play; their common efforts are required to allay public fears by ensuring the safe disposal of PCBs.

