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COMMENT

NORTH CAROLINA'S 1981 WASTE MANAGEMENT ACT AND ITS IMPACT ON LOCAL GOVERNMENTS: THE GOOD, THE BAD AND THE UGLY

I. INTRODUCTION

The volume of hazardous wastes¹ and low-level radioactive wastes² has been steadily increasing in the United States.³ In 1981 North Carolina's hazardous waste generators generated 1.8 billion pounds of waste.⁴ The largest concentration of waste generation was in the Piedmont; however, New Hanover County was the

1. "Hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

- a. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
- b. Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

N.C. GEN. STAT. § 130-166.16(4) (Cum. Supp. 1981).

2. "Low-level Radioactive Waste" means radioactive waste not classified as high-level radioactive waste or spent nuclear fuel as defined by the N.C. Nuclear Regulatory Commission, transuranic waste, or byproduct material as defined in Section 11 (e)(2) of the Atomic Energy Act of 1954 as amended. N.C. GEN. STAT. § 104-5(9a) (Cum. Supp. 1981).

Although North Carolina's 1981 Waste Management Act addresses both hazardous wastes and low-level radioactive wastes, most of the regulations, data, and studies restrict discussion to hazardous wastes. As a result, this comment will be limited to those studies dealing with hazardous wastes.

3. The United States Environmental Protection Agency (EPA) estimated that generation of hazardous wastes is increasing at a probable annual rate of three to four percent. Canter, *Hazardous Waste Disposal and the New State Siting Programs*, 14 NAT. RESOURCES LAWYER 421, 423 (1982) (citing Office of Water & Wastewater Management, U.S. Environmental Protection Agency, *Solid Waste Facts: A Statistical Handbook 2* (SW-694) (1978). See also Dunn and Swanson, *The Waste Management Act of 1981*, Campbell Law Observer, Aug. 28, 1981, at 7, col. 2.

4. Solid & Hazardous Waste Management Branch Environmental Health Section Division of Health Services, N.C. Department of Human Resources, North Carolina 1981 Annual Report of Hazardous Waste 1 (1982).

state's largest generator.⁵ As a result of the increased generation, transportation, storage and disposal of hazardous wastes, both the United States Congress⁶ and the North Carolina legislature⁷ have enacted statutes regulating hazardous wastes.

Local community interest in hazardous wastes accelerated with publicity from the dumping of polychlorinated biphenyls (hereinafter PCBs) along North Carolina's highways and from leakage of hazardous waste materials at various sites in the northeastern United States.⁸ Public opposition to local siting of hazardous waste disposal facilities is evidenced by a 1980 poll conducted by the President's Council on Environmental Quality⁹ and by local ordinances passed by North Carolina counties which prohibited the siting of hazardous waste facilities in those counties.¹⁰

The increasing volume¹¹ of hazardous wastes, the need for new, secure disposal sites,¹² the growing strength of local opposition to siting of hazardous waste facilities, and the need for a reorganization of existing regulations of hazardous wastes all led North Carolina Governor James B. Hunt, Jr. to appoint a Task Force on Waste Management in July, 1980.¹³ As a result of the Task Force's Report, the 1981 session of the General Assembly passed the Waste Management Act, Chapter 704 of the 1981 Session Laws (hereinafter the Act).¹⁴

5. *Id.*

6. See Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et. seq.*; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), 42 U.S.C. § 9605 *et. seq.*

7. See N.C. GEN. STAT. §§ 62-281 and 130-166.16 (Cum. Supp. 1981).

8. Dunn & Swanson, *supra* note 3, at 7, col. 5. Perhaps the most familiar reference is to the Love Canal incident in New York state. See *United States v. Hooker Chemical and Plastics Corp.*, 540 F. Supp. 1067 (N.D.N.Y. 1982).

9. National Governors' Association, *Siting Hazardous Waste Facilities* 2 (1981).

10. See *Warren County v. State*, 528 F. Supp. 276, 288 (E.D.N.C. 1981). The federal district court held the Warren County ordinance was void due to federal preemption by the Toxic Substances Control Act, 15 U.S.C. § 2601 (1976), 528 F. Supp. at 290; Lee County, N.C. 180 Day Moratorium Ordinance on Hazardous Waste and Low-Level Radioactive Waste Management Facility (October 19, 1981). The Lee County ordinance became invalid with the passage of North Carolina's 1981 Waste Management Act. See N.C. GEN. STAT. § 143-216.10 (b) (Cum. Supp. 1981).

11. *Supra* note 3.

12. Canter, *supra* note 3, at 425-427.

13. Dunn & Swanson, *supra* note 3, at 8, col. 1.

14. An Act to Provide for the Management of Hazardous and Low-Level Ra-

A first glance at the Act indicates that local governments are left with little control over the establishment or operation of hazardous and low-level radioactive waste facilities in their communities.¹⁵ One must closely examine the Act to determine what powers remain within the jurisdiction of local governments. The Act has the effect of allowing the State to tell a local community that it must have a waste facility in its backyard.¹⁶ Questions concerning the Act's constitutionality arise when the Act gives such preemptive powers to the State.

This comment will analyze the provisions of the Act which affect local governments by restricting local acts and local ordinances. Further, this comment will examine the constitutionality of the Act as well as the remaining powers for local governments. Other states have chosen to preempt or accommodate local legislation. This comment will examine such provisions in four other states, California, Michigan, New Jersey, and New York.

II. THE ACT

State governments can choose from a variety of methods to facilitate the siting of hazardous waste facilities and to address the problem of public opposition. There are six basic methods: (1) planning facilities by documenting the need for facilities and determining suitable areas for sites; (2) limiting local zoning and other land use powers of local government; (3) providing a mediation service to address conflicts over sites; (4) providing some form of compensation or other incentive for local communities to accept sites; (5) insuring strict enforcement of the laws and regulations which govern the transportation and disposal of hazardous waste; and (6) obtaining complete or partial ownership of disposal sites and facilities.¹⁷

North Carolina employs several of these methods in its 1981 Act. The North Carolina legislation created a state board which examines needs and suitable areas.¹⁸ The Act provides for limited preemption of local zoning laws,¹⁹ enables local governments to im-

dioactive Waste in North Carolina, ch. 704, 1981 N.C. SESS. LAWS.

15. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

16. N.C. GEN. STAT. §§ 130-166.17B and 104E-6.2 (Cum. Supp. 1981).

17. Farkas, *Overcoming Public Opposition to the Establishment of New Hazardous Waste Disposal Sites*, 9 CAP. U.L. REV. 451, 454-461 (1980).

18. N.C. GEN. STAT. § 143B-216.13 (Cum. Supp. 1981).

19. N.C. GEN. STAT. §§ 130-166.17B and 104E-6.2 (Cum. Supp. 1981).

pose taxes on facilities as compensation for the location of sites in their communities,²⁰ and requires conveyance of title to land used for commercial waste facilities to the state before such facilities may be used.²¹

The stated purpose of the Act is to provide a comprehensive system for management of hazardous and low-level radioactive wastes.²² The Act also seeks to provide a uniform system to manage wastes.²³ While the Act may prove uniform in application, its scheme is a composite of amendments to prior statutes and added sections to prior chapters of the General Statutes. For example, the Act includes modifications to Chapters 62, 104E, 105, 130, 143B, 153A and 160A. Local governments must carefully chart the path through the General Statutes before they can determine the full range of limitations on their legislative powers.

The Act may be broken down into four components: (1) creation, functions and composition of the Governor's Waste Management Board; (2) functions and powers of the Department of Human Resources; (3) functions and powers of the State; and (4) limited preemption of local government regulation.

The Governor's Waste Management Board (hereinafter the Board) is part of the Department of Human Resources. The Board is composed of the heads of five state government departments, or their appointees, two members of the General Assembly, and eight members appointed by the Governor from the following categories: one each from county and municipal governments, two from private industry, two from the fields of higher education, research, or technology, and two from the public at large who are interested in environmental matters.²⁴

The Board's main functions are periodic evaluation and assessment of the volume, distribution, location and characteristics of hazardous and low-level radioactive wastes generated or disposed of in the State, review of the State's comprehensive plan, recommendations on policy issues, evaluation and assessment of the number and type of waste facilities, and promotion of research, development and education in the area of hazardous and low-level radioactive waste. The Board also makes requisite findings and

20. N.C. GEN. STAT. §§ 160A-211.1 (1982) and 153A-152.1 (Cum. Supp. 1981).

21. N.C. GEN. STAT. §§ 130-166.17A and 104E-6.1 (Cum. Supp. 1981).

22. An Act to Provide for the Management of Hazardous and Low-Level Radioactive Waste in North Carolina, ch. 704, 1981 N.C. Sess. Laws.

23. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

24. N.C. GEN. STAT. § 143B-216.12(a) (Cum. Supp. 1981).

submits to the Governor its recommendations concerning the exercise of the State's preemptive powers.²⁵

Previous legislation authorized the Department of Human Resources to "develop a comprehensive program for implementation of safe and sanitary practices for management of solid wastes."²⁶ "Solid waste" includes hazardous garbage.²⁷ The Department also had authority to enforce rules concerning the management of hazardous wastes²⁸ and to develop a permit system governing hazardous waste facilities.²⁹ The 1981 Act added to this program by authorizing the Department to collect fees from the operators of these facilities.³⁰ These fees establish a fund which will be used by the State to monitor and care for the facility after the end of a period, defined under state and federal law, for which the operator is responsible for post-closure monitoring and care of the facility.³¹

The 1981 Act's limited preemption provisions give the State comprehensive powers over the waste management system.³² The State further controls waste management by requiring fee simple title to be transferred to the State before the land may be used for a commercial hazardous waste facility.³³

Several sections of the Act relate to state preemption.³⁴ The Act repeals all local, special or private acts or resolutions which:

- (1) prohibit the transportation, treatment, storage, or disposal of hazardous or low-level radioactive waste within any county, city,

25. N.C. GEN. STAT. § 143B-216.13(11) (Cum. Supp. 1981).

26. N.C. GEN. STAT. § 130-166.18(a)(1) (Cum. Supp. 1981); part of the statutes existing at the time of the passage of the Act.

27. N.C. GEN. STAT. § 130-166.16(16) (Cum. Supp. 1981). "Garbage" means all putrescible wastes, including animal offal and carcasses and recognizable industrial byproducts but excluding sewage and human waste. N.C. GEN. STAT. § 130-166.16(3) (Cum. Supp. 1981).

28. N.C. GEN. STAT. § 130-166.18(c) (Cum. Supp. 1981).

29. N.C. GEN. STAT. § 130-166.18(c)(14) (Cum. Supp. 1981). "Hazardous waste facility" is defined as a facility for the storage, collection, processing, treatment, recycling, recovery, or disposal of hazardous waste. N.C. GEN. STAT. § 130-166.16(5) (Cum. Supp. 1981).

30. N.C. GEN. STAT. § 130-166.18(a)(6) (Cum. Supp. 1981).

31. N.C. GEN. STAT. § 130-166.18(a)(3), (a)(6) (Cum. Supp. 1981) and § 130-166.18(a)(4) (1981).

32. N.C. GEN. STAT. §§ 130-166.17B and 104E-6.2 (Cum. Supp. 1981).

33. N.C. GEN. STAT. §§ 130-166.17A(a) and 104E-6.1(a) (Cum. Supp. 1981) (for low-level radioactive waste landfill facility).

34. N.C. GEN. STAT. §§ 143B-216.10(b), 130-166.17B and 104E-6.2 (Cum. Supp. 1981).

or other political subdivision; (2) prohibit the siting of a hazardous waste facility . . . within any county, city, or other political subdivision; (3) place any restriction or condition not placed by this act or by General Statutes Chapter 130, Article 13B or Chapter 104E upon the transportation, treatment, storage or disposal of hazardous . . . waste facility or low-level radioactive waste facility within any county, city, or other political subdivision; or (4) in any manner are in conflict or inconsistent with the provisions of this act or General Statutes Chapter 130, Article 13B or Chapter 104E.³⁵

The Act also invalidates all local ordinances which:

(1) prohibit or have the effect of prohibiting the establishment or operation of a hazardous waste facility or a hazardous waste landfill facility approved by the Governor pursuant to G.S. § 130-166.17B; or (2) prohibit or have the effect of prohibiting the establishment or operation of a low-level radioactive waste facility or a low-level radioactive waste landfill facility approved by the Governor pursuant to G.S. § 104E-6.2.³⁶

Further, the Act prohibits adoption of local ordinances which have the same prohibitory effect, but "only to the extent necessary to effectuate the purpose of this Article."³⁷ The State further restricts local control by giving the Governor's Waste Management Board the power to review specific privilege license taxes which local governments may assess to waste management facilities.³⁸

Having documented the areas the State has occupied by this Act, what is left for local governments and the local population? First, composition of the Board reflects local input through two means: (1) the Governor appoints one member each from county and municipal governments and two from the public at large who are interested in environmental matters,³⁹ and (2) two additional members are appointed by the governing body of the city or county in which the proposed site is located, but only for the term ending with the Governor's final determination as to the approval or disapproval of the site.⁴⁰ Second, the Act gives local governments, both cities and counties, the power to levy an annual privi-

35. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

36. *Id.*

37. N.C. GEN. STAT. § 130-166.17B(a) (Cum. Supp. 1981).

38. N.C. GEN. STAT. § 43B-216.13(12) (Cum. Supp. 1981).

39. N.C. GEN. STAT. § 143B-216.12(a)(2) (Cum. Supp. 1981).

40. N.C. GEN. STAT. § 130-166.17B(a) (Cum. Supp. 1981).

lege license tax on the operators of both hazardous and low-level radioactive waste.⁴¹ The rate of the tax should reflect the compensation needed by the local government to meet the additional costs incurred when such facilities are located within its jurisdiction.⁴² These costs may include losses from lower ad valorem taxes on the site property, provision of additional emergency services, costs of monitoring the air or water near the site, and other costs that may be established as associated with the facilities.⁴³

When local ordinances are alleged to prevent the construction or operation of a facility, the developer or operator may petition the Board for review.⁴⁴ The Board is required to hold a hearing at which any interested person may submit written material pertaining to the matter to the Board.⁴⁵ The Board must make statutorily required findings and reports its recommendations to the Governor.⁴⁶ The following are the mandatory findings:

- (1) That the proposed facility is needed in order to establish adequate capability for the management of hazardous waste generated in North Carolina and therefore serves the interests of the citizens of the State as a whole;
- (2) That all legally required state and federal permits or approvals have been issued by the appropriate state and federal agencies;
- (3) The local citizens and elected officials have had adequate opportunity to participate in the siting process;
- (4) That the construction and operation of the facility will not pose an unreasonable health or environmental risk to the surrounding locality and that the facility developer or operator has taken any reasonable measures to avoid or manage foreseeable risks and to comply . . . with any applicable ordinance(s).⁴⁷

The Governor must then examine the same four areas.⁴⁸ If he

41. N.C. GEN. STAT. §§ 160A-211.1(a) (1982) and 153A-152.1(a) (Cum. Supp. 1981). The tax may not, however, prohibit or have the effect of prohibiting the establishment of a facility. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

42. N.C. GEN. STAT. §§ 160A-211.1(b) (1982) and 153A-152.1(b) (Cum. Supp. 1981).

43. *Id.*

44. N.C. GEN. STAT. §§ 130-166.17B(b) & (c) and 104E-6.2(b) & (c) (Cum. Supp. 1981).

45. *Id.*

46. *Id.*

47. N.C. GEN. STAT. § 130-166.17B(c) (Cum. Supp. 1981).

48. N.C. GEN. STAT. §§ 130-166.17B(b) & (c) and 104E-6.2 (b) & (c) (Cum. Supp. 1981).

makes the requisite findings, he approves the facility. If he fails to make these findings, then he shall disapprove the facility. The Governor is not bound by the findings of the Board and his decision is final unless a party to the action files an appeal, pursuant to North Carolina General Statute § 7A-29, within thirty days. Scope of review is limited to abuse of discretion.⁴⁹ The Act does not define who is a party to this action, but the North Carolina Administrative Procedure Act provides that definition.⁵⁰

III. ANALYSIS

The Waste Management Act of 1981 was enacted to meet "one of the most urgent problems facing North Carolina"⁵¹—the safe management and disposal of hazardous wastes and low-level radioactive wastes. The General Assembly determined that "safe management and disposal of these wastes are essential to continue economic growth and to the protection of the public health and safety."⁵² By this Act, the General Assembly sought to protect the State's economic future while creating a uniform system to determine the siting of waste facilities.⁵³ No doubt there was a pressing need for legislation in this area, and to meet this need, the General Assembly exercised its police power.

State police power is subordinate to the federal and state constitutional limitations and guarantees which protect basic property rights.⁵⁴ The exercise of police power is valid when "the power extends only to such measures as are reasonable under all existing conditions and surrounding circumstances."⁵⁵ The exercise must be "reasonably calculated to accomplish a purpose falling within the legitimate scope of the police power, without burdening unduly the

49. N.C. GEN. STAT. §§ 130-166.17B(b) & 104E-6.2(b) (Cum. Supp. 1981).

50. "Party" means:

each person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the hearing agency where appropriate; provided, this shall not be construed to permit the hearing agency or any of its officers or employees to appeal its own decision for initial judicial review.

N.C. Admin. Proc. Act; N.C. GEN. STAT. § 150A-2 (5) (1978).

51. N.C. GEN. STAT. § 143B-216.10(a) (Cum. Supp. 1981).

52. *Id.*

53. *Id.*

54. *City of Winston-Salem v. Southern Ry. Co.*, 248 N.C. 637, 642, 105 S.E.2d 37, 40-41 (1958).

55. *Id.*

person or corporation affected."⁵⁶ There is no set formula for unreasonableness, rather it is determined on a case-by-case basis.⁵⁷ The power may be extended or restricted in light of changing economic or social conditions.⁵⁸

Police power extends to all the public needs and "its exercise is especially favored in the regulation of the use of property and of individual conduct for the purpose of promoting the health of the public."⁵⁹ The General Assembly has the power to promulgate rules and fix minimum standards to protect life, health, safety and welfare.⁶⁰

To determine if the Act meets the constitutional test for the exercise of police power, one must determine that the exercise was reasonable in light of the "existing conditions and surrounding circumstances."⁶¹ At the time the Act was being considered by the General Assembly, generation of hazardous wastes was accelerating.⁶² Prior to 1981, North Carolina had regulations governing the management of hazardous wastes,⁶³ but did not have a system to determine the siting of waste facilities. As production increased, a need developed for increased establishment of facilities—facilities for "storage, collection, processing, treatment, recycling, recovery, or disposal. . . ." ⁶⁴ While existing generators of wastes usually had some sort of facility for handling the wastes, those facilities were being outgrown.⁶⁵

At the same time, local opposition grew as most communities opposed the storing, dumping, treatment, or other management of waste in their backyards.⁶⁶ In North Carolina, this opposition led to numerous local ordinances, acts, land use restrictions and other regulations which effectively deterred or greatly delayed the establishment of facilities in those communities.⁶⁷ Those conditions cre-

56. *Id.*

57. *Id.*

58. *Id.*

59. *Hartford Accident & Indemnity Co. v. Commissioner*, 290 N.C. 457, 466, 226 S.E.2d 498, 504 (1976).

60. *Walker v. City of Charlotte*, 276 N.C. 166, 172, 171 S.E.2d 431, 435 (1969).

61. 248 N.C. at 642, 105 S.E.2d at 41.

62. *Supra* note 3.

63. N.C. GEN. STAT. § 130-166.16 (Cum. Supp. 1981).

64. N.C. GEN. STAT. § 130-166.16(5) (Cum. Supp. 1981).

65. *Canter, supra* note 3, at 426.

66. *Canter, supra* note 3, at 427.

67. *Supra*, note 10.

ated the need for the Governor's Task Force and for the Waste Management Act.⁶⁸

The Act promotes the health and safety of the state's population by providing mechanisms to determine the siting of hazardous waste facilities⁶⁹ and to study methods to improve waste management, reduce the amount of waste generated, and maximize resource recovery, reuse, and conservation.⁷⁰ No one wants a waste facility in his backyard, but in light of the "existing conditions and surrounding circumstances,"⁷¹ the General Assembly balanced the strong interest of the state in the management of wastes and the concomitant demands from the local populace to restrict and regulate such facilities for the protection of their environment.⁷² The legislature has exercised its police power in an apparently reasonable manner by the Act being "reasonably calculated to accomplish a purpose falling within the legitimate scope of the police power. . . ." ⁷³ Perhaps the final test for reasonableness, and thus constitutionality, comes from examining what the Act has left for local governments to regulate. An examination of the provisions for limited state preemption⁷⁴ revealed that the Act does not burden unduly the person or corporation affected.⁷⁵

The North Carolina Constitution and the legislature have granted delegate powers to local governments. Article VII, sec. 1 of the North Carolina Constitution states:

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.⁷⁶

As the North Carolina Supreme Court stated in *Davis v. City of*

68. Dunn & Swanson, *supra* note 3, at 7, col. 5.

69. N.C. GEN. STAT. § 130-166.17B (c) (Cum. Supp. 1981).

70. N.C. GEN. STAT. §§ 143B-216.13(2) (Cum. Supp. 1981). As the Act promotes the health and safety of the State's population, its exercise must be favored. 290 N.C. at 466, 226 S.E.2d at 504.

71. 248 N.C. at 642, 105 S.E.2d at 41.

72. N.C. GEN. STAT. § 143B-216.10(a) (Cum. Supp. 1981).

73. 248 N.C. at 642, 105 S.E.2d at 40-41.

74. N.C. GEN. STAT. §§ 130-166.17B and 104E-6.2 (Cum. Supp. 1981).

75. 248 N.C. at 642, 105 S.E.2d at 40-41.

76. N.C. CONST. art. VII, § 1.

Charlotte,⁷⁷ “[a] municipal corporation is a creature of the General Assembly” and “[m]unicipal corporations have no inherent powers but can exercise only such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given.”⁷⁸ Incorporated cities and towns have no inherent police powers.⁷⁹ A municipal corporation depends upon delegation of zoning power from the General Assembly as a municipal corporation “has no inherent power to zone its territory and restrict to specified purposes the use of private property. . . .”⁸⁰

The General Assembly gave local government’s the express power to make general ordinances.⁸¹ By its ordinances, a city may “define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city . . .”⁸² These ordinances must be consistent with state and federal law and are not consistent when:

[t]he ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law; [or] [t]he ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. . . .⁸³

Two separate tests must be utilized to determine whether local ordinances are inconsistent with state law. First, has a state or federal law expressly forbidden cities to regulate the establishment or operation of waste facilities? The 1981 Act only invalidates those local ordinances which “prohibit or have the effect of prohibiting the establishment or operation” of waste facilities.⁸⁴ The Act provides for repeals of special, local, or private acts or resolutions, but not for repeals of local ordinances.⁸⁵ Limited state preemption occurs when a developer or operator of a facility petitions the Board to review a local ordinance which would prohibit the establishment

77. 242 N.C. 670, 89 S.E.2d 406 (1955).

78. *Id.* at 674, 89 S.E.2d at 409.

79. *State v. Furio*, 267 N.C. 353, 356, 148 S.E.2d 275, 277 (1966).

80. *Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325, 330 (1968).

81. N.C. GEN. STAT. § 160A-174 (1982).

82. *Id.* at (a).

83. *Id.* at (b)(4) & (5).

84. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

85. *Id.*

or operation of a facility.⁸⁶ Before recommending the Governor's approval, the Board must make the findings previously mentioned. The Act does not prohibit all local ordinances which regulate the operation or establishment of a waste facility, but only those which "prohibit or have the effect of prohibiting" the facilities.⁸⁷

Second, is there a clear legislative intent to provide a "complete and integrated regulatory scheme to the exclusion of local regulation"?⁸⁸ The purpose of the Act is "to provide for a comprehensive system for management of hazardous and low-level radioactive waste in North Carolina. . . ."⁸⁹ The Act also states a legislative intent "to prescribe a uniform system for the management of hazardous waste and low-level radioactive waste" and "to place limitations upon" zoning regulations, local ordinances, property restrictions and other restrictions which regulate the management of these wastes.⁹⁰ While the Act seeks to provide a uniform and a comprehensive system, it does not preclude all local regulations.⁹¹

Black's Law Dictionary defines "uniform" as [c]onforming to one rule, mode, pattern, or unvarying standard. . . ."⁹² "Complete" is defined as "[f]ull; entire; including every item or element of the thing spoken of, without omissions or deficiencies; not lacking in any element or particular. . . ."⁹³ Webster's New American Dictionary defines "comprehensive" as "extensive; including much."⁹⁴ The Act does not speak of a complete regulatory scheme and this leaves room for some elements of local waste management regulation. If, indeed, local governments may regulate to a certain extent in the field of waste management, then the 1981 Act does not burden unduly local governments and is reasonable enough to pass constitutional muster.

The final step in this analysis is the examination of the types of local ordinances that may co-exist with the recent act.⁹⁵ The key is whether the state law has occupied the field and would preempt the local ordinance. Several local governments in North Carolina

86. N.C. GEN. STAT. § 130-166.17B(b) (Cum. Supp. 1981).

87. N.C. GEN. STAT. §§ 130-166.17B(a) and 104E-6.2(a) (Cum. Supp. 1981).

88. N.C. GEN. STAT. §§ 160A-174(b)(4) & (5) (1982).

89. An Act, *supra* note 11.

90. N.C. GEN. STAT. § 143B-216.10 (b) (Cum. Supp. 1981).

91. N.C. GEN. STAT. §§ 130-166.17B(a) & 104E-6.2(a) (Cum. Supp. 1981).

92. BLACK'S LAW DICTIONARY 1372 (5th ed. 1979).

93. *Id.* at 258.

94. WEBSTER'S NEW AMERICAN DICTIONARY 215 (1966).

95. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

are currently drafting ordinances which they hope will prove consistent with state law.⁹⁶ Typical regulations which local governments might be able to enact are zoning ordinances which establish buffer zones between the facility and certain areas which the local government wants to protect, such as residential or school zones. Building restrictions, local permits, and required local records of "cradle-to-grave" histories of the wastes may be enacted as long as they do not prohibit or have the effect of prohibiting the operation or establishment of the facilities.

Areas which the statute does not address and which therefore could be covered by local ordinances include: what constitutes a nuisance and what are the concomitant penalties;⁹⁷ whether a local government may bring an action against the operator of a facility for property damage occurring when the waste leaks onto property (the soil, water, or air) owned by the local governments; and whether local governments may prohibit waste generated outside the local community from being accepted at the local facility. The test for consistency with the Act would, again, be whether the local ordinance has a prohibitive effect on the establishment or operation of the facility.⁹⁸

Another approach which local communities could use when opposing the location of a facility in their area involves the federal location standards promulgated under the Resources Conservation and Recovery Act (RCRA).^{98.1} Under authority from that Act, the Environmental Protection Agency (EPA) has established temporary standards for permitting new land disposal facilities and it remains to be seen what the permanent standards will require.⁹⁹ The standards relate to surface faults and 100-year floodplains.¹⁰⁰ Hazardous waste facilities are prohibited from being located within 200

96. Interview with O.W. Strickland, Department of Human Resources, Solid Waste Management Division, in Raleigh, N.C. (by phone) (June 4, 1982).

97. *But cf. Warren County v. State*, 528 F. Supp. 276, 285-86 (E.D.N.C. 1981) (Court states that use by the State of North Carolina of its own property in a manner authorized by valid legislative authority may not be enjoined by the courts as a nuisance).

98. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

98.1. *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6901.

99. *Canter*, *supra* note 3 at 431.

100. *Id.* (citing 40 C.F.R. §§ 264.18(a) and 264.18(b) (1981)) (A 100-year flood is a flood which has a one percent chance of being equalled or exceeded in any given year; a flood of such magnitude that it is expected to occur only once every hundred years).

feet of a fault that has moved in the recent geologic past.¹⁰¹ Hazardous waste facilities for treatment, storage, and disposal are not prohibited from floodplains, but must be constructed to prevent washout of any of the hazardous wastes during a 100-year flood.¹⁰² Other environmental statutes protect endangered species and sole source aquifers.¹⁰³ Local communities could employ these federal standards in areas which would be protected under federal regulations since the North Carolina Act requires a finding that the facility has obtained all required federal permits and approvals.¹⁰⁴

Before local communities can find their place in the puzzle, they must find their way through the maze of federal and state regulations.¹⁰⁵ The fact that local opposition resulted in regulation and preemption by the state and federal government is ironic. The local community is most directly affected, has spoken the loudest, and is now relegated to speaking last. Other states have both similar and differing patterns for incorporating the regulations of local communities.¹⁰⁶ The regulations of other states are examined in the following section.

IV. REGULATION BY OTHER STATES

Comparing the statutes of other states is instructive in analysis of a new North Carolina statute. Examining case law under those statutes can prove helpful in interpreting the effect of statutory language. When other state statutes are also fairly recent, a dearth of case law means that an analyst can provide only a comparison of comparable regulations.

States which have enacted statutes which override, preempt, or limit local government's legislation include Connecticut, Florida, Indiana, Iowa, Maryland, Michigan, Minnesota, Ohio and Pennsylvania.¹⁰⁷ The Michigan act will be compared with the North Caro-

101. Canter, *supra* note 3, at 431.

102. *Id.*

103. *Id.* at 432 (citing 16 U.S.C. § 1531 *et seq.* (1973) and 42 U.S.C. § 1424(e) (1976)). (The Safe Drinking Water Act designates certain water sources as the sole or principal source of drinking water for a large population.).

104. N.C. GEN. STAT. § 130-166.17B(c)(2) (Cum. Supp. 1981).

105. *See Warren County v. State*, 528 F. Supp. 276, 288-289 (E.D.N.C. 1981).

106. Farkas, *supra* note 17.

107. Canter, *supra* note 63, at 450 n. 168 (citing CONN. GEN. STAT. ANN. § 22a-124 (West Supp. 1981); FLA. STAT. § 403.723 (Supp. 1980); IND. CODE ANN. § 13-7-8.6(13)(a) (Burns Supp. 1981); 1981 Iowa Legis. Serv. Senate File 420, § 8(2), 11; MD. NAT. RES. CODE ANN. § 13-705(d), (e) (Supp. 1981); MICH. COMP. LAW

lina act to show the relationship of local ordinances to each act. Michigan also employs some language prohibiting local ordinances which prohibit operation of waste facilities.¹⁰⁸ Also, comparison will be made of differing treatments of local regulations through examination of the statutes of New Jersey, New York and California.

The Michigan Hazardous Waste Management Act, effective January 1, 1980, states that "a local ordinance, permit, or other requirement shall not prohibit the operation of a licensed disposal facility."¹⁰⁹ As this statute is found under the "site approval board" the same language probably applies to the establishment of a facility. This language is similar to that of the North Carolina act which invalidates local ordinances which prohibit or have the effect of prohibiting the establishment or operation of waste facilities.¹¹⁰

The Michigan act does not express a legislative intent to preempt the field of hazardous waste management but provides that the Act serves "to protect the public health and the natural resources of the state and to license and regulate persons engaged in removing and disposing of hazardous waste; to provide for hazardous waste management facilities; to create a hazardous waste site approval board; and . . . to regulate the operation of disposal facilities;" ¹¹¹ The best indication of the intent of Michigan's legislature is the required criteria which the siting board must consider before approving an application for a facility. The siting board considers local ordinances, permits, or other requirements and their potential relationship to the proposed facility,¹¹² and the board integrates, as best possible, the provisions of the local ordinances, permits, or regulations.¹¹³

Compared to the Michigan act, North Carolina's preemption is more explicit and provides a stronger override of local enactments.

ANN. § 299.521 (Supp. 1981); MINN. STAT. ANN. § 115A.28(2) (West Supp. 1981); OHIO REV. CODE ANN. § 3734.05 (D) (3) (Page Supp. 1980); PA. STAT. ANN. tit. 35, § 6018.105(h) (Purdon Supp. 1981).

108. MICH. COMP. LAWS § 299.524 (MICH. STAT. ANN. § 13.30(24) (Callaghan 1981)).

109. *Id.*

110. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

111. MICH. COMP. LAW § 299.500 (MICH. STAT. ANN. § 13.30 (Callaghan 1981)) (statement of purpose).

112. MICH. COMP. LAW § 299.520 (MICH. STAT. ANN. § 13.30(20)(7)(d) (Callaghan 1981)).

113. MICH. COMP. LAWS § 299.508 (MICH. STAT. ANN. § 13.30(8) (Callaghan 1981)).

North Carolina requires findings that "local citizens and elected officials had adequate opportunity to participate in the siting process"¹¹⁴ and that "the construction and operation of the facility will not pose an unreasonable health or environmental risk to the surrounding locality. . . ." ¹¹⁵

Both Michigan and North Carolina require representation from local cities and counties during the siting approval process and both consider the health and environmental risks.¹¹⁶ The difference lies in North Carolina's specific intent to preempt prohibitive local legislation¹¹⁷ and Michigan's intent to accommodate local ordinances, where practicable.¹¹⁸ There is no case law, at this writing, which interprets these sections of the Michigan act.

New Jersey has a Solid Waste Management Act which requires the operator of each solid waste facility to maintain a list of all hazardous wastes received during the year.¹¹⁹ While the Act does not include "hazardous waste" in its definitions or within the definition of "solid waste," it does define "solid waste" as "garbage, refuse, and other discarded materials resulting from industrial, commercial and agricultural operations. . . ." ¹²⁰

The New Jersey act is instructive in that the New Jersey courts have interpreted the act to preempt local regulation in the field of solid waste disposal.¹²¹ In *Township of Little Falls v. Bardin*,¹²² the court considered the following factors in determining state preemption of local ordinances: the need for statewide treatment in matters not proper subjects for local regulation; whether the intent to occupy the field is made clear by the state; whether the state regulation is so comprehensive that it "effectively precludes co-existence of the municipal regulation"; and whether the

114. N.C. GEN. STAT. § 130-166.17B(c)(3) (Cum. Supp. 1981).

115. *Id.* at (4).

116. MICH. COMP. LAW § 299.517 (MICH. STAT. ANN. § 13.30(17) (Callaghan 1981)) and N.C. GEN. STAT. §§ 130-166.17B (1) and 104E-6.2(a) (Cum. Supp. 1981); MICH. COMP. LAWS § 299.520 (MICH. STAT. ANN. § 13.30(20)(7) (Callaghan 1981)) and N.C. GEN. STAT. §§ 130-166.17B(c)(4) & 104E-6.2(c)(4) (Cum. Supp. 1981).

117. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

118. MICH. COMP. LAWS § 299.520 (MICH. STAT. ANN. § 13.30(20)(8) (Callaghan 1981)).

119. N.J. REV. STAT. § 13:IE-40 (1979).

120. N.J. REV. STAT. § 13:IE-3(a) (1979).

121. *Township of Little Falls v. Bardin*, 173 N.J. Super. 397, 414 A.2d 559, 567 (1979).

122. *Id.*

local regulations conflict with the state act.¹²³ The court found the need for state preemption in the legislative findings "that the management of solid waste in New Jersey consists largely of piecemeal, uncoordinated activities developed to meet the immediate needs of local governments with little, if any, regard for regional planning and coordination"¹²⁴ and further found that it was the policy of the state to establish a statutory framework for solid waste management.¹²⁵ The state's establishment of solid waste management districts with opportunities for input from local governments was further evidence that the state intended to occupy the field.¹²⁶

The North Carolina Waste Management Act is more explicit in reflecting the intent of the legislature that state law preempt local regulations, but, again, only to the extent the purposes of the Act are served.¹²⁷ Since the test for preemption in North Carolina¹²⁸ is much the same as that for New Jersey, *Bardin* could prove instructive as to how North Carolina courts would treat the North Carolina act. The North Carolina act, however, did not establish area districts.

Examples of state statutes which provide that the state will not override local regulation are found in New York and California. In New York, no one may construct or operate an industrial hazardous waste facility without a "certificate of environmental safety and public necessity from the facility siting board."¹²⁹ The siting board shall "deny an application to construct or operate a facility . . . if construction or operation of such facility would be contrary to local zoning or land use regulations in force on the date of the application. . . ." ¹³⁰ The municipalities are, however, prevented from requiring any approval, consent, permit, certificate or other condition regarding the operation of a facility with respect to the certificate granted.¹³¹

The North Carolina act treats *existing* local zoning and land use regulations differently. The North Carolina act repealed all

123. *Id.* at 566.

124. *Id.* at 567.

125. *Id.*

126. *Id.* (North Carolina also provides for sanitary districts for solid waste. N.C. GEN. STAT. § 130-126 *et seq.* (Cum. Supp. 1981)).

127. N.C. GEN. STAT. §§ 130-166.17B(a) and 104E-6.2 (a) (Cum. Supp. 1981).

128. 287 N.C. at 73, 213 S.E.2d at 236.

129. N.Y. ENVTL. CONSERV. LAW § 27-1105(1) (McKinney Supp. 1981).

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

131. N.Y. ENVTL. CONSERV. LAW 27-1107 (McKinney Supp. 1981).

provisions of special, local or private acts or resolutions prohibiting the siting of a waste facility within any county, city, or other political subdivision.¹³² By repealing existing prohibitory regulations and invalidating prospective prohibitory ordinances, North Carolina clearly established a consistent rule for state preemption. New York sets two separate rules for local regulations by accommodating existing local land use regulation and ordinances while limiting subsequent local legislation. The New York act is not clear in its reasons for creating separate rules and such classification may prove challengeable under the equal protection clause. North Carolina avoids this constitutional challenge by setting one rule for existing and subsequent local legislation.

The New York statutes contain a separate title for solid waste management and resource recovery facilities which provides that it does not supersede consistent local ordinances.¹³³ To be consistent, and thus not preempted, local regulations must comply with at least the minimum acceptable requirements of rules or regulations promulgated pursuant to the statute.¹³⁴ In *Monroe-Livingston Sanitary Landfill v. Town of Caledonia*,¹³⁵ a New York court held that this title did not preempt a local ordinance prohibiting refuse generated outside Caledonia from being accepted in the town licensed facilities. The court found that the express terms of the statute precluded preemption of local ordinances that are consistent with the statute.¹³⁶

The North Carolina act provides for limited state preemption. While the North Carolina act did not disclaim that it did not supersede local ordinances, as the New York statute did, North Carolina case law indicates that local regulations which are consistent with state law will be upheld.¹³⁷ Seen in this light, the New York case law may serve as a guide for North Carolina courts in any reviews challenging local regulations.

The California regulations of existing hazardous waste facilities express an "intent not to preempt local land use regulation."¹³⁸ In a subsequent section of the same article, cities and counties are prevented from enacting an ordinance which prohibits or unrea-

132. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

133. N.Y. ENVTL. CONSERV. LAW § 27-0711 (McKinney Supp. 1981).

134. *Id.*

135. 51 N.Y.2d 679, 435 N.Y.S.2d 966 (1980).

136. 51 N.Y.2d at 684, 435 N.Y.S.2d at 968.

137. 287 N.C. at 73, 213 S.E.2d at 236.

138. CALIF. HEALTH & SAFETY CODE § 25147 (West Supp. 1982).

sonably regulates the disposal, treatment, or recovery of resources from hazardous waste.¹³⁹ These latter provisions, however, relate only to existing hazardous waste facilities.¹⁴⁰

California does not appear to have current statutes governing the siting of new facilities and it is questionable whether the state would preempt local land use regulations which prohibit the establishment of new facilities. This prediction is supported by examining the statutes governing hazardous waste haulers. Those statutes declare a legislative intent to preempt local regulations covering transport of hazardous waste.¹⁴¹ The siting of new facilities in California will probably be subject to accommodation of local land use regulations, much the same as the Michigan act.

North Carolina repealed all local acts and invalidated all local ordinances which "prohibit or have the effect of prohibiting the establishment or operation of a hazardous waste facility."¹⁴² The California statute works in an opposite manner, refuting preemption of local regulation, with the exception of the provisions regarding hazardous waste haulers, which resemble the North Carolina act.

The comparison of the North Carolina act to those acts of Michigan, New Jersey, New York and California shows that North Carolina definitely intended to preempt certain government regulations. The North Carolina act invalidates local ordinances which prohibit waste facilities.¹⁴³ The General Assembly intended to place limitations upon local governments' powers to regulate.¹⁴⁴ The Act, however, provides for only *limited* state preemption,¹⁴⁵ and does not show a clear legislative intent to provide a complete and integrated scheme to the exclusion of all local regulation.¹⁴⁶

V. CONCLUSION

The North Carolina Hazardous Waste Management Act restricts local community input concerning the siting of hazardous waste facilities. The Act does not, however, preclude all local regu-

139. CALIF. HEALTH & SAFETY CODE § 25149 (West Supp. 1982).

140. CALIF. HEALTH & SAFETY CODE § 25147 (West Supp. 1982).

141. CALIF. HEALTH & SAFETY CODE § 25167.3 (West Supp. 1982).

142. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

143. N.C. GEN. STAT. §§ 130-166.17B and 104E-6.2 (Cum. Supp. 1981).

144. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

145. N.C. GEN. STAT. §§ 130-166.17B and 104E-6.2 (Cum. Supp. 1981).

146. N.C. GEN. STAT. § 160-174(b)(5) (1982).

lation. The North Carolina act does not establish sites as do some acts.¹⁴⁷ Local representation on the Governor's Waste Management Board provides local input when a site is reviewed for approval or disapproval;¹⁴⁸ thus, there is still some opportunity for local government and local community input into the siting process.

Local governments may enact ordinances establishing buffer zones between the waste facility site and adjacent zones which require protection. Other local permit requirements and building restrictions may regulate the facility when not prohibitory. Local governments may be able to monitor the adjacent water sources and soil to determine if any leakage is occurring. Such leakage may result in a cause of action against the operator or developer of a waste facility as the act states that the operator shall remain fully liable for damages or injuries resulting or arising out of the operation of the facilities.¹⁴⁹ The state would be immune from liability except where otherwise provided by statute.¹⁵⁰ Finally, local governments would be wise to examine the federal regulations for waste facilities and other federal regulations which protect endangered species, wetlands, wilderness areas, water sources, etc.

The North Carolina act, in fact, places a burden on the facility operator or developer, as they must be the ones to challenge the local ordinance. In other words, the operator or developer's contention that the ordinance prohibits the development of a facility brings the statute into actual use.¹⁵¹ Required findings must then be made before a facility may be located in a local community.

While the North Carolina Act was not what most local communities wanted, it was a necessary step in attacking a very urgent problem. The next steps are find more ways to safely store, recycle, and greatly reduce the production of hazardous wastes. When the state assumes the leadership in these tasks, local communities might prove more receptive to this Act.¹⁵² The battle over the siting of hazardous waste facilities is still raging in North Carolina. At this writing, many citizens of Warren County had turned to civil disobedience when the legal remedies they pursued did not

147. Canter, *supra* note 3, at 443-446 (Maryland, Minnesota, and Massachusetts).

148. N.C. GEN. STAT. §§ 130-166.17B(a) and 104E-6.2(a) (Cum. Supp. 1981).

149. N.C. GEN. STAT. §§ 130-166.17A(a) and 104E-6.1(a) (Cum. Supp. 1981).

150. *Id.*

151. N.C. GEN. STAT. § 143B-216.10(b) (Cum. Supp. 1981).

152. See Canter, *supra* note 3, at 453.

produce the result they desired.¹⁵³ Citizens in Anson County have formed a group called CACTUS (Citizens Against Chemical Toxins in Underground Storage) so that they may oppose the siting of a chemical waste landfill facility in their county.¹⁵⁴ No doubt there will be more legal challenges, more local ordinances, and more local civil disobedience. The prohibition of siting by local ordinances created the impetus for the Hazardous Waste Management Act, but the problems of siting, local opposition, and the continuing increase in the production of hazardous wastes have not gone away. The balancing process of dealing with a very urgent waste problem and salving local opposition has not been completed. The dilemma of the 1980's is to learn to live with a bit of the good, a bit of the bad, and a lot of the ugly.

Sarah Patterson Brison

153. Jeffries, *67 Arrested as PCB Cleanup Starts*, Raleigh News & Observer, Sept. 16, 1982, at 1A, cols. 1-4.

154. Basgall, *Anson Disposal Site May Test Legislation on Hazardous Waste*, Raleigh News & Observer, Sept. 20, 1982, at 1A, cols. 3-5. Anson County has drafted a local act and a local ordinance which involve the provisions for limited state preemption under the Act. The local act was found unconstitutional on its face by a Wake County Superior Court Judge. *Chem-Security Sys., Inc. v. Morrow*, decided Civ. No. 81-8704 (N.C. Super. Ct., Jan. 29, 1982) *aff'd* 61 N.C. App. 147 (1983). The second ordinance may yet be challenged by the private company which wants to develop the landfill facility in Anson County.