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Maybe in My Backyard: Strategies for Local Regulation of Private Solid Waste Facilities in New York

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MAYBE IN MY BACKYARD: STRATEGIES FOR LOCAL REGULATION OF PRIVATE SOLID WASTE FACILITIES IN NEW YORK

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Contrary to some reports, there is an emerging consensus on waste management in this country, and it is this: We all agree that waste should be picked up; and increasingly we agree also that it should not be put down again!

And yet I can't help sensing an opportunity in this.

William K. Reilly, Administrator
Environmental Protection Agency[1]

I. INTRODUCTION

In September 1991, the Town Board of Farmersville, New York, (population 869)[2] approved a controversial contract with Integrated Waste Systems, Inc. (Integrated) licensing a 423-acre sanitary landfill, potentially the largest in the Northeast.[3] In explaining their decision the Board members said they believed they had no choice.[4] Outgunned by the resources available to Integrated, the Board secured what it felt was the best deal possible against the inevitable victory for the landfill.

The Farmersville story is not unique. The garbage crisis in this

1. William K. Reilly, The Turning Point, An Environmental Vision for the 1990s, Annual Marshall Lecture to the Natural Resources Defense Council (Nov. 27, 1989), *in* 20 Env't Rep. (BNA) 1386, 1388 (1989).

2. 1990 U.S. Census.

3. Donna Snyder, *Board OKs Landfill Pact in Farmersville*, BUFF. NEWS, Sept. 10, 1991, at B2.

4. *See A Small Town's Government Proves Inept on Landfill Issue*, BUFF. NEWS, Sept. 11, 1991, at B2 [hereinafter *Small Town*].

country[5] is increasingly making the rural areas of New York State the location of choice for the solid waste industry. Communities are often overwhelmed by the vast resources of the landfill operators, promises of economic prosperity, and threats of legal action. Few resources are available to aid these communities in evaluating their options. New York State considers solid waste disposal to be largely a local matter,[6] and the state agency charged with regulating the industry must balance the need to provide adequate disposal capacity with its environmental protection efforts.[7]

Nevertheless, there are actions which local governments[8] can take to protect the local environment and deal on their own terms with solid waste facility[9] operators. In fact, municipalities are authorized to regulate facilities more vigorously than the State and can even ban facilities outright. The aim of this article is to provide a comprehensive catalog of options available to municipalities in drafting local legislation to deal with proposed and existing facilities. A community can use the powers granted by the State to minimize the environmental risks while maximizing the economic benefits from solid waste facilities. Such actions can include total bans, restrictions on specific types of facilities,

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5. *See generally* George J. Church, *Garbage, Garbage Everywhere*, TIME, Sept. 5, 1988, at 81; William L. Kovacs, *The Coming Era of Conservation and Industrial Utilization of Recyclable Materials*, 15 ECOLOGY L.Q. 537 (1988). For all the gains of the environmental movement, the average American now produces 4 lbs. of garbage a day compared to 2.6 lbs. in 1960. Michael Weisskopf, *Tossing Out Trash-for-Cash Plans Like So Much Garbage*, WASH. POST, March 9-15, 1992, Nat'l Weekly Ed., at 33. New Yorkers generate approximately 6 lbs. per person per day, almost 50% greater than the national average. Daryl W. Ditz, Solid Waste: Local Problems and Opportunities for Planning, Address at the Annual Meeting of the New York Planning Federation, Oct. 16, 1989, *in* 54 PLAN. NEWS 1 (Jan./Feb. 1990).

6. New York's Solid Waste Disposal Policy declares "the basic responsibility for the planning and operation of solid waste management facilities remains with local governments." N.Y. ENVTL. CONSERV. LAW § 27-0106(2) (McKinney 1991).

7. The Department of Environmental Conservation (DEC) was created to protect the environment, N.Y. ENVTL. CONSERV. LAW § 1-0101 (McKinney 1984), but is also charged with planning to meet the disposal needs of the State, N.Y. ENVTL. CONSERV. LAW § 27-0106 (McKinney 1992). For a discussion critical of the manner in which the DEC handles these dual mandates in regard to hazardous waste disposal, see R. Nils Olsen, Jr., *The Concentration of Commercial Hazardous Waste Facilities in the Western New York Community*, 39 BUFF. L. REV. 473 (1991).

8. Unless otherwise stated in this article, local government means the governing body of a county, city, town, or village.

9. This article concerns solid waste facilities, which include landfills, monofills, incinerators, and transfer stations. Which facilities can be the subject of local legislation is discussed *infra* at notes 72-80 and accompanying text.

or restrictions on certain types of waste. This article specifically targets the rural areas of New York State which are becoming the dumping grounds of choice for urban communities.[10] As the Farmersville experience suggests, the time for action may be immediate.[11]

Part I outlines the major factors that contribute to the current pressure on rural communities. It explains why these communities should take affirmative action rather than rely on state and federal regulators. Part II describes the federal and state regulatory picture in which private facilities operate. It also frames the limits of local regulatory power. Part III discusses local government supervision of private waste disposal, including the powers that the State has provided to local communities. Part IV details strategies for maximizing the economic gain from private facilities while minimizing the environmental risks.

A. *Pressures on Rural New York Communities*

A number of factors are contributing to the pressure on rural areas of New York to allow for the creation of new landfills or for the expansion of existing facilities. First, the "civil war of waste"[12] between the waste exporting and importing states has led Congress to consider a number of bills that would authorize states to enact garbage import bans.[13] In New York, garbage import bans would mean that major

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10. This article is intended to be general in scope. Therefore, it does not consider the following specific laws and situations:

a) Long Island Landfill Closure Law
b) New York City garbage laws
c) Adirondack Park complications
d) Siting of facilities on Native American Reservations
e) Publicly owned solid waste facilities.

11. A similar warning was issued by a local government expert in 1981. Bruce B. Roswig, *Local Government*, 32 SYRACUSE. L. REV. 435, 437 (1981). See also Chem-Troll Pollution Services, Inc. v. Board of Appeals of the Town of Porter, 411 N.Y.S.2d 69 (App. Div. 4th Dep't 1978), discussed *infra* at notes 223-29 and accompanying text, for an example of the consequences of failure to enact comprehensive local solid waste facility regulations.

12. 138 CONG. RECS. 9915 (daily ed. July 20, 1992) (statement of Sen. Baucas).

13. Under current Supreme Court interpretations of the Commerce Clause there can be no discrimination against the interstate shipment of waste. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992); Philadelphia v. New Jersey, 437 U.S. 617 (1978). *See infra* text accompanying notes 319-35. As a result, the states have looked to Congress for relief. In 1990 an import ban introduced by Indiana Senator Dan Coats was passed by the Senate but

trash producers and exporters, such as Long Island and New York City, would be forced to seek new disposal sites within the State.[14] Thomas

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was removed by a House-Senate Conference Committee. H.R. REP. NO. 958, 101st Cong., 2d Sess. (1990). Over twenty measures authorizing some form of state regulation of interstate waste disposal have been introduced in the 102d Congress. The most recent attempt, the Interstate Transportation of Municipal Waste Act of 1992 (S. 2877, 102d Cong., 2d Sess. (1992)), which was introduced in the wake of several Supreme Court rulings voiding restrictive local measures as violations of the Commerce Clause, passed the Senate 89-2 on July 23, 1992. Keith Schneider, *Senate Approves Bill Curbing Interstate Garbage Shipments*, N.Y. TIMES, July 24, 1992, at A16. The possibility of passage into law is unclear. The House had planned to consider waste import restrictions in the Resource Conservation and Recovery Act (RCRA) reauthorization bill, but such comprehensive action is considered unlikely. *Impasse on House RCRA Bill Continues; House Chairman Lashes Out at Industry*, 23 Env't Rep. (BNA) 1506 (1992).

The pressure exerted on members of Congress by their constituents to allow state discrimination against waste imports reflects similar concerns raised at the state and local level. The Towns of Caledonia and Lewiston, N.Y., passed ordinances restricting the disposal of non-local waste after local private landfills signed contracts with Monroe County. *Landfill Owner Gets Deadline*, ROCHESTER DEMOCRAT & CHRON., July 20, 1976, at B5; Modern Landfill, Inc. v. Town of Lewiston, 3 (Preliminary Injunction, Index No. 69836, June 12, 1989) (unpublished opinion describing history behind adoption of Town of Lewiston Local Law No. 1 of 1988). The Benton, Arkansas, City Council had unanimously approved an agreement to accept New York City trash, but a public outcry based on the source of trash caused the Council to unanimously reverse itself. *See* J.C. Barden, *Garbage is One Thing, but Garbage from New York? Forget it!*, N.Y. TIMES, Feb. 12, 1989, at 26. Indiana reacted to increased imports of waste from east coast states by passing restrictive laws, which were ultimately thrown out by the courts. Government Suppliers Consolidating Servs. v. Bayh, 753 F. Supp. 739 (S.D. Ind. 1990). The Waste Information Network was founded in Missouri in response to imports of out-of-state garbage. Bill Breen, *Truckin' Trash*, GARBAGE, Jan./Feb. 1991, at 48. Its founder, Kathleen McCartney, stated: "We're not opposed to building landfills to take care of our waste. But we're not going to take care of someone else's waste, too." *Id.*

Ironically, few of the states attempting to establish barriers to waste imports are innocent parties. All but 12 states are importers and exporters. *Id.* Indiana sends trash into Illinois, Kentucky, Ohio, and Michigan. *Id.* Missouri sends 34% of its municipal solid waste out-of-state. *Id.*

14. According to the National Solid Waste Management Association, New York State exported 2.4 million tons of solid waste in 1989, 16% of total interstate shipments. *Interstate Garbage Trucking*, GARBAGE, Jan./Feb. 1991, at 58. New York City alone produces 28,000 tons of waste a day. Michael Specter, *Pact on Garbage in New York City*, N.Y. TIMES, Aug. 18, 1992, at A1. Only 10% of the City's waste is recycled while another 10% percent is burned. The rest is either shipped to the City's only remaining landfill (which only has a remaining life of 10-20 years) or exported. *Id.* The pressure to find landfill space is likely to increase when a ban on ocean dumping of sewage sludge goes into effect in 1992. Almost four million wet tons of

Jorling, Commissioner of the New York State Department of Environmental Conservation (DEC) has admitted that "[i]n New York, we should manage the waste we generate here."[15] Large waste disposal companies support garbage import bans because New York and other states with inadequate landfill capacity would be forced to construct new facilities.[16]

Export restrictions would drastically increase the volume of garbage absorbed by New York's waste handlers. For example, Long Island produces 3.5 million tons of garbage a year.[17] Only 15% of that trash is currently recycled.[18] Incineration accounts for the disposal of another 46% of Long Island's garbage, but anti-incinerator sentiment is likely to limit any future growth of this disposal option.[19] Some of the remaining waste is deposited in one of the few remaining operating

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sludge were dumped into the ocean by New York City in 1990. ERIC A. GOLDSTEIN & MARK E. IZEMAN, THE NEW YORK ENVIRONMENT BOOK 81 (1990).

Because local governments can discriminate against intrastate waste (see *infra* text accompanying notes 132-141), congressionally approved barriers would benefit rural areas by relieving the pressure from out-of-state sources. But since the urban areas of New York are among the largest waste exporters, rural New York would only be trading out-of-state waste for urban waste if local action is not taken to regulate solid waste facilities.

15. Sarah Lyall, *From L.I. to Angry Illinois: A 5-Day Trash Odyssey*, N.Y. TIMES, Dec. 26, 1991, at A1. Commissioner Jorling's talk has not been backed up by action. While New Jersey, the leading trash exporter, has cut its trash shipments from 5.5 million tons in 1989 to between 3 and 4 million tons in 1991, New York exports rose from 2.3 million to 3.1 million tons in the same period. Dan Fagin, *Badlands in Demand; Indians' Land Is Sought For Biggest Landfill in U.S.*, NEWSDAY, Oct. 21, 1991, at 5. Jorling told Congress that the other states are "accepting New York's solid waste on a temporary basis while our planning and implementation efforts are brought to fruition." *House RCRA Hearings Explore Pros, Cons of Interstate Waste Limits*, INTEGRATED WASTE MGMT., May 15, 1991, *available in* LEXIS, Nexis Library, OMNI file. Jorling asked Congress to delay implementing a ban for seven to ten years. Lyall, *supra*.

16. *Schneider*, *supra* note 13 (comments of William J. Plunkett of Waste Management Inc., the nation's largest collection and disposal company).

17. John Rather, *Discovering Ways to Dump Garbage*, N.Y. TIMES, Jan. 5, 1992, Long Island Section, at 1.

18. *Id.* New York mandates that all communities must have a recycling program in place by September, 1992, but it does not require specific levels. N.Y. GEN. MUN. LAW § 120-aa (McKinney 1992).

19. In recent years two Long Island town supervisors were elected on promises to cancel contracts to build incinerators, which they did. In addition, the City of Glen Cove's incinerator is currently closed and its future uncertain. Rather, *supra* note 17.

landfills,[20] but most waste is shipped from Long Island. The State has mandated that to protect the area's ground water, all municipal dumps on Long Island must be closed.[21] Also, the majority of Long Island's incinerator ash is currently sent out-of-state.[22] If this refuse is sealed within the state's borders by a Congressional ban, rural upstate areas are the most likely disposal target.

The second factor that contributes to pressure on upstate areas is that the economics of waste disposal, combined with increased environmental regulations, have created a trend towards regional "megadumps." A landfill can earn a gross profit margin of 15% on 1,000 tons of trash per day, but at 4,000 tons per day the margin rises to 60%.[23] Waste Management, Inc., one of the largest firms in the disposal industry, is constructing a 480 acre regional landfill in Mobile, Arizona. It will cost $240 million to construct while total revenues over the facility's 50-year life will be $2.26 billion, at current rates.[24] Meanwhile, old dumps are closing because most communities cannot afford to comply with new environmental regulations.[25] A new landfill can cost $400,000 per acre to construct.[26] Under increased environmental regulations, the number of landfills nationwide is

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20. *See* Rather, *supra* note 17.

21. N.Y. ENVTL. CONSERV. LAW § 27-0704 (McKinney 1984 & Supp. 1991). Landfills remain open in the Towns of East Hampton, Riverhead, and Southold, while those communities pursue judicial measures to overturn the Landfill Closing Law. Rather, *supra* note 17.

22. Fagin, *supra* note 15. At the same time New York City recently decided to build a new incinerator to help address its waste disposal needs, it decided not to build an ash landfill on Staten Island, preferring instead to export the incinerator's residue. Specter, *supra* note 14. If a waste export ban is enacted, upstate New York is the most likely destination for the ash.

23. Jeff Bailey, *Economics of Trash, Some Big Waste Firms Pay Some Tiny Towns Little for Dump Sites*, WALL ST. J., Dec. 3, 1991, at A1, A9.

24. *Id.*

25. Keith Schneider, *Rules Forcing Towns to Pick Big New Dumps or Big Costs*, N.Y. TIMES, Jan. 6, 1992, at A1. One study estimates that only communities of over 125,000 will produce enough garbage to make local landfills economical; the required population base rises to 395,000 if only residential solid waste is accepted. *Cost of Compliance with RCRA Subtitle D Will Lead to 'Mega-Landfills,' Consultant Says*, 23 Env't Rep. (BNA) 1204 (1992). In New York, only 15 of 177 landfills are in full compliance with state and federal regulations. New York State Legis. Comm. on Solid Waste Mgmt., *Where Will the Garbage Go?, discussed in* 21 Env't Rep. (BNA) 2236 (1991).

26. John Holusha, *Making the Town Dump Sanitary*, N.Y. TIMES, Sept. 13, 1989, at D6.

expected to decrease from 6,500 to 1,000; in New York, the expected decrease will be from 518 in 1983, to under 100.[27]

The third major reason for concern is that New York, particularly Niagara County, has become a destination of choice for Canadian trash processors seeking cheaper disposal sites.[28] Canadian trash is exempted from the Agriculture Department health requirement that all foreign trash be incinerated before being landfilled in the United States.[29] However, the Agriculture Department never recognized this exemption until July, 1991.[30] Since the exemption was recognized, Canadian waste handlers have sharply increased trash shipments to United States [31] The Toronto metropolitan area sent over 550,000 tons of waste into the United States, of which about 20 percent went to Niagara County alone.[32]

Finally, because many rural communities are impoverished and/or politically weak, they are prime targets for the waste disposal industry.[33] A 1984 report prepared for the California Waste Management Board focused on the kind of communities where facility siting is more likely to succeed.[34] It recommended siting facilities in

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27. Schneider, *supra* note 25, at A1, B8.

28. An increase in tipping fees at metropolitan Toronto landfills from $18 to $150 a ton, combined with scarce capacity and tighter environmental controls have created the exodus. John Machacek, *House Small Business Chairman Calls for Controls on Garbage*, Gannett News Serv., Oct. 31, 1991, *available in* LEXIS, Nexis Library, WIRES file.

29. 9 C.F.R. § 94.5(a)(1) (1991).

30. The decision, which was not published in the Federal Register, is discussed in 3 ENVTL. L. N.Y. 35 (1992).

31. *Congressman Seeks Pact With Canada to Regulate, Limit Exports of Garbage*, BNA INT'L TRADE DAILY, Nov. 12, 1991, *available in* LEXIS, Nexis Library, OMNI file [hereinafter *Congressman Seeks Pact*]; 137 CONG. REC. S15,297 (daily ed. Oct. 28, 1991) (statement of Sen. D'Amato). Senator Al D'Amato and Congressman Bill Paxon of New York have each introduced legislation that would require the Agriculture Department to inspect imported Canadian waste, and would impose a per ton inspection fee which would make disposal in the United States economically unattractive. H.R. 3661, 102d Cong., 1st Sess. (1991); S. 1884, 102d Cong., 1st Sess. (1991). Neither bill has advanced out of committee.

32. *Congressman Seeks Pact*, *supra* note 31.

33. Bailey, *supra* note 23, at A1. Disposal company officials deny this, but admit many dumps are located near small towns. *Id.*

34. The report is discussed in Sarah Crim, *The NIMBY Syndrome in the 1990's: Where Do You Go After Getting to 'No'?*, 21 Env't Rep. (BNA) 132 (1990). *See* Robert F. Kennedy, Jr. and Dennis Rivera, *Pollution's Chief Victims: The Poor*, N.Y. TIMES, Aug. 15, 1992 at 19.

economically impoverished communities whose residents are older, have low incomes, education levels of high school or less, are politically conservative with a free market orientation, and have 'nature exploitive' occupations such as farming.[35] Many rural New York communities fit this profile.

B. *Relationship Between the Department of Environmental Conservation and Local Communities*

An initial question all communities must face is whether to take any local action to regulate solid waste facilities. It may be in the local community's best interests to act affirmatively in regulating solid waste disposal facilities. However, the state government, through the DEC, does operate a comprehensive licensing process for all solid waste facilities. Any local licensing is in addition to State licensing. The DEC possesses technical knowledge rarely found at the local level. Additionally, communities can participate in the DEC process at all phases.

However, the DEC usually has different objectives than does a local community in its licensing process. The DEC is required to make decisions based on the needs of the State as a whole, and a facility may be necessary to provide adequate disposal capacity. If a facility is needed and meets federal and state environmental requirements, the DEC is likely to approve it. Local sentiments can be considered, but they are not controlling.

Local governments may have different beliefs than the DEC about a facility. The municipality may make evaluations of economic benefit versus environmental harm based on local values. For example, gains may be considered inadequate compensation for allowing construction of a solid waste facility. While DEC decision makers are insulated from community opinion, local legislators must answer to the local populace for their decisions.

Moreover, the DEC does not have a flawless record in the performance of its duties. This is primarily the result of the continuing budget crisis in New York State, which has left the DEC without adequate resources to properly discharge its many responsibilities.[36]

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35. *Id.*

36. On the budget crisis in general see Kevin Sack, *$6 Billion Deficit is Seen by Cuomo for Next Budget*, N.Y. TIMES, Jan. 25, 1991 at A1; Alvin E. Bessent, *Cuomo Vetoes $4.6M More From Budget*, NEWSDAY, May 4, 1989, at 17. As an example of the DEC's problems, in the mid-1970's Long Island averaged 27 or 28 environmental conservation officers. Although the intervening years saw an exponential increase

But there are also questions as to the Agency's competence. For example, some have charged that the different divisions of the agency do not adequately coordinate their efforts;[37] even the DEC's Commissioner has labeled the efforts of one DEC laboratory as counterproductive to some of the DEC's enforcement activities.[38] These questions arise from the DEC's mission relative to solid waste licensing. In 1986 the DEC granted, without any environmental review, a permit that would double the size and height of an existing landfill.[39] Only after prodding by the local county and town governments was the permit revoked.[40]

If a locality merely participates in the DEC process, the DEC alone has the final approval. Nothing in state law or regulations requires the DEC to obtain local government authorization.[41] By acting affirma-

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in the responsibilities of the officers, by 1989 the authorized force was down to 23. Celeste Hadrick, *Environment; Fewer Sites Would Be Policed*, NEWSDAY, Mar. 13, 1989, at 19. *See also Fight Albany Budget Terrorism; Free the 'DEC 67'*, NEWSDAY, Mar. 24, 1989, at 72 (editorial criticizing Governor Cuomo's threat to cut 67 DEC jobs as a ploy in a legislative-executive political fight).

37. Joan Swirsky, *On the Trail of L.I. Cancer, Amateur Sleuths*, N.Y. TIMES, July 5, 1992, § 13 (Long Island), at 1 (discussing efforts by one DEC division to clean-up existing pollution while another division considers granting the same polluter a new permit).

38. Bessent, *supra* note 36.

39. Modern Landfill, Inc. v. Jorling, 555 N.Y.S.2d 937 (App. Div. 4th Dep't), *appeal denied*, 566 N.E.2d 1171 (N.Y. 1990). See *infra* text accompanying notes 89-131 for a discussion of environmental review requirements for solid waste facilities.

40. The courts upheld the revocation of the permit. *Modern Landfill*, 555 N.Y.S.2d 937. An interesting and disturbing example of the DEC's questionable efforts to protect the environment is Commissioner Jorling's recent decision to bypass the normal permitting procedures to make a quick decision on New York City's incinerator permit request. The sudden action on a permit request filed in 1985 was necessary to avoid the requirements of the Clean Air Act, which became effective Nov. 15, 1992, and would require the City to reduce other sources of pollution before the incinerator could be built. William Bunch, *Race to Pollute; State Move Could Foul City*, NEWSDAY, Oct. 6, 1992, at 5. Proponents of a quick decision asserted that the new incinerator would be outfitted with state of the art emission controls, and that a quick decision was necessary to implement other areas of the waste plan, including closing two older incinerators. *Id.* Opponents argued that the new incinerator would produce pollution equivalent to 500,000 new cars, and a quick decision would unfairly preclude public participation. *Id.*

41. *See* Town Bd. of Greenpoint v. Department of Envtl. Conservation (Sup. Ct. Albany Cty., Aug. 2, 1991) (No. 91-ST3038) (DEC could conduct licensing process even though local law banned private facility in question). This allows the DEC to conduct its operations on an objective basis with minimal influence from local politics.

tively a local community can create a veto power over proposed or expanded facilities. The values of the local community are then injected into the process. With affirmative local community action, a facility cannot operate without local permission, even with a DEC license. Even when a community has no objection to a facility, a local licensing process can be used as leverage for higher host fees and/or environmental restrictions on the facility. Conversely, when an operator does not need any local approval, there is little incentive to pay host fees or make environmental concessions to the community.

The State has authorized municipalities to participate with neighboring jurisdictions in the formulation of local waste management plans.[42] These plans can be utilized in conjunction with local land use plans and zoning powers, solid waste facility legislation, and other state and local environmental laws to create a comprehensive scheme to control over solid waste disposal activity. By acting affirmatively, the locality assures itself a key role in all issues affecting the local environment; failure to act can leave the community a helpless bystander in the solid waste disposal facility siting process.

II. OVERVIEW OF FEDERAL AND STATE LAW CONCERNING SOLID WASTE FACILITIES

Waste disposal management has been an issue for local government since the colonial period[43] and is still largely a local concern in New York.[44] Nevertheless, in enacting local statutes, the community must act within the regulatory scheme established by the federal and state governments. This section provides a brief history of federal and state regulation of solid waste and describes its current status.

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42. *See infra* text accompanying notes 145-50.

43. In 1683 the New York City Common Council passed an ordinance forbidding the improper disposal of "any dung, draught, dyrte or any other thing to fill up or annoy the mould or Dock or the neighborhood near the same." NEW YORK CITY COMMON COUNCIL, 1 MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK: 1675 - 1776 55 (1905) *quoted in* M. GRANT GROSS, 26 MESA N.Y. BIGHT ATLAS 1, 7 (1976).

44. New York State Department of Environmental Conservation, *New York State Solid Waste Management Plan*, 1-7 (1987-88 Update); Legislative Commission on Expenditure Review, *Solid Waste Management in New York State*, 19 (1976).

A. *Federal*

Federal regulation of private waste disposal began with an 1890 Congressional Act prohibiting dumping in or on the banks of navigable waters.[45] The Act is still in force and has been utilized by the federal government[46] in litigation concerning pollution of waterways.[47] Modern federal involvement in the management of solid waste was inaugurated with the Solid Waste Disposal Act of 1965.[48] This "modest effort"[49] established only an advisory role for the federal government. Its provisions merely called for study of the problem, aided by planning grants to the states. While the Solid Waste Disposal Act was first modified in 1970,[50] no real change in the government's role occurred until Congress passed the Resource Conservation and Recovery Act (RCRA) in 1976.[51] In taking this action, Congress noted that although waste disposal was still mainly a state and local concern, the situation

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45. Act of Sept. 19, 1890, ch. 907, § 6, 26 Stat. 426, 453. The provision was reenacted as the Refuse Act of 1899, § 13 of the River and Harbors Appropriation Act of 1899, 30 Stat. 1152 (codified at 33 U.S.C. § 407 (1988)).

46. The Act does not provide a private cause of action which municipalities can use against polluters unless an obstruction to navigation or other interference with interstate commerce can be proven. Town of N. Hempstead v. Village of N. Hills, 482 F.Supp. 900 (E.D.N.Y. 1979); Parscel v. Shell Oil Co., 421 F. Supp 1275 (D.C. Conn. 1976), *affd*, 573 F.2d 1289 (2d Cir. 1976).

47. *See, e.g.*, United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133 (2d Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985); United States v. Stoeco Homes Inc., 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1976); United States v. Republic Steel Corp., 362 U.S. 482 (1960).

48. Pub. L. No. 89-272, tit. II, 79 Stat. 997 (1965).

49. Roger W. Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 633, 641.

50. Resource Recovery Act of 1970, Pub. L. No. 91-512, 84 Stat. 1227. This Act expanded research in recycling, required several studies, and expanded the available grants. Andersen, *supra* note 49, at 641. Professor Andersen suggests that Congress did not approach solid waste comprehensively, as it had with air pollution in the Clean Air Act Amendments of 1970, because solid waste was still thought of as a local problem and the scope of the land pollution problem was not yet recognized. *Id.* at 636.

51. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C.A. §§ 6901-6992 (West 1983 & Supp. 1992)). RCRA, and its later amendments, also addressed hazardous waste disposal. Because New York has preempted all local regulation of hazardous waste facilities, *see infra* note 74, local regulation of such facilities will not be considered further unless also relevant to non-hazardous waste facilities.

had grown to a point that required greater federal involvement.[52]

RCRA is a complicated statute[53] which focuses primarily on the handling of hazardous waste.[54] RCRA addresses non-hazardous waste in Subtitle D by encouraging development of environmentally sound disposal methods, resource recovery (such as waste to energy plants), recycling, and waste reduction.[55] The Act provides financial and technical assistance to states that create a solid waste management plan in accordance with RCRA's objectives.[56] In order to qualify for aid under RCRA, state plans must include provisions ending the use of open dumps and requiring all future disposal to take place at sanitary landfills.[57] This is the one facet of RCRA's non-hazardous provisions which directly regulates private activity.[58]

Federal legislation, as it currently stands, shows that Congress intended the federal and state governments to cooperate fully to address waste disposal concerns. Even while establishing the basis for federal involvement, RCRA notes that solid waste disposal will continue to be

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52. 42 U.S.C. § 6901(a) (1988).

53. One court described an effort to understand RCRA's provisions as a "mind numbing journey." American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987). An excellent section by section explanation of RCRA can be found in Randolph L. Hill, *An Overview of RCRA*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,254 (1991).

54. The definition of hazardous waste, indeed of waste itself, is extremely complicated and beyond the scope of this article. Generally a waste is hazardous when it exhibits one of the hazardous waste characteristics defined by the EPA. Hill, *supra* note 53, at 10,258. This article addresses only facilities handling non-hazardous waste because local governments are pre-empted by state law on matters concerning hazardous waste facilities. *See infra* note 74.

55. 42 U.S.C. § 6941 (1988).

56. 42 U.S.C. § 6948 (1988). Conversely, states that do not adopt solid waste management plans are denied federal financial and technical assistance in addressing solid waste problems. *Id.*

57. 42 U.S.C. § 6945 (1988). Sanitary landfills are defined as land disposal sites "employing an engineered method of disposing of solid wastes on land in a manner that minimizes environmental hazards by spreading the solid wastes in thin layers, compacting the solid wastes to the smallest practical volume, and applying and compacting cover material at the end of each operating day." 40 C.F.R. § 240.101(w) (1991). An open dump is a "land disposal site at which solid wastes are disposed of in a manner that does not protect the environment, are susceptible to open burning, and are exposed to the elements, vectors, and scavengers." 40 C.F.R. § 240.101(s) (1991).

58. Since open dumps are now illegal under RCRA, 42 U.S.C. § 6945 (1988), no local action is required to prevent open dumping.

primarily a state and local function.[59] The Hazardous and Solid Waste Amendments of 1984[60] added the establishment of a federal/state partnership to carry out the Act.[61]

The Environmental Protection Agency (EPA) was given primary responsibility for RCRA's solid waste provisions, a duty it largely ignored until prodded into action by Congress.[62] The EPA has since enacted solid waste regulations to implement RCRA, providing standards for the construction and operation of facilities.[63] The most influential of these regulations requires that solid waste landfills be fitted with leak proof bottom layers so that contaminated water (leachate) can be trapped and treated.[64] This regulation has substantially increased landfill construction costs.[65] The regulations also require that state solid waste plans must be promulgated in accordance with federal rules.[66] The EPA relies on the states to provide the bulk of solid waste enforcement efforts once a solid waste management plan is approved.

B. *New York State*

Prior to the 1970s, solid waste regulation in New York was fairly limited.[67] Recognition of the growing problem led the State to create a program to fund one hundred percent of county and regional solid waste planning efforts.[68] In 1970 the program was expanded to provide

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59. 42 U.S.C. § 6901(a) (1988). The U.S. Supreme Court has rejected the argument that RCRA preempts state regulation. Philadelphia v. New Jersey, 437 U.S. 617, 620 n.4 (1978).

60. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

61. 42 U.S.C. § 6902(a)(7) (1988).

62. See H.R. REP. No. 198, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576 for a general discussion of the inadequacy of EPA action.

63. 40 C.F.R. §§ 240-281 (1991).

64. *See* Schneider, *supra* note 25.

65. Holusha, *supra* note 26; Schneider, *supra* note 25.

66. 40 C.F.R. § 256.01 (1991).

67. Philip Weinberg, commentary to Title 7 of Article 27 of the N.Y. ENVTL. CONSERV. LAW ANN. (McKinney 1983 & Supp. 1991). The few existing provisions were adopted by the State Public Health Council in 1963 as part of the State Sanitary Code. *Id.* They required that disposal be in sanitary landfills and that municipal incinerators do not exceed air quality standards. Legislative Commission on Expenditure Review, SOLID WASTE MANAGEMENT IN NEW YORK STATE 1 (1976).

68. Act of Aug. 1, 1966, ch. 902, 1966 N.Y. Laws 2651.

fifty percent of the cost of planning construction of new facilities and improving existing solid waste facilities.[69] Neither the 1966 nor 1970 law sets any standards for operation of public or private facilities.

New York enacted its first major solid waste legislation in response to the rising tide of environmental awareness. In 1973, Governor Hugh Carey approved legislation creating a state-wide comprehensive scheme for management of solid waste.[70] The Governor noted that this law created, for the first time, central responsibility for managing the crisis in garbage disposal.[71] This state law defines a solid waste management facility as a

> facility employed beyond the initial solid waste collection process including but not limited to, transfer stations, baling facilities, rail haul or barge haul facilities, processing systems, including resource recovery facilities or other facilities for reducing solid waste volume, sanitary landfills, facilities for the disposal of construction and demolition debris, plants and facilities for compacting, composting, or pyrolization of solid wastes, incinerators and other solid waste disposal, reduction or conversion facilities.[72]

A municipality can create local control over any facility included in this definition, unless specifically pre-empted by state statute.[73] Communities are pre-empted by state law from regulating industrial hazardous waste facilities[74] and low-level radioactive waste

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69. Act of May 8, 1970, ch. 683, 1970 N.Y. Laws 2356. The Governor's approval message noted the need to ease the financial burden on localities caused by solid waste disposal. Local funding of the financial burden remains a concern today. NEW YORK STATE LEGISLATIVE ANNUAL 510 (1970).

70. SOLID WASTE MANAGEMENT AND RESOURCE RECOVERY FACILITIES ACT OF 1973, ch. 399, 1973 N.Y. Laws 1474 (codified as amended in Article 27, Tit. 7 of the N.Y. ENVTL. CONSERV. LAW (McKinney 1984 & Supp. 1992)). Title 7 was originally passed in 1973 as Title 5, but was renumbered in 1977.

71. Governor's Message to the Legislature upon approval of the measure *in* Bill Jacket, ch. 399., laws of 1973.

72. N.Y. ENVTL. CONSERV. LAW § 27-0701(2) (McKinney 1984 & Supp. 1992).

73. Authority for local legislation is provided by N.Y. ENVTL. CONSERV. LAW § 27-0711 (McKinney 1984). *See infra notes* 132-44 and accompanying text.

74. Industrial hazardous waste facilities are defined in N.Y. ENVTL. CONSERV. LAW § 27-1101(5). The pre-emption is made by N.Y. ENVTL. CONSERV. LAW § 27-1115 (McKinney 1992). Originally the hazardous waste siting provisions did not pre-empt local land use regulations. N.Y. ENVTL. CONSERV. LAW §§ 27-1105(f) and 27-1115 were amended after a community successfully used its local land use laws to fight the

management facilities.[75] Medical waste, which is not considered hazardous, can be treated and then disposed of by burial at a landfill, and therefore is subject to local regulation.[76]

It can be seen from the above definition that the solid waste facilities subject to control by local governments include much more than the local landfill. Before deciding to exercise control over specific disposal activities, communities should consider the possible consequences of the proposed legislation. For example, some communities have banned any disposal of incinerator ash in the community.[77] Where bottom ash[78] from a coal burning plant was used

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siting of a proposed hazardous waste facility. Act of Aug. 3, 1987, ch. 618, § 11, 1987 N.Y. Laws 2673. *See* Washington County CEASE Inc., v. Persico, 465 N.Y.S.2d 965 (S. Ct. 1983), *aff'd*, 473 N.Y.S.2d 610 (App. Div. 1984) *aff'd*, 477 N.E.2d 1084 (N.Y. 1985).

75. Low-level radioactive waste management facilities are defined in N.Y. ENVTL. CONSERV. LAW § 29-0101(2) (McKinney 1992). State pre-emption is made by N.Y. ENVTL. CONSERV. LAW § 29-0507 (McKinney 1992).

76. Medical waste was recognized as a unique item, separate from hazardous and solid waste, by the Medical Waste Tracking Act of 1988, Pub. L. No. 100-582, 102 Stat. 2950. The Act was passed in response to medical waste washing up on public beaches and other concerns about improper disposal. *See* Laurence D. Granite, *Note, The Medical Waste Tracking Act Effect on New York*, 7 TOURO L. REV. 259 (1990). The state provisions were originally adopted in 1987 and were amended in 1989 to implement the federal law in New York. Act of July 27, 1987, ch. 431, 1987 N.Y. Laws 2356; Act of June 22, 1989, ch. 180, 1989 N.Y. Laws 2153.

Medical waste is defined in N.Y. ENVTL. CONSERV. LAW § 27-1501(1) (McKinney 1992). N.Y. ENVTL. CONSERV. LAW § 27-1507(1) (McKinney 1992) provides acceptable methods to treat medical waste. As long as the medical waste was not hazardous before it was incinerated, composted medical waste and sterilized medical waste can be disposed of at landfills. N.Y. ENVTL. CONSERV. LAW § 27-1507(2) (McKinney 1992). Sludge from sewage systems into which liquid medical waste is discharged can also be landfilled. N.Y. ENVTL. CONSERV. LAW §§ 27-1507(1)(b) and (2) (McKinney 1992).

77. Incinerator ash is the residue from the burning of waste, a disposal method of questionable value. *See generally* Susan M. Komo-Kim, *Municipal Waste Combustion: A Wasted Investment?*, 12 U. HAW. L. REV. 153 (1990). Every 100 tons of waste incinerated produces about 30 tons of ash. *Solid Waste Incineration Sparks Environmental Debate*, 240 Chem. Mktg. Rep. 21, Sept. 16, 1991, *available* in LEXIS, Nexis Library, Omni File. Incineration concentrates chemicals and heavy metals in the resulting ash, as well as producing dangerous emissions containing sulfur dioxide, nitrogen dioxide, carbon monoxide, dioxins, and furans. *Id.*; John Holusha, *Farewell to Those Old Printing Ink Blues, and a Few Reds and Yellows*, N.Y. TIMES, May 13, 1990, § 3, at 9. The method also allegedly discourages recycling by burning materials that could be recycled. *Solid Waste Incineration Sparks Environmental Debate, supra.*

Ash is normally disposed of in ash monofills or used as ground cover in

to fill a pond, the pond was determined to be a solid waste facility.[79] If local law banned all disposal of incinerator ash within the community, the electric generating plant would be effectively illegal. In another case, use of the parking lots of an elementary school and a fire department to shift waste from satellite trucks to compactor trucks was considered operation of a solid waste facility.[80] As these examples demonstrate, if all facilities were banned, important facilities for local waste disposal could be affected.

These examples illustrate the need to carefully evaluate the impact of local regulations on the commerce of a community. They also highlight the methods used by communities to dispose of their own refuse and the advantages of using the state regulatory system as much as possible. The DEC regulations provide the basis for determining what facilities are regulated, and minimum environmental standards with which all facilities must comply. A state permit was required in

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landfills. It is unclear whether ash is hazardous or not from a legal perspective. The Second Circuit has found that it is not, Environmental Defense Fund v. Wheelabrator Technologies, Inc., 931 F.2d 211 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 453 (1991). The Seventh Circuit had ruled that it is, but the Supreme Court vacated the decision and remanded, Environmental Defense Fund v. City of Chicago, 948 F.2d 345 (7th Cir. 1991), vacated and remanded, 61 U.S.L.W. 3369 (1992). Rather than directly addressing the question as part of the Clean Air Amendments, Congress prohibited the EPA from regulating incinerator ash before November, 1992. Clean Air Amendments of 1990, Pub. L. No. 101-549, § 306, 104 Stat. 2399, 2584. In anticipation of the expiration of that moratorium, the EPA has indicated its intent to classify ash as non-hazardous. *Ash From Combustion of Municipal Waste to be Considered Non-Hazardous*, 23 Env't Rep. (BNA) 1459 (1992).

Determination that incinerator ash is hazardous, and thus subject to hazardous waste disposal requirements, would not necessarily benefit local communities. For those localities which have pursued incineration as a disposal method, the cost of ash disposal would substantially increase. John Holusha, *Ruling on Ash May Increase Some Cities' Disposal Costs*, N.Y. TIMES, Nov. 22, 1991, at D1. Additionally, facilities handling ash would be hazardous waste facilities, which local governments are pre-empted from controlling. *See supra* note 74. Thus, while local governments can currently prohibit facilities like ash monofills, if ash is considered hazardous, local governments would be pre-empted and the DEC could approve facilities that local governments would not. For a description of the hazardous waste facility siting process, and the ineffective voice that the public has in it, see Olsen, *supra* note 7, at 474-82.

78. Bottom ash is the solid ash residue left behind in the incinerator after combustion. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.2(6)(18) (1991).

79. DEC Declaratory Ruling 27-20 (New York State Energy and Gas Corp.) (1988).

80. A & M Bros. v. Waller, 541 N.Y.S.2d 237 (App. Div. 2d Dep't 1989) (upholding requirement to obtain permit).

each case, and a permit would be required under any local government ordinance incorporating the DEC regulations. If a local ordinance prohibits all waste facilities, both on-site and off-site facilities would be prohibited. Yet the on-site ash disposal facility, in the first example, served an electric plant that may have been vital to the local economy, while the transfer station, in the second example, may have been necessary to handle the community's own trash. Indiscriminate banning of solid waste facilities should be avoided to prevent unanticipated negative impacts.

C. *Role of the Department of Environmental Conservation*

Primary responsibility for implementing and enforcing New York's solid waste program lies with the New York State Department of Environmental Conservation (DEC).[81] The DEC was created in 1970[82] to carry out New York's policy "to conserve, improve and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being."[83] This solid waste legislation charged the DEC with preventing or reducing air, water, and noise pollution, obnoxious odors, unsightly conditions caused by uncontrolled litter, fly and vermin infestations, and other conditions necessary to protect public health, safety, and welfare.[84] The DEC has promulgated comprehensive regulations related to every aspect of landfill construction, operation, and closing.[85]

In adopting local legislation, local governments should incorporate the current DEC regulations.[86] By doing so, a municipality authorizes

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81. N.Y. ENVTL. CONSERV. LAW § 27-0703 (McKinney 1984 & Supp. 1991).

82. Act of Apr. 22, 1970, ch. 140, 1970 N.Y. Laws 866.

83. N.Y. ENVTL. CONSERV. LAW § 1-0101(1) (McKinney 1984). Specific functions, powers and duties of the department are delineated at N.Y. ENVTL. CONSERV. LAW § 3-0301 (McKinney 1984 & Supp. 1991).

84. N.Y. ENVTL. CONSERV. LAW § 27-0703(2) (McKinney 1984 & Supp. 1991).

85. N.Y. COMP. CODES R. & REGS. tit. 126, Part 360 (1991).

86. Adoption of DEC regulations does not require a community to permit what the DEC does, it just establishes the minimum standards for those facilities the locality chooses to allow. An example of a local law incorporating state law and regulations without surrendering the right to enact stricter requirements is found in the Town of Lewiston Local Law No. 2 of 1988, § 24C-5:

> A. All relevant sections of Article 27 of the New York State Environmental Conservation Law and Title 6 of the New York Codes, Regulations and Rules, Parts 360 to 364, are deemed to be included

itself to enforce what the DEC may not. State law provides that authority to enforce the Environmental Conservation Law is vested in the State, not local governments.[87] A local official would be enforcing only local law, thus avoiding any argument over local authority to enforce state law. Additionally, in creating local legislation the community can use the state regulatory structure to its advantage. For example, a community desiring to ban only waste to refuse or similar resource recovery facilities need only refer to facilities identified in *Official Compilation of Codes, Rules & Regulations of the State of New York*, title 6, section 360.3, rather than trying to create and maintain a comprehensive definition of such facilities. Finally, incorporation of the state regulations helps refute any allegation that the local law is inconsistent with state regulations.[88]

D. *State Environmental Quality Review Act (SEQRA)*

A primary piece of State legislation affecting any state or local decision involving a solid waste facility is the State Environmental Quality Review Act (SEQRA).[89] The legislature's intent in enacting SEQRA was

> to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the State.[90]

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within and as part of this local law, and any violation thereof shall be considered to constitute a violation of this local law.
B. The provisions of this local law shall be interpreted in such a manner as to be consistent with state law, except that this local law may provide more stringent regulations.

87. N.Y. ENVTL. CONSERV. LAW § 71-0101 (McKinney 1984).

88. *See infra* notes 132-44 and accompanying text. Use of DEC's standards in effect gives a community a higher level of technical expertise without paying for it. Additionally, the community need only defend its regulations when they vary from the state norms.

89. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984 & Supp. 1992). The DEC has promulgated detailed SEQRA regulations. N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (1991).

90. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984 & Supp. 1992).

SEQRA requires any "agency," including local governments,[91] to consider the environmental consequences[92] before taking any "action,"[93] and to act or choose alternatives which minimize or avoid adverse impacts on the environment.[94] SEQRA was modeled after the federal National Environmental Policy Act (NEPA).[95] Unlike NEPA, SEQRA dictates that an agency has an obligation to protect the environment in the conduct of its own affairs.[96] When acting as a regulatory body, the agency must give "due consideration . . . to preventing environmental damage."[97] Thus SEQRA contains a "substantive mandate to mitigate environmental harm, which is not the case under the federal statute."[98]

SEQRA is implicated when a local government undertakes an

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91. SEQRA uses the term "agency" to refer to those entities, including state agencies and local governments, which are subject to its mandates. N.Y. ENVTL. CONSERV. LAW § 8-0105 (McKinney 1984 & Supp. 1992).

92. Examples of environmental consequences that could be associated with a solid waste project are increased air pollution, increased traffic, effect on purity of water supply and loss of open space. SEQRA also applies to economic consequences, N.Y. ENVTL. CONSERV. LAW § 8-0109(1), (8) (McKinney 1984 & Supp. 1992), so parties demonstrating economic but not environmental harm have standing to challenge compliance under SEQRA. Moran v. Village of Philmont, 542 N.Y.S.2d 873, 875 (App. Div. 3d Dep't 1989) (owner of landfill regulated by ordinance has standing to challenge compliance with SEQRA by village enacting ordinance), *appeal dismissed*, 549 N.E.2d 477 (N.Y. 1989).

93. There are two types of actions: (1) projects and activities, and (2) policy, regulations and procedure-making. N.Y. ENVTL. CONSERV. LAW § 8-0105(4)(i), (ii) (McKinney 1984 & Supp. 1992). Projects include endeavors directly undertaken, financially supported, and/or licensed by the local government. *Id.* An example is construction of an incinerator. Congdon v. Washington County, 512 N.Y.S.2d 970 (Sup. Ct. 1986), *aff'd*, 518 N.Y.S.2d 224 (App. Div. 3d Dep't 1987), *appeal denied*, 516 N.E.2d 1223 (N.Y. 1987). An example of the policy requiring the preparation of an environmental impact statement is the adoption of a community land use master plan. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12(b)(1) (1991). Laws subjecting private waste disposal to local control are illustrative of procedure-making subject to SEQRA. See discussion of Niagara Recycling, Inc. v. Town Bd. of Niagara, 443 N.Y.S.2d 951 (App. Div. 1981), *aff'd*, 438 N.E.2d 1142 (N.Y. 1982) *supra* text accompanying notes 119 to 126. The DEC regulations have divided actions into five categories, which are discussed *infra* at notes 100-14 and accompanying text.

94. N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 1991).

95. MICHAEL GERRARD, ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, § 1.02 (1991). This volume is the authoritative guide to SEQRA.

96. N.Y. ENVTL. CONSERV. LAW § 8-0103(8) (McKinney 1991).

97. N.Y. ENVTL. CONSERV. LAW § 8-0103(9) (McKinney 1991).

98. GERRARD ET AL., *supra* note 95, § 1.02.

activity that may have a significant impact on the environment; such an activity is called an action.[99] In the SEQRA regulations, the DEC has established five categories that cover all possible actions: Type I, Type II, Exempt, Excluded, and Unlisted. The manner in which an action is evaluated depends on the category within which it falls. If an action is categorized Excluded, Exempt or Type II, SEQRA is not applicable, and an in-depth evaluation of its environmental consequences is not necessary.[100] If it is a Type I or Unlisted action, SEQRA is applicable.[101]

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99. A "significant impact on the environment" is not defined in the law or regulations. Instead a set of criteria is provided by the SEQRA regulations to make a determination based on the expected impact of each action. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(a) (1991). Examples include reduction in air and water quality, removal of large amounts of vegetation, and creation of a hazard to human health. *Id.* at § 617.11(a)(7). The long-term, short-term, and cumulative effects of the action are to be assessed in connection with factors such as the setting, duration of effects, and number of people affected. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(b) (1991).

100. GERRARD ET AL., *supra* note 95, § 2.01[3]. Exempt and excluded actions are those which are given SEQRA exemptions by the legislature or the regulations. *See* N.Y. ENVTL. CONSERV. LAW §§ 8-0105(5), 8-0111(5)(a)-(c) (McKinney 1991); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q) (1991). Examples are maintenance or repair involving no major structural changes, and actions of the State Legislature, which has exempted itself from SEQRA. Type II actions are those which have been determined not to have a significant environmental impact. GERRARD ET AL., *supra* note 95, § 2.01[3][b]. Examples from the DEC list of Type II actions at N.Y. COMP. CODES R. & REGS. tit. 6, § 617.13(d) (1991) include repaving existing highways without increasing the number of lanes; forest management practices not involving tree removal or pesticide application; collective bargaining activities; routine program administration and management; and agricultural farm management practices.

101. Type I actions are those more likely to require preparation of an Environmental Impact Statement (EIS). Type I actions are defined and listed at N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12 (1991). Examples include any physical alteration of 10 acres or more, or adoption of a community master plan. *Id.* Unlisted actions are those not covered in any other category. GERRARD ET AL., *supra* note 95, § 3.01[1][a].

Within the regulations the DEC has established lists of Type I and Type II actions. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.12(b), 617.13(d) (1991). These lists are binding on all local communities but are not exhaustive. A community can create its own Type I list that is more inclusive than the DEC's list, as long as a Type II action (SEQRA not applicable) from the DEC list is not redefined as a Type I action (SEQRA applicable). N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12(a)(2) (1991). This mechanism allows community discretion over which actions are more likely to significantly impact the environment. For example, the following law was adopted by the Town of Ogden, N.Y.:

A. Consistent with Part 617 of Title 6 of the New York Code Rules and

Most actions concerning solid waste facilities involve two or more agencies, such as the DEC and the local government; SEQRA considers each to be an "involved agency."[102] Where a Type I action is involved, a lead agency must be established.[103] The lead agency is the agency which has primary responsibility for carrying out the action and this agency will have the chief obligation to comply with SEQRA.[104] The DEC or the local government can be the lead agency. However, if the local government has not affirmatively acted upon its right to control private waste management activity, that government has no responsibility to carry out the action. Therefore, it can be an involved agency but not a lead agency. The designation of lead agency is important "since that agency calls the tune to which the others must dance."[105] The lead agency has considerable discretion, within the mandates of SEQRA, in determining the environmental impact of an action, the content of an Environmental Impact Statement (EIS), and the necessary extent of efforts to mitigate adverse environmental impacts.[106]

If an action is Type I or Unlisted, and thus subject to SEQRA review, the lead agency determines whether the action will affect the environment. A negative declaration is issued if a proposed action will not have a significant impact on the environment;[107] a positive declaration is prepared if the action may have a significant environmental impact.[108] In making this declaration the agency is

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> Regulations and the criteria therein, the following actions, in addition to those listed in § 617.12 of Title 6 of the New York Code Rules and Regulations as Type I actions, are likely to have a significant effect on the environment.
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> . . . .
>
> (6) A sanitary landfill for an excess of one hundred thousand (100,000) cubic yards per year of landfill.

Town of Ogden Local Law No. 3 of 1984 in § 22-3 of the Town Code.

102. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(t) (1991).

103. N.Y. ENVTL. CONSERV. LAW § 08-0111(6) (McKinney 1991). A lead agency is established for unlisted actions only if there is to be a coordinated review among the jurisdictions. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(b)(1) (1991).

104. N.Y. ENVTL. CONSERV. LAW § 8-0111(6) (McKinney 1991); GERRARD ET AL., *supra* note 95, § 3.03[1].

105. Philip Weinberg, commentary to N.Y. ENVTL. CONSERV. LAW ANN. § 8-0111 (McKinney 1984 & Supp. 1992). *See* GERRARD ET AL., *supra* note 95, § 3.03[1].

106. *See* GERRARD ET AL., *supra* note 95, at ch. 3.

107. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(y) (1991).

108. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(cc) (1991).

required to comply with the three prong test established in *H.O.M.E.S. v. New York State Urban Development Corp.*[109] First, the relevant areas of environmental concern must be identified.[110] Second, the agency must take a "hard look" at the potential environmental significance of an action,[111] completely analyzing the identified relevant environmental concerns.[112] Finally, if the agency determines there is no significant environmental impact, a written "reasoned elaboration" of its decision is prepared,[113] and the process is finished. However, if a positive declaration is made, preparation of an Environmental Impact Statement (EIS) begins.[114]

An EIS is a detailed written report describing the action, its environmental impact, any unavoidable adverse effects of the action, alternatives, and mitigation measures to minimize environmental harm from the action.[115] The EIS is the "heart" of SEQRA[116] and the primary method by which the environment is protected from harmful actions.[117] The agencies must then decide whether to proceed with the action based on the EIS and its evaluation of adverse environmental impacts.[118]

Before adopting legislation controlling the private disposal of solid waste, a local government must determine if it is taking an action within the scope of SEQRA.[119] This question was addressed in *Niagara Recycling v. Town Board of Niagara.*[120] Prior to enacting solid waste legislation substantially more restrictive of private disposal

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109. 418 N.Y.S.2d 827 (App. Div. 4th Dep't 1979). The DEC has codified the test at N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(g) (1991).

110. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(g)(2)(ii) (1991).

111. H.O.M.E.S., 418 N.Y.S.2d at 832.

112. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(g)(2)(iii) (1991).

113. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(g)(2)(iv) (1991).

114. GERRARD ET AL., *supra* note 95, § 3.01[1][c].

115. N.Y. ENVTL. CONSERV. LAW § 08-0109(2) (McKinney 1991).

116. Jackson v. New York State Urban Dev. Corp., 494 N.E.2d 429, 435 (N.Y. 1986).

117. H.O.M.E.S. v. New York State Urban Dev. Corp. 418 N.Y.S.2d 827, 830 (App. Div. 4th Dep't 1979).

118. Town of Henrietta v. Department of EnvTL. Conservation, 430 N.Y.S.2d 440, 446-47 (App. Div. 4th Dep't 1980).

119. Because only the local government is involved in adopting the legislation, it is the lead agency. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(a) (1991).

120. 443 N.Y.S.2d 951 (App. Div. 4th Dep't 1981), *aff'd*, 438 N.E.2d 1142 (N.Y. 1982).

activity, the Town made a declaration of nonsignificance (negative declaration) and thus did not prepare an EIS.[121] The trial court invalidated the law.[122] The Appellate Division reversed, finding that the law merely established additional conditions for solid waste businesses. Because it did not authorize any activity, it was not an action within the scope of SEQRA.[123] The court expressly rejected the lower court's contention that, as a result of passing the new law, additional waste activities were "likely to be undertaken."[124] It ruled that the town had met its SEQRA "hard look" obligation by examining the "potential environmental consequences" of the proposed law.[125] Importantly, the court rejected the assertion that the Town's deliberations should have included a "wide range of economic and other considerations . . . beyond those bearing upon the reasonably anticipated environmental impact from . . . the enactment of the local law."[126] Requiring such an economic prognostication is beyond the ability of most localities. In addition, it would put a greater emphasis on the economic values of the applicant than on the environmental values of the community.

Conversely, in *Society of Plastics Industry, Inc. v. County of Suffolk*,[127] a County ordinance prohibiting the use of certain non-biodegradable plastic packaging was voided because an EIS had not been prepared. The Court felt that the County had not met the "hard look" standard and that the potential negative effects of the ordinance necessitated preparation of an EIS; the County failed to "articulate a reasonable elaboration for its negative declaration."[128]

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121. *Id.* at 952. The Town found that none of the adverse effects discussed in N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11 (1991) were present, and therefore a negative declaration, pursuant to N.Y. COMP. CODES R. & REGS. tit. 6, § 617.10 (1991), was appropriate. *Id.*

122. 437 N.Y.S.2d 560 (Sup. Ct. 1981).

123. 443 N.Y.S.2d at 954.

124. *Id.*

125. *Id.*

126. *Id.* at 955. The factors raised by the petitioners were whether the local law was consistent with the federal and state regulatory scheme, whether the ordinance would impede or eliminate current or future facilities, and whether the ordinance had an adverse impact on the local socio-economic climate. *Id.* at 955 n.6.

127. 552 N.Y.S.2d 138 (App. Div. 2d Dep't 1990), *rev'd on other grounds*, 573 N.E.2d 1034 (N.Y. 1991).

128. *Id.* at 140. On appeal the Court of Appeals reversed and reinstated the law, without reaching the SEQRA issue. 573 N.E.2d 1034 (N.Y. 1991). *See also In re* Fernandez v. Planning Bd. of Pomona, 504 N.Y.S.2d 524 (App. Div. 2d Dep't 1986)

These precedents show that the enactment of local solid waste legislation is an action within the meaning of SEQRA, and the local legislative body should conduct an intensive inquiry (the required "hard look") into the environmental consequences of the legislation. Legitimate determinations by a local government that no significant adverse impact on the environment will occur as a result of the local legislation, and thus no EIS is needed, should be upheld.[129] However, legal enactments which, explicitly or implicitly, authorize solid waste activities not previously allowed, should be preceded by EIS preparations and full environmental evaluations.

Once local legislation is in place, almost every authorization for new or substantially increased disposal activity will require preparation of an EIS to determine the environmental consequences.[130] Actions which are categorized as Excluded, Exempted, or Type II do not require a SEQRA determination or preparation of an EIS.[131] However, it is unlikely that any activity to construct or expand solid waste facilities will not require an EIS. It is recommended that communities include in local statutes a requirement for SEQRA compliance, and, at the discretion of the governing body, preparation of an EIS upon application for a permit or variance. This gives the local government authority to explore the environmental consequences of its actions, even when the DEC believes an EIS is unnecessary.

E. *Environmental Conservation Law Section 27-0711: The Right to Adopt More Stringent Local Standards*

For communities seeking local influence in managing solid waste facilities the most important provision of state legislation is New York Environmental Conservation Law section 27-0711. It states that a local

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(finding planning board's failure to set forth reasoned elaboration for basis of its negative declaration as to environmental impact and need for an EIS in violation of SEQRA).

129. *See* Village of Moran v. Philmont, 542 N.Y.S.2d 873 (App. Div. 3d Dep't) (upholding negative declaration on ordinance prohibiting private landfills), *appeal dismissed*, 549 N.E.2d 477 (N.Y. 1989).

130. *See* GERRARD ET AL., *supra* note 95, § 4.10[2]. But see Town of Victory *ex rel.* Richardson v. Flacke, 476 N.Y.S.2d 711 (App. Div. 4th Dep't 1984), upholding a determination by DEC that a solid waste facility would not have a significant impact and thus no EIS was required). This demonstrates the importance of direct local legislation to implement community policy rather than relying on state agencies.

131. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(j) (1991). Type II actions are listed in N.Y. COMP. CODES R. & REGS. tit. 6, § 617.13 (1991).

government can enact laws, ordinances, or regulations as long as they are not inconsistent with the state solid waste law, or regulations promulgated thereunder. If a local law complies with the minimum requirements of state law, rules, and regulations, it will be deemed consistent.

A key aspect of this provision is the requirement that local legislation be consistent with DEC regulations.[132] This places a higher burden on the local government in creating and maintaining the validity of legislation applicable to solid waste management. New York State courts have consistently rejected arguments that New York Environmental Conservation Law section 27-0711 pre-empts stricter control of solid waste facilities by municipalities.[133] In *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*,[134] the Court of Appeals noted that:

> In fact the statute in express terms disclaims any State purpose to either supersede or preclude the enactment of local ordinances so long as they are consistent 'with at least the minimum applicable requirements' of those regulations promulgated by the statute (N.Y. Envtl. Conserv. Law section 27-0711) and speaks specifically, not of the preclusion, but rather the inclusion of local government in the planning and control of problems endemic to waste management . . . .[135]

The Court rejected the contention "that [by] the mere fact that the State deals with a subject it automatically pre-empts it."[136] The Court

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132. N.Y. COMP. CODES R. & REGS. tit. 6, Part 360 (1992).

133. The Supreme Court has ruled that RCRA does not pre-empt state regulation of non-hazardous waste. City of Philadelphia v. New Jersey, 437 U.S. 617, 620 n.4 (1978). Local governments must be aware that what is not pre-empted today may be pre-empted tomorrow. Indeed, Congress is currently considering reauthorization of RCRA, the impact of which, as to municipal rights to regulate private facilities, cannot be known. *See supra* note 13. Local governments must recognize the political aspects inherent in protecting their traditional right to legislate in the areas of health and safety, and land use, and insist that their state and federal representatives safeguard this right. The attack on local government power is continuing. The State has already eliminated local control over hazardous waste facilities, *see supra* note 74, and low-level radioactive waste facilities, *see supra* note 75.

134. 417 N.E.2d 78 (N.Y. 1980).

135. *Id.* at 80.

136. *Id.*

explained its reasoning for this rule in *People v. Cook*:[137]

> If this were the rule, the power of local governments to regulate would be illusory. Any time that the State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State. That is the essence of home rule.[138]

In *Cook* the court established that the proper test in determining if local action has been pre-empted is whether an intent to pre-empt is evidenced in the legislation.[139] If a state law does pre-empt a field, a local law is deemed to be inconsistent if it conflicts with the state mandate.[140] Because Environmental Conservation Law section 27-0711 evidences no such intent to pre-empt, but rather encourages local participation in solid waste management, there is no pre-emption. The absence of state pre-emption is particularly important as it gives communities the right to ban new solid waste facilities entirely, even if the State would allow the facility.[141]

The question remains, what local action is inconsistent with state law and regulations? A local government cannot authorize less strict requirements although it may demand compliance with more stringent rules. Thus, where the DEC requires six inches of cover to be placed on a landfill each day,[142] the locality cannot allow the use of only two inches. But it can require the use of seven inches. DEC approval of a project means that the project has fulfilled the rules and regulations of the DEC, and on those matters the DEC's opinion is binding upon the locality.[143] This highlights the need for communities to be involved

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137. 312 N.E.2d 452 (N.Y. 1974).

138. *Id.* at 457.

139. *Id.* at 459. *See* Jancyn Mfg. Corp. v. County of Suffolk, 518 N.E.2d 903, 905-06 (N.Y. 1987).

140. Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862 (App. Div. 1962), *aff'd*, 189 N.E.2d 623 (N.Y. 1963).

141. Town of LaGrange v. Giovenetti Enters., 507 N.Y.S.2d 54 (App. Div. 2d Dep't 1986) (upholding ordinance banning dump and transfer stations within town).

142. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-2.17(c) (1992).

143. *In re* Zagoreos v. Conklin, 491 N.Y.S.2d 358, 370 (App. Div. 2d Dep't, 1985) (DEC approval meant proposed power plant met state standards and was binding on Town to that extent). *Zagoreos* upheld the Town's power to enact stricter regulations prohibiting what the DEC approved. *See* SCA Chem. Waste Servs. v. Board of Appeals, 427 N.Y.S.2d 1017 (App.Div. 1980), *aff'd*, 419 N.E. 872 (N.Y. 1981) (DEC

with DEC proceedings as well as local ones. Local governments retain the right to judicially challenge the DEC's decision in an Article 78 action,[144] but because the standard of such review gives great deference to the state agency, active participation at the hearing stage can be far more valuable.

F. *Local Waste Management Plans*

In 1988, the state legislature, unhappy with the pace of environmental improvements, substantially expanded the non-hazardous waste portions of the environmental law by enacting the Solid Waste Management Act of 1988.[145] The goal of the Act was to protect the public health and the environment by establishing proper solid waste management.[146] A waste management hierarchy was adopted, with preference (in order) to waste reduction, recycling, energy recovery, and disposal by land burial.[147] The law envisioned that local governments would maintain basic responsibility for solid waste planning and operation.[148]

The law allows municipalities to join with each other in planning units to create local solid waste management plans in accordance with state policy.[149] The law provides financial and technical incentives to communities to create local plans. The main incentive, however, is a mandate to the DEC not to approve permits for locally owned facilities unless a local plan is in effect.[150] Consequently, communities that do not act to create plans cannot establish locally owned facilities, while private waste facilities of any size can be sited within the community.

Communities that act will be serving their own needs by providing an orderly method for disposing of local waste. The use of local waste

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decision on environmental impact of possible pipeline leakage binding on Town). Decisions by federal agencies as to environmental compliance issues have also been held binding on local governments. *In re* Consolidated Edison Co. of N.Y. v. Hoffman, 374 N.E.2d 105 (N.Y. 1978) (decision of Atomic Energy Comm. binding).

144. N.Y. CIV. PRAC. L. & R. art. 78 (McKinney 1990 & Supp. 1992).

145. Solid Waste Management Act of 1988, ch. 70, 1988 N.Y. Laws 1966.

146. Solid Waste Management Act of 1988, ch. 70, § 2, 1988 N.Y. Laws 1966, 1966-67.

147. N.Y. ENVTL. CONSERV. LAW § 27-0106(1) (McKinney 1991).

148. N.Y. ENVTL. CONSERV. LAW § 27-0106(2) (McKinney 1991).

149. N.Y. ENVTL. CONSERV. LAW § 27-0107(1) (McKinney 1991). Counties may act on their own or in conjunction with other counties. *Id.*

150. *Id.*

management plans allows a community to comprehensively deal with public and private waste disposal. Additionally, the presence of a local plan can provide a basis to deny permission to an unwanted private facility. For example, a community which has located adequate disposal capacity for its own waste has a stronger case in rejecting an incinerator or landfill that would increase disposal capacity, solely for the benefit of non-residents.

III. SOURCES OF LOCAL LEGISLATIVE POWER

Local governments in New York have no inherent powers, only those which are granted by the State.[151] Thus, a local government must demonstrate that it has been granted a power before it can successfully employ it.[152] In his renowned formulation of the types of power available to local governments, Judge Dillon stated that:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient but indispensable.[153]

As noted in the preceding section, the New York Environmental Conservation Law allows stricter local regulation than that imposed by the State. In addition to this statute, there are several sources of local regulatory power. The strongest are the direct authorizations to regulate dumps or dumping grounds. Additional authority is found in laws affecting all aspects of the solid waste industry, such as the environmental laws and zoning laws. Communities also have implied powers such as those provided by the police power.

Police power reflects the power of government to restrict individual activities for the common good.[154] "Even liberty itself, the greatest of

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151. Seaman v. Fedourich, 209 N.E.2d 778 (N.Y. 1965).

152. Unitarian Universalist Church of Cent. Nassau v. Shorten, 314 N.Y.S.2d 66 (Sup. Ct. 1970).

153. JOHN F. DILLON, 1 MUNICIPAL CORPORATIONS 443-449 (5th ed. 1911).

154. It is difficult o define an amorphous concept like police power. For a discussion of various definitions see 20 N.Y. JUR.2D *Constitutional Law* § 189 (1981).

all rights, is not an unrestricted license to act according to one's own will."[155] In regard to private business activities like solid waste disposal, New York courts have noted that a person's right to freely carry on a vocation, a right protected by the state and federal constitutions, is not unlimited.[156] "Power and authority exist, however, in the legislature, to license and regulate certain vocations . . . to protect the health, morals or general welfare of the state."[157]

The police power authority is not unlimited; it cannot be employed to deprive a solid waste facility operator of constitutionally protected rights. "[M]unicipal enactments depending for validity on the police power must be really, reasonably, properly and substantially related to public health, safety, or welfare."[158] Additionally, "[a] statute cannot, under the guise of the police power, but really to affect some purpose not within such power, arbitrarily interfere with a person or a property right."[159] When a local statute is not reasonably related to the public need, is arbitrary or capricious on its face or in its application, or improperly deprives a citizen of a property interest without compensation, the police power authority has been voided.[160]

When a community acts to regulate disposal of solid waste it is utilizing its police powers. The next section discusses how the regulation of waste grew from the express and implied police power relating to public health. The remaining discussion examines the affirmative powers that the state constitution and legislature have granted to municipalities.

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155. Crowley v. Christensen, 137 U.S. 86, 89 (1890).

156. People v. Ringe, 90 N.E. 451, 452-53 (N.Y. 1910).

157. *Id.* at 453.

158. Wiggins v. Town of Somers, 149 N.E.2d 869, 874 (N.Y. 1958) (Desmond, J., dissenting). *Wiggins* is discussed *infra* in the text accompanying notes 188-98.

159. Ringe, 90 N.E. at 453.

160. A discussion of all the constitutional ramifications of solid waste disposal facility regulation is beyond the scope of this article and, and has been addressed elsewhere in great detail. *See e.g.*, Robert Meltz, *State Discrimination Against Imported Solid Waste: Constitutional Roadblocks*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,383 (1990); Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans* 15 COLUM. J. ENVTL. L. 1 (1990); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Postindustrial Natural Resources," and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989); Charles T. Dumars, *State Market Power and Environmental Protection: A State's Right to Exclude Garbage in Interstate Commerce*, 21 N.M. L. REV. 37 (1990).

A. *History of Local Power over Private Waste Disposal*

The authority of local governments to regulate solid waste disposal was originally based on their police power. An early city incorporation act granted the "power to make bye-laws [sic] . . . relative to anything whatsoever which may concern the good government and police of the said city."[161] The specific police power referenced for most of the State's early history was the ability to act to protect public health. In 1796 the legislature granted New York City the power to "make bye [sic] laws ordinances rules and orders for . . . preserv[ing] general health in the said city and for removing or destroying all offensive or putrid articles or substances which may be stored or otherwise collected and generally for preventing all other nuisances within the said city."[162] As other local governments were created, they were given similar powers.[163]

Early acts empowering towns to protect the public health were mainly concerned with protecting agricultural interests by improving common areas and erecting fences, controlling loose cattle and dogs, and destroying such pests as wolves, wild cats, and blackbirds.[164] In 1850 the New York State legislature mandated the creation of a board of health in any village or city[165] which did not already have one.[166] The duties conferred in the law dealt mainly with the prevention and control of the spread of infectious diseases.[167] Trash control powers of individual local governments were still primarily enumerated in the

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161. Act of Apr. 22, 1785, ch. 83, § 11, 1785 N.Y. Laws 154, 158 (incorporating City of Hudson).

162. Act of Apr. 1, 1796, ch. 38, art. XI, 1796 N.Y. Laws 682, 684-85.

163. *See, e.g.*, Act incorporating City of Brooklyn authorizing the city "to prohibit and abate all nuisances" and "to promote the health and comfort of the inhabitants of the said city." Act of Apr. 18, 1834, ch. 92, § 26(8), (17), 1834 N.Y. Laws 90, 99-100; *see also* Act of Apr. 11, 1844, ch. 145, § 10, 1844 N.Y. Laws 138 (amending the Charter of Rochester); Act of Apr. 19, 1867, ch. 451, § 17 (18)-(20), (25), 1867 N.Y. Laws 1078, 1086-87 (creating the Village of Mayville).

164. Act of Mar. 7, 1788, ch. 64, 1788 N.Y. Laws 748, 767; Act of Mar. 27, 1801, ch. 78, 1801 N.Y. Laws 153, 158.

165. It is not unusual that towns were not included in the directive. This type of power is beyond what was considered appropriate for town government at that time.

166. Act of Apr. 10, 1850, ch. 324, § 1, 1850 N.Y. Laws 690, 690-91.

167. *Id.* § 3.

individual mandates of the state legislature creating those jurisdictions.[168] In the consolidated Town Law enacted in 1890, governing boards were given power to direct the change, abatement, or removal of "public nuisances . . . affecting the security of life and health."[169] Early versions of the general city law and general municipal law did not address public health promotion.[170] In 1893, the State enacted a general Public Health Law which enlarged the duties of local boards of health.[171] The Act provided that local boards should enact regulations "necessary and proper for the preservation of life and health, and the execution and enforcement of the public health law" and for the "suppression of nuisances."[172]

Until this point, most of the state's legislation was probably superfluous, because communities had the power to abate public nuisances as part of the implied police powers.[173] Beginning in 1909, the State began to supply affirmative solid waste management powers to local governments. A 1909 provision, recognizing the growing suburban character of some communities, allowed towns with a population greater than 10,000 to control the collection and disposal of trash.[174] In 1,932 a provision was added to the Town Law that authorized towns to act to promote the health, safety, morals, and general welfare of the community.[175] At the request of towns on Long Island concerned about widespread illegal dumping,[176] the legislature in 1937, allowed towns to prohibit or regulate the use of any lands

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168. The first general law for incorporation of villages did allow the compelling of "persons to remove dead animals and stagnant water from their premises" but did not otherwise address improper waste disposal. Act of Dec. 7, 1847, ch. 426, § 58(4), 1847 N.Y. Laws 532, 546.

169. Act of June 7, 1890, ch. 569, § 24(7), 1890 N.Y. Laws 1211, 1216.

170. Act of May 18, 1892, ch. 685, 1892 N.Y. Laws 1732; Act of Apr. 6, 1900, ch. 327, 1900 N.Y. Laws 690.

171. Act of May 9, 1893, ch. 661, §§ 20-32, 1893 N.Y. Laws 1495, 1501-1510. This statute addressed towns, cities, and villages. *Id.* § 20.

172. *Id.* § 21.

173. *See, e.g.*, Village of Carthage v. Frederick, 122 N.Y. 269 (1896); City of Rochester v. Collins, 12 Barb. 559 (N.Y. Sup. Ct. 1850).

174. N.Y. TOWN LAW §§ 320-22 (1909).

175. Act of Apr. 8, 1932, ch. 634, § 130(14), 1932 N.Y. Laws 1355, 1406. The provision was renumbered to its current place (N.Y. TOWN LAW § 130(15)) by Act of Mar. 7, 1944, ch. 126, § 1, 1944 N.Y. Laws 433.

176. Memorandum attached to Letter to Governor Lehman from Association of Towns, *in* Bill Jacket for Act of May 22, 1937, ch. 495.

within their borders as dumps or dumping grounds.[177] This last provision gives towns a direct police power that other local governments lack; this power should be the primary building block upon which towns construct their regulations.

New York courts have long accepted the regulation of waste disposal by local governments as a public health necessity. In 1850, the court in *City of Rochester v. Collins*[178] established that a city has broad powers to control waste disposal under its public health authorization. Rochester enacted an ordinance prohibiting the dumping upon city streets or in city waters of "any dead animal, fish, or putrid meat, entrails, shells of oysters or clams, decayed vegetables, or any other offensive substance."[179] The Rochester City Charter provided the power "to abate and remove nuisances,"[180] but the Court found that this only applied to existing nuisances; the provision did not entitle the City to act to prevent future problems.[181] However, the City Charter also bestowed authority to act "for the preservation of health and the suppression of disease in the city."[182] The Court concluded that this clause implicitly authorized the prevention of future nuisances from improper dumping.[183]

The notion that the hazards of improper disposal are within the regulatory reach of local governments was quickly accepted. "No argument is needed to show that garbage in a decayed or decaying condition is a substance deleterious to health, the keeping of which may properly be prohibited by a municipality in the exercise of the police power."[184] The Court of Appeals also confirmed that a municipality could regulate private waste disposal, in the name of public health, before a danger actually existed.[185] "The city is not required, in a case

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177. N.Y. TOWN LAW § 130(6) (McKinney 1987). The Attorney General has concluded that "dumping" in this state law is synonymous with refuse disposal area or sanitary landfills, and thus applicable to current day operations. 1972 Op. Att'y Gen. (Inf.) 152, 153 (May 1, 1972).

178. 12 Barb. 559 (N.Y. Sup. Ct. 1850).

179. Rochester City Ordinance of June 15, 1847, § 6, *quoted in Collins*, 12 Barb. at 561.

180. Act of Apr. 11, 1844, ch. 145, tit. 3, § 10, 1844 N.Y. Laws 138, 155.

181. 12 Barb. at 562.

182. Act of Apr. 11, 1844, ch. 145, tit. 11, § 2, 1844 N.Y. Laws 135, 207.

183. 12 Barb. at 562. *See also* Gregory v. Mayor of New York, 40 N.Y. 273, 279 (1869) ("[P]owers conferred for so greatly needed and most useful purposes, should receive a liberal construction.").

184. Town of Newtown v. Lyons, 42 N.Y.S. 241 (App. Div. 2d Dep't 1896).

185. City of Rochester v. Gutberlett, 105 N.E. 548 (N.Y. 1914).

where danger is constantly to be apprehended, to wait until a nuisance actually exists before taking action to safeguard the public health."[186] The court held that when the public health was in question, solid waste disposal regulation was "not only lawful, but an affirmative duty imposed upon municipalities."[187]

B. *Efforts to Ban Waste Imports Using the Police Power*

In *Wiggins v. Town of Somers*,[188] the Court of Appeals heard a challenge to a local ordinance allowing only local waste to be received at a private dump. Within a mile of the Somers Town Hall an open dump was receiving garbage from the town and a number of other communities.[189] The operation was the source of offensive odors, pest problems, and smog from burning garbage.[190] The town enacted an ordinance prohibiting the transportation of waste into and through the town, and the dumping within the town of garbage originating out-of-town.[191] The Court of Appeals upheld the ban on dumping of outside the town waste as a legitimate exercise of the police power.[192] The Court noted that garbage was a noxious substance capable of threatening the public health.[193] "[T]hus the Town is entitled, in the exercise of the police power to minimize this potential by limiting quantity."[194]

Judge Desmond, in dissent, argued that there was no public health basis for discrimination between in-town and out-of-town garbage; therefore it was unconstitutionally arbitrary.[195] His argument anticipated later decisions that the Commerce Clause of the United States Constitution[196] requires that in-state and out-of-state waste be

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186. *Id.* at 550.

187. *Id.* at 549.

188. 149 N.E.2d 869 (N.Y. 1958).

189. *Id.* at 871-72.

190. *Id.* at 872.

191. The transportation portion of the ordinance was unanimously voided because local governments lack the power to control use of state highways. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 874 (Desmond, J., dissenting).

196. "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

treated evenhandedly.[197] However, as case law in New York has developed, the right to exclude neighboring in-state communities' garbage has been upheld.[198]

The holding of the majority in *Wiggins* conformed to U.S. Supreme Court interpretations of the police power and private waste disposal. The Court dealt with municipal police power, garbage collection and disposal, and a takings claim in *California Reduction Co. v. Sanitary Reduction Works.*[199] San Francisco outlawed improper dumping and granted an exclusive franchise for handling all of its waste to a crematorium.[200] When an out-of-town crematorium contracted with local waste haulers to receive waste in violation of the franchise, the franchisee sought an injunction.[201] The Court found that the city ordinance was a valid exercise of the police power under state constitutional and statutory provisions in order "to guard the public health in all reasonable ways."[202] On the same day, the Court decided a similar challenge to a City of Detroit waste collection and disposal ordinance by refuse collectors who resold the waste products.[203] The Court acknowledged that the garbage had value to the plaintiff, but rejected a takings claim[204] because "the property rights of individuals in the noxious materials described in the ordinance must be subordinated to the general good."[205]

During the 1960s, the garbage crisis in New York became serious. Yet in a challenge similar to that in *Wiggins*, the Court of Appeals refused to revisit the issue. The Town of Stillwater had enacted a ban on in-town disposal of out-of-town waste because it feared becoming a

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197. In City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), the Supreme Court established that solid waste is an article of commerce and thus subject to the protection of the Commerce Clause.

198. The story is different when out-of state garbage is involved, and thus the Commerce Clause is invoked. *See infra* notes 318-35 and accompanying text.

199. 199 U.S. 306 (1905).

200. *Id.* at 307-08.

201. *Id.* at 310-11.

202. *Id.* at 317.

203. Gardner v. Michigan, 199 U.S. 325 (1905).

204. Takings claims are based on the Fifth Amendment requirement that no property be taken by the government, except for public use and with just compensation. U.S. CONST. amend. V.

205. *Gardner*, 199 U.S. at 333. The Sixth Circuit has affirmed the continuing liability of *California Reduction* and *Gardner*. Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1193 (6th Cir.), *vacated on other grounds*, 455 U.S. 931 (1981).

dumping ground for the nearby Albany metropolitan area.[206] The court limited its opinion to upholding the ban on the basis of *Wiggins*.[207] The landfill operator in *Stillwater* attempted to distinguish *Wiggins* because his facility was a sanitary landfill, not an open dump; no violations of health law had occurred as they had in *Wiggins*. Unlike *Wiggins*, there was no alternative dump site for this operator to use, which created a prohibitive economic burden.[208]

In asking that *Wiggins* be set aside, the operator raised policy issues that are alive today. He claimed that *Wiggins* had created "two armed camps" — the towns with their land and the cities with their garbage.[209] By allowing bans on non-local waste, communities were allowed to place their self-interests first, to the detriment of the public health and welfare of the state as a whole. Although state law currently permits strong local action, sentiment among some state leaders today mirrors the operator's opinions. Governor Cuomo has suggested that some local facility siting power be transferred to siting boards.[210] The lesson for communities is that their right to control private disposal is not guaranteed and they must be vigilant in its defense.

C. *State Constitutional Authority*

The police power of communities predates the state constitution and is not dependent upon it. In contrast, the affirmative powers of communities originate in delegations from the state. Discussion of these municipal powers begins with the New York State Constitution. Article IX deals with local governments and provides two possible sources of authority. Section 2(c)(i) states that "every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its

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206. Brief for Respondent at 3, Town of Stillwater v. Doughty, 253 N.E.2d 218 (N.Y. 1969).

207. *Stillwater*, 253 N.E.2d at 219.

208. Brief for Appellant at 3-5, Stillwater, 253 N.E.2d 218.

209. *Id.* at 5.

210. Governor Mario Cuomo, State of the State Message, Jan. 4, 1989 *in* 1989 N.Y. Laws 2267, 2313. Governor Cuomo previously signed legislation pre-empting local control over hazardous waste facilities. Act of Aug. 3, 1987, ch. 618, § 10, 1987 N.Y. Laws 2673, 2676. The Public Policy Institute, a branch of the New York Business Council, has made a similar recommendation. PUBLIC POLICY INSTITUTE, *Dealing with Solid Waste* (1988).

property affairs and government."[211] In addition to legislating on property, affairs, and government, section 2(c)(ii) provides that "every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to . . . the government, protection, order, conduct, safety, health and well-being of persons or property therein."[212]

These provisions do not provide communities with the wide-ranging powers that were desired when the various home rule amendments to the state constitution were adopted.[213] First, because "property, affairs, and government" has been interpreted as not giving communities power in areas of state concern, [214] and public health has been found to be an area of state concern,[215] local governments cannot find more authority for action in section 2(c)(i) than the state legislature otherwise allows. Second, the power in section 2(c)(ii) is only valid to the extent that it is not inconsistent with state law. Environmental Conservation Law section 27-0711 already provides that power.

The constitutional provisions do not grant any more power to regulate the solid waste industry than already conferred by the state legislature. However, legislative grants of authority are only useful as long as they are not revoked. If stripped of their regulatory powers by the state legislature, local governments could not look to the state constitution for relief.

D. *Affirmative Powers to Regulate*

Local governments derive much of their power to regulate the solid waste industry from affirmative pronouncements in state law. The Town Law provides authority to protect the health, safety, morals, and general welfare.[216] Similar provisions, based on protecting public health, exist in the County,[217] City,[218] Village,[219] and Municipal

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211. N.Y. Const. art. IX, § 2(x)(i). What constitutes an "inconsistent action" is addressed *supra* notes 132-44 and accompanying text.

212. N.Y. Const. art. IX, § 2(c)(ii).

213. Jacob D. Hyman, *Home Rule in New York, 1941-1965 Retrospect and Prospect*, 15 BUFF. L. REV. 335 (1965). Professor Hyman explains the hopes for local freedom from state limitations that, unfortunately, have not been realized.

214. Adler v. Degan, 167 N.E. 705 (N.Y. 1929).

215. *Id.*; S.H. Kress & Co. v. Department of Health, 27 N.E.2d 431 (N.Y. 1940).

216. N.Y. TOWN LAW § 130(15) (McKinney 1987).

217. N.Y. COUNTY LAW § 226-b (McKinney 1991).

218. N.Y. GEN. CITY LAW §§ 19-20(13) (McKinney 1989).

Home Rule laws.[220] A town's powers also include "[p]rohibiting and/or regulating the use of any lands within the town as a dump or dumping ground,"[221] and "licensing and otherwise regulating . . . the collection of garbage."[222]

Because a community has state permission to govern local solid waste facilities, ordinances should directly address any unpopular activities, rather than attempt to twist other statutes into indirect attacks upon these activities. Failure to address the issue directly can lead to unpleasant results. In *Chem-Troll Pollution Services, Inc. v. Board of Appeals of Porter*,[223] a liquid and solid waste disposal business had excavated and operated six secure landfills.[224] When they applied for an excavation permit to construct the seventh landfill, the Board of Appeals denied the application.[225]

In ordering the Board to issue the permit, the court noted that while the town had legitimate concerns about the "ultimate use of the excavation site and . . . possible seepage contaminating the environment," because the town had no "laws or ordinances granting it any authority to regulate the construction and operation of a landfill . . . the Board of Appeals may not utilize the excavation permit requirements to fill this void."[226] Thus, the Board was limited to considering "whether Chem-Troll met the standards required in the zoning ordinance."[227]

The Board had concluded that the proposed excavation was inconsistent with the general zoning law because the site would have no useful purpose after it was filled and sealed.[228] However, the court noted that no showing of ultimate usefulness was required by the

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219. N.Y. VILLAGE LAW § 4-412 (McKinney 1973 & Supp. 1991).

220. N.Y. MUN. HOME RULE LAW § 10(1)(a)(11)-(12) (McKinney 1992). In addition, counties are given power to prevent solid waste disposal into watercourses improved by flood control or part of a soil erosion program. N.Y. MUN. HOME RULE LAW § 10(1)(b)(11) (McKinney 1991).

221. N.Y. TOWN LAW § 130(6) (McKinney 1991).

222. N.Y. TOWN LAW § 136(8) (McKinney 1991).

223. 411 N.Y.S.2d 69 (App. Div. 4th Dep't 1978).

224. *Id.* at 70.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 71.

statute, and thus could not be required by the Board.[229] The lesson is clear that local governments should act affirmatively to optimize their right to regulate solid waste management. This is truly a case where those who hesitate may be lost.

Land use regulation is usually confined to the zoning powers, which local governments can also utilize to regulate solid waste operations. Different results can be produced depending on whether a community decides to base the regulation of solid waste facilities upon its zoning powers or upon its other powers. This was demonstrated in *Town of Islip v. Zalak*.[230]

The Town prohibited the operation of a transfer station or recycling center without a permit.[231] The defendants claimed that the authorizing statute was invalid because the variance power under the waste control statute was given to the Town Board, not the Planning Board, as would be the case in normal requests for zoning variances under Town Law section 267(5).[232] The court ruled that although the law had provisions similar to zoning laws, it did not regulate as an occupation, but rather as a land use under the power granted by Town Law section 130(6).[233] Because it was not a zoning law, the procedural requirements of the state zoning law were not applicable.[234]

The lesson of *Zalak* is to designate in a waste control ordinance the source of authority for its passage. Unless a waste control ordinance is part of the zoning ordinance, it should be based on Environmental Conservation Law section 27-0711, and in towns, on Town Law section 130(6). This will provide the greatest latitude to the governing board and will limit the impact of the complex requirements of the state

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229. *Id.* Local governments cannot read in new requirements to prohibit otherwise valid applications or to respond to community opposition. *See In re* Pleasant Va. Home Constr. v. Van Wagner, 363 N.E.2d 1376 (N.Y. 1977) (mobile home park met legislative criteria and was entitled to permit; denial actually due to community opposition rather than permit's inadequacy); *In re* Fox v. City of Buffalo Zoning Bd. of Appeals, 401 N.Y.S.2d 649 (App. Div. 4th Dep't 1978) (permit denial inappropriate where use was allowed under applicable ordinance and reason for denial was opposition to additional liquor store in the area). *Compare In re* Mobil Oil Corp. v. Oaks, 390 N.Y.S.2d 276 (App. Div. 4th Dep't 1976) (permit denial upheld where ordinance granted right to consider whether proposed use was in harmony with existing area and future plans).

230. 566 N.Y.S.2d 306 (App. Div. 2d Dep't 1991).

231. *Id.* at 307-08.

232. *Id.* at 308.

233. *Id.* at 311.

234. *Id.* *See* Niagara Recycling v. Town of Niagara, 443 N.Y.S.2d 939 (App. Div. 4th Dep't 1980).

zoning laws.[235]

As part of the zoning structure, the state enabling statutes set up separate boards, such as the Zoning Board of Appeals. Which governing body within a community can authorize permits for a solid waste management facility depends on whether the ordinance is based on the zoning powers or other waste control powers. If a facility requires a special use permit or a variance, the decision to grant it will be made not by an elected board, but by an appointed board less subject to community political pressure.[236] If permitting is under authority of Town Law section 130(6), as in *Zalak*, the Town Board retains approval power. Ordinances should be drafted to reflect a community's decision on where permitting authority should lie. Even where the governing board retains permitting authority, zoning variances or special use permits may be needed before a facility can begin operations, and thus the other local government boards will be involved.[237] The authorizing local zoning statute should also incorporate local environmental values, to provide a basis for comprehensive review of a project and avoid the pitfalls of *Chem-Troll*.

E. *Zoning Powers*[238]

There is, of course, a role for the zoning powers available to a local community. The zoning powers are part of the police powers that the State has delegated to the villages,[239] towns,[240] and cities.[241] Zoning is the division of the municipality into districts, with the land

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235. Additionally, it should reference the Municipal Home Rule Law if provisions are dependent on that statute for effect. *See supra* text accompanying notes 252-54.

236. *See, e.g.*, Town of Le Roy, N.Y., Town Code § 122-10 (1992) (requiring a special use permit for sanitary landfills and thus placing the authority to approve a facility with the Zoning Board of Appeals.

237. For example, the zoning board of appeals in a town normally grants variance decisions. N.Y. TOWN LAW § 267 (McKinney 1991).

238. This article is not intended to be an introduction to zoning, therefore the present discussion is limited to the manner in which zoning laws can be used to further local control of private solid waste facilities. For information on zoning laws in New York, see ROBERT M. ANDERSON, NEW YORK ZONING LAW AND PRACTICE (3d ed. 1984).

239. N.Y. VILLAGE LAW §§ 7-700 to 7-742 (McKinney 1991).

240. N.Y. TOWN LAW §§ 261-84 (McKinney 1991).

241. N.Y. GEN. CITY LAW §§ 19-24 (McKinney 1991).

uses in each district regulated according to a master plan.[242]

Zoning can be an integral portion of a community's comprehensive approach to solid waste regulation. The zoning master plan can encompass local values regarding waste disposal operations. Some operations, such as transfer stations, are best limited to industrial areas due to the possibility of nuisances such as odors and scattered debris. On-site facilities can also be controlled through zoning.[243] Zoning ordinances can prohibit such facilities or establish specific criteria for their location and operation.[244] Zoning ordinances and plans should be amended to be consistent with the solid waste facility statute and local waste management plan. Thus, in a town which desires to ban all facilities, the zoning ordinance should not allow any such uses in any districts.[245]

Zoning ordinances, as valid exercises of the police power, will be upheld if the restrictions they impose are not arbitrary and bear a substantial relationship to the welfare of the community.[246] The Town of LaGrange, N.Y., used its zoning powers to completely ban commercial solid waste transfer stations, by not including such stations on the schedule of permitted uses in any of the Town's districts.[247] The ban was upheld as sufficiently related to the community's health and welfare concerns with the storage of trash on private lands.[248]

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242. 12 N.Y. JUR 2D *Buildings* § 79 (1981).

243. The term "on-site facilities" refers to solid waste facilities that are an integral part of a business operation, such as an incinerator operated on-site by a hospital. "Off-site" refers to facilities handling waste created in locations other than at the solid waste facility.

244. In Vanno v. River Market Commodities, Inc., 564 N.Y.S.2d 924 (App. Div. 4th Dep't 1990), for example, a city ordinance and special zoning exception required an animal hide processing operation to be conducted entirely indoors. The issuance of a preliminary injunction was upheld where this was not done, and the outdoor storage of the waste created a public nuisance (noxious odors and blood seepage).

245. In Town of LaGrange v. Giovenetti Enters., 507 N.Y.S. 54 (App. Div. 2d Dep't 1986), the court upheld a zoning ordinance outlawing most disposal facilities. The court found the zoning provisions rationally related to the protection of the public health and the general welfare.

246. Robert E. Kurzius, Inc. v. Village of Upper Brookville, 414 N.E.2d 680 (N.Y. 1980), *cert. denied*, 450 U.S. 1042 (1981).

247. *Town of LaGrange*, 507 N.Y.S.2d at 54.

248. *Id.* See *supra* text accompanying notes 341-43 for a discussion of how the zoning powers can also be employed to limit the size, height, and location of solid waste management facilities.

F. *Municipal Home Rule Powers*

Environmental Conservation Law section 27-0711 grants municipalities the ability to create stricter local regulation of solid waste management facilities, as long as the local law is not inconsistent with the state law. Other local governmental powers useful in creating a comprehensive strategy to address the siting of disposal facilities, especially the zoning powers, are not so limited. The municipal home rule powers[249] provide a mechanism by which these other powers can supersede state law, creating a broader basis for local regulation, even if the local law is inconsistent with state law. For example, using these powers the local government can keep approval of all aspects of facility licensing within the domain of the Town Board.[250]

The Court of Appeals in Kamhi v. Town of Yorktown[251] held that municipalities can use the Municipal Home Rule Law to create inconsistency between state and local law when: 1) inconsistency is not expressly prohibited by the state legislature; 2) the local law seeks to tailor application of state law to fit peculiar local needs; and 3) the local legislature has expressly stated an intention to amend or supersede state law.

The municipal home rule powers can be used to supersede state zoning requirements.[252] Additionally, the powers can be used to create supermajority voting requirements in the local solid waste law for variances or permits. This can make it extremely difficult for operators to expand facilities or to obtain waivers of environmental protections in the law.[253] Communities must include in the ordinances a provision declaring their intent to supersede the applicable state law.[254]

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249. N.Y. CONST. art. IX, § 2; N.Y MUN. HOME RULE LAW (McKinney 1991).

250. Sherman v. Frazier, 446 N.Y.S.2d 372 (App. Div. 2d Dep't 1982).

251. 547 N.E.2d 346 (N.Y. 1989). *See* KENNETH H. YOUNG & MARK S. DENNISON, *New Decisions in Litigation, in* 1991 ZONING AND PLANNING LAW HANDBOOK, at § 2.02[2][a] (1991).

252. Sherman v. Frazier, 446 N.Y.S.2d at 372 (Town could supersede Town Law § 267 and allow special board to review conversions of one family house to two family house instead of Zoning Board of Appeals). *See* Terry Rice, *Zoning and Municipal Home Rule*, 52 PLAN. NEWS 3 (May/June 1988).

253. *See e.g.*, Town of Lewiston Local Law No. 2 of 1988, § 24C-10.

254. *Kamhi*, 547 N.E.2d at 352; N.Y. MUN. HOME RULE LAW § 22(2) (McKinney 1991).

G. *Eminent Domain*

A potential source of local power is the power of eminent domain, granted by the state constitution,[255] and governed by the New York Eminent Domain Procedure Law.[256] In its simplest form, eminent domain can be used to condemn and purchase a proposed landfill site and put it to other public use. Because full value would have to be paid to the owner under the U.S. Constitution,[257] this use of eminent domain is an unlikely option to oppose landfills.

Eminent domain might also be used to prevent expansion by condemning only the proposed expansion site. In addition, eminent domain could be used in cooperation with a disposal site operator in order to provide a buffer around the existing landfill for health, safety and aesthetic reasons. The proposed cost of these limited uses might be more reasonable.

Eminent domain is an inherent sovereign right of the state,[258] antedating and surviving the state and federal constitutions, and is limited only by the constitutional restrictions that takings shall be for public use with just compensation paid.[259] Because municipalities are not sovereign entities, eminent domain is not one of their innate powers.[260] However the state may delegate the power to local governments,[261] and has done so in the Constitution[262] and in various enabling statutes.[263] The state has established specific procedures which must be followed when a municipality exercises its power of eminent domain.

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255. N.Y. CONST. art. IX, § 1(e).

256. Chapter 73 of the Consolidated Laws (McKinney 1979). The scenario considered in this section concerns affirmative efforts by a community to use its eminent domain powers to influence the private operation of a solid waste facility. This discussion does not deal with those circumstances in which the exercise of the police power goes too far and thus effects a taking. *See supra* note 160.

257. U.S. CONST. amend. V.

258. First Broadcasting Corp. v. City of Syracuse, 435 N.Y.S.2d 194 (App. Div. 4th Dep't 1981); People v. Priest, 99 N.E.2d 547 (N.Y. 1912).

259. Fifth Ave. Coach Lines Inc. v. City of New York, 183 N.E.2d 684 (N.Y. 1962).

260. Getman v. Niferopolous, 289 N.Y.S. 374 (App. Div. 4th Dep't 1936), *rev'd on other grounds*, 11 N.E.2d 713 (N.Y. 1938).

261. *In re* Board of Water Supply, 14 N.E.2d 789, 790 (N.Y. 1938) (state could delegate its eminent domain power to city for construction of dam and aqueduct for water supply).

262. N.Y. CONST. art. IX, § 1(e).

263. *E.g*, N.Y. TOWN LAW § 64(2) (McKinney 1987).

Eminent domain can be applied to any interest in real property; the interest need not be a full fee. Thus, another potential use of eminent domain is to acquire a conservation easement in order to bar the development of the land.[264] A conservation easement is an interest in real property "which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance, or amenities of the real property."[265] Easements must be drafted to meet the requirements of the enabling statute, and once established, can only be modified or extinguished as allowed by the law.[266]

Cooperation between a facility operator and a local government using the power of eminent domain is possible. For example, many property owners around solid waste facilities are opposed to them because of the odor, increased traffic, and other nuisances. The host fees[267] paid by an operator could be used by a local government to purchase land under the local condemnation power. This would create a buffer around the facility to be developed as a green belt. The community would be shielded from the most obvious effects of the facility. Property owners are compensated for their losses and the facility would be available to provide waste disposal to the community.

IV. MAXIMIZING THE BENEFITS OF SOLID WASTE FACILITIES WHILE MINIMIZING THE ENVIRONMENTAL HAZARDS

The strongest action that New York communities can take against solid waste facilities is to ban them outright. Unfortunately, there is a problem with this strategy. If every community in the state and nation took such measures, there would be no place for the garbage to go, and it must go somewhere. Even if the most optimistic estimates of waste reduction and recycling were realized, an enormous waste stream would still exist requiring disposal by incineration or burial.

Communities should therefore at least consider how to coexist with a solid waste facility. This section suggests ways in which communities

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264. N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to 49-0311 (McKinney 1991). On conservation easements generally, see Carol Rosenthal, *Conservation Easements in New York State* (Pts. 1 & 2), 3 ENVTL. L. IN N.Y. 34, 50 (1992).

265. N.Y. ENVTL. CONSERV. LAW § 49-0303(1) (McKinney 1991).

266. N.Y. ENVTL. CONSERV. LAW § 49-0305 (McKinney 1991). The law also provides that conservation easements are immune to most common law defenses. N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney 1991).

267. *See infra* text accompanying notes 273-86.

can maximize the economic benefits from such facilities, while using the powers described above to limit the environmental risks.

A. *Maximizing the Economic Benefits*

1. *Tax Assessments and Jobs.* In a rural community a large solid waste facility is likely to be the major economic force. The assessed valuation of a facility can make it the largest taxpayer in the community. In addition, the facility will bring jobs, often giving unskilled labor a job market that is otherwise unavailable. Furthermore, such facilities tend to be stable, long-term employers.

For example, one incinerator was estimated to bring in 1,000 construction jobs, 60-80 permanent full time positions, and $165,000 in annual taxes.[268] The proposed Farmersville facility would be the largest employer and taxpayer in the Town.[269]

On the other hand, there is an opportunity cost for allowing such a facility. What other businesses would want to follow a megadump or an incinerator? Will property values decline, along with the quality of life, due to the presence of the facility? What will be the physical and mental health effects of the new venture? Careful planning by the whole community is necessary to ensure that all costs, financial and otherwise, are weighed against the benefits to be gained.

Communities must also be wary of "bait and switch" tactics by solid waste proponents. When Integrated Waste Services first approached the Town of Farmersville, it proposed paying all town, county, and school taxes for the residents for the life of the proposed facility.[270] But the final contract with the Town included no such tax payment plan; in fact, the school district received nothing in the final deal.[271] Communities may also be faced with operators who offer benefits while at the same time threaten non-cooperative governments with legal action. While it was "cooperating" with the Town, Integrated Waste was accused of bullying the Town by suing it in three separate

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268. 174 WASTE NOT, Nov. 19, 1991.

269. *See Small Town, supra* note 4.

270. John T. Eberth, *Company Raises the Stakes for Landfill Proposal*, OLEAN TIMES HERALD, July 6, 1990, at 2.

271. Contract between Integrated Waste Systems and Town of Farmersville (Sept. 9, 1991) [hereinafter Integrated Contract] (copy on file with the *Buffalo Environmental Law Journal*).

actions.[272]

2. *Host Community Fees.* By far the greatest potential gain for communities rests in the area of host fees. These are payments to the community for the right to do business within that community. The community with a control system in place will be in a better position to bargain than a community which has minor approval procedures through which a facility operator must pass.

There is wide disparity between what communities receive in host fees. Mobile, Arizona received about $50,000 in total benefits for a landfill that is expected to provide its owners with over $2 billion in revenue during its useful life.[273] A few hundred miles west of Mobile, Riverside County, California, receives $6-$7 per ton from one dump and $4 per ton from another, generating over $40 million annually.[274] Farmersville will receive no more than $3 million per year at a rate of between $2.75 and $3.50 a ton, with only $75,000 up front.[275] Why is

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272. Michael Beebe, *Duped on Dump, Landowners Say*, BUFF. NEWS, Sept. 8, 1991, at A1, A12; *Small Town, supra* note 4. Among the questions communities must face is who is going to be running the disposal facilities. Because of charges of alleged prior improper practices in the waste industry, State Assemblyman Maurice D. Hinchey has questioned whether, under the DEC's Bad Actors Enforcement Directive, Integrated Waste should be granted a license for the Farmersville landfill. Bucky Gleason, *Landfill Developers Staunchly Deny Claims Made by Legislator*, OLEAN TIMES HERALD, Apr. 13, 1992, at A1. The company denied all of the charges against it. *Id. See also* Michael Beebe, *Williams Cuts a Wide Swath in Business*, BUFF. NEWS, Nov. 17, 1991, at B1. The owner of a landfill in Lewiston, N.Y., was arrested for allegedly trying to bribe the Town Attorney in an effort to procure favorable local legislation. Dan Herbeck & Robert J. McCarthy, *Landfill Operator Accused of Bribe Try*, BUFF. NEWS, May 19, 1992, at A1. Communities should cooperate with the DEC to thoroughly investigate all aspects of an applicant's ability to safely and properly run a facility. Local ordinances should include prior performance as a criterion for determining whether to issue a license. Valid, documented decisions to reject unqualified applicants should withstand judicial scrutiny. *See* Barton Trucking Corp. v. O'Connell, 197 N.Y.S.2d 138, 148 (1959) (licensing agency "not only empowered but indeed is duty bound, to inquire into the character and personal fitness of the proposed licensee"); Olsen v. Town Bd. of Saugerties, 557 N.Y.S.2d 633 (App. Div. 3d Dep't 1990) (upholding Town Bd. denial of license for a junkyard based on prior illegal operation); Suzette Brooks, *'Bad Actor' Laws Snag Repeat Environmental Violators*, 3 ENVTL. L. IN N.Y. 97 (1991).

273. Bailey, *supra* note 23.

274. *Id.* Riverside County is especially aggressive in allowing trash disposal for cash. The County recently authorized a company to dump 20,000 tons of trash a day in an old mine in return for $30 million in annual fees. USA TODAY, Oct. 7, 1992, at 10A.

275. *Small Town, supra* note 4; Integrated Contract, *supra* note 271.

California desert worth $1-$4 a ton more than New York farmland? Simply because the California officials negotiated a better deal. The task is not an easy one for local officials. Waste companies do not like to disclose fees, try to low-ball their bids, and often combine such pitches with threats of lawsuits.[276] Unlike their counterparts in the waste disposal industry, many local officials are not experienced at negotiating complicated contracts.

Communities should start with a heavy dose of skepticism. They should review annual reports of the companies, and beware of small independents that are really subsidiaries of large firms. Communities should always ask for more, because there is nothing to lose except a landfill or incinerator as a neighbor. Contracts can include clauses with automatic inflationary increases in host fees.[277] At its expected capacity of 2,500 tons a day,[278] Farmersville's potential loss is between $2,500 and $10,000 a day in host fees.

An additional component of host fees is that free trash disposal can be provided by the facility. With trash disposal costing communities $40 to $130 a ton,[279] substantial tax savings can be achieved by free disposal service. The Town of Colonie, N.Y., has established a composting operation which provides both host fees and tax savings. In conjunction with a private concern, the Town opened a commercial food-waste composting plant. The plant will produce compost that Colonie will use as landfill cover material, saving $100,000 to $200,000 a year in tax dollars that would have been used to purchase landfill cover. The life of the landfill will be extended by not depositing food waste in it, and the host fees of about $250,000 a year will exceed the revenue lost due to the food-waste being composted instead of landfilled.[280]

Municipalities pursuing similar partnership arrangements should be wary of making commitments that can leave the community financially exposed if the joint plans do not succeed. Most often such

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276. *See Bailey, supra* note 23.

277. The Town of Lewiston included a clause in a proposed contract that would have required an increase in its host fees if other communities were getting higher fees. Stipulation for Settlement, Modern Landfill, Inc. v. Town of Lewiston (Sup. Ct., Sept. 10, 1991) (No. 69836).

278. Eberth, *supra* note 270.

279. RACHEL'S HAZARDOUS WASTE NEWS, No. 307, Oct. 14, 1992.

280. *BFI, Colonie, N.Y. Develop State's 1st Commercial Food-Waste Compost Plant*, INTEGRATED WASTE MGMT., Feb. 19, 1992, at 3.

agreements are made with resource recovery plants,[281] where the community guarantees it will deliver the minimum amount of trash necessary for the profitable operation of the incinerator. If the minimum amount is not delivered, the town suffers a financial penalty, paying the incinerator company for the lost profits caused by the trash shortfall. The success of recycling and waste reduction programs have substantially reduced the available flow of trash.[282] The Town of Babylon, N.Y., was providing 10,000 to 15,000 tons of trash a year less than the 225,000 tons required to provide an incinerator, and faced a potential penalty of several hundred thousand dollars.[283] In neighboring Huntington, N.Y., the Town Board imposed a waste usage fee of between $170 and $500 per family to resolve financial difficulties caused by inadequate trash receipts and revenue at its incinerator.[284]

Another potential use of host fees is to cover the cost of monitoring disposal facilities.[285] Many solid waste facilities utilize monitors and inspectors to constantly evaluate performance. State law requires most of these monitors and establishes the criteria for their application. Local governments can request in the negotiating process that the facilities pay for costs of monitoring above and beyond that which the state and federal governments require.[286] Such additional measures could include extra air and water quality monitoring at sites away from the facility. Fees could be placed in a dedicated fund to pay for inspections

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281. Resource recovery facilities process waste into its component parts so that recyclable resources, raw materials, and energy can be recovered. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.2(130) (1991). Most agreements involve waste to energy incinerators, which handle 16% of the country's municipal waste and produce energy equivalent to 31 million barrels of oil. *Ash from Combustion of Municipal Waste to be Considered Non-Hazardous*, *supra* note 77.

282. Frank Edward Allen, *Some Incinerators Have Capacity to Burn*, WALL ST. J., Oct. 2, 1991, at B1.

283. Jonathan Rabinowitz, *Costs of L.I. Incinerators Rise With Trash Shortage*, N.Y. TIMES, Oct. 10, 1992, at 26. To make up the shortfall, Babylon contracted to process a neighboring town's garbage for twenty years, but agreed to do so at a price that may be much lower than what the market price will be in the future. *Id.*

284. *Id.*

285. Another way is to use fees to purchase property negatively affected by facilities. *See supra* text accompanying notes 255-66.

286. For example, KCI, Inc. has offered to pay the City of Havana, Ill., the full cost for an incinerator inspector. *The Bait Offered to Havana, Illinois, to Become a Dump Town*, 181 WASTE NOT, Jan. 1992 [hereinafter *Bait Offered*]. Because facilities are required to make extensive reports to the DEC, *see, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 6, § 360-2.9 (1991), the municipality should require that copies of all reports to the DEC also be delivered to the municipality.

and monitoring, and could be administered by officials reporting to the community.

Communities can negotiate contracts that take advantage of the special skills of the solid waste operator. One community facing the expense and environmental liability of closing its own landfill arranged for the landfill company to assume the costs and responsibilities for closing the town facility.[287] Another community was offered a deal including free enlargement of its water system, if that was needed.[288] All communities should look at potential solid waste operators as possible allies, not just as an adversary. There can be many benefits for those communities that have protected themselves by enacting comprehensive legislation before dealing with an unpopular facility.

3. *Property and Financial Guarantees.* Shortly after the Farmersville landfill plans were announced, a resident of the area with an excellent credit rating and steady employment was refused a home equity loan. In explaining the rejection the bank cited the "questionable future value of your property because of the proximity to the proposed industrial waste site."[289]

Regardless of how well disposal facilities are run, they are not considered desirable neighbors. Odors, noise, fumes, pollution, vermin problems, and increased traffic can accompany even the best facilities. As a result, property values near disposal facilities can be severely depressed.[290] For many people the home is their main asset, and reduced value could have a devastating effect on their financial status. In appropriate circumstances property owners could take legal action against disposal facilities, pursuing their claims on grounds such as

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287. Stipulation for Settlement, Modern landfill, Inc. v. Town of Lewiston (Sup. Ct., Sept. 10, 1991) (No. 69836).

288. *Bait Offered, supra* note 286. Because leachate from landfills can contaminate groundwater, permits should contain requirements that landfill operators indemnify the community for costs of water system improvements and other contamination response costs.

289. Paul Carroll, *Landfill Foes Claim Equity Loan Refusal*, BUFF. NEWS, Mar. 7, 1992, at C4. Ironically, she had moved to Farmersville to get away from another landfill in Chaffee, N.Y. *Id.*

290. *But see* Bruce J. Jarker & John H. Turner, *Overcoming Obstacles to the Siting of Solid Waste Management facilities*, 21 N.M. L. REV. 91, 119 n. 166 (discussing studies that concluded that there was no adverse impact upon property values).

nuisance and trespass.[291] However, litigation is expensive and success is hardly certain.

Municipalities can act on behalf of these property owners during negotiations with prospective facility operators. Property value guarantees can be utilized by the community, property owners and facility operators to reduce the burden of facility siting. A typical property value guarantee contract would entail the operator guaranteeing the value of a property, as determined by an independent appraisal performed as if the facility did not exist, against the inability of the owner to sell the property at the appraised price.

Because property value guarantees are usually offered to reduce public opposition to projects, communities should consider their cost carefully. For example, some guarantees are contingent on local acquiescence to facility operation.[292] As a result, residents are forced

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291. *See, e.g.*, Copart Industries v. Consolidated Edison of N.Y., 362 N.E.2d 968 (N.Y. 1977); Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). Common law rights are important because the Environmental Conservation Law does not provide a private cause of action. Town of Wilson v. Town of Newfane, 581 N.Y.S.2d 962 (App. Div. 4th Dep't 1992) (only the Attorney General, not a municipality, can enforce the Environmental Conservation Law), *leave to appeal denied*, 1992 App. Div. LEXIS 8420 (June 5, 1992). However, the Environmental Conservation Law does not preempt common law claims. State v. Monarch Chemicals, 443 N.Y.S.2d 967 (Sup. Ct. 1981), *aff'd*, 456 N.Y.S.2d 867 (App. Div. 3d Dep't 1982) (State retains existing rights and remedies to suppress pollution and abate nuisances under N.Y. ENVTL. CONSERV. LAW § 17-1101).

Although municipalities cannot utilize the Environmental Conservation Law as a cause of action, they can pursue public nuisance claims against polluting disposal facilities. *See* State v. Schenectady Chemicals, Inc., 479 N.Y.S.2d 1010, 1013 (App. Div. 3d Dep't 1984) (pollution of water supply is a public nuisance); *Monarch*, 456 N.Y.S.2d at 868 (soil and groundwater pollution by a chemical facility a public nuisance); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359 (1990); Louise Halper, *Public Nuisance and Public Plaintiffs* (pts. 1 & 2), 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,292 (1986), 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,044 (1987).

292. *Two Ohio Waste Management Firms Propose Landfill for Lee County, S.C.*, INTEGRATED WASTE MGMT., May 16, 1990, at 7. In return for giving up the right to oppose the project, the companies offered to guarantee 110% of property values for 15 years. *Id.* Akzo Salt originally included, in a section labeled "Mutual Best Interest," such a "gag order" in a property guarantee program it offered to residents near its proposed ash disposal facility, but dropped the speech restrictions in response to community opposition. Akzo Salt Inc., Restof Mine Backfill Project, Property Value Guarantee Program, para. 7., [hereinafter Akzo Contract] (copy on file with the *Buffalo Environmental Law Journal*); *Akzo Salt's Asking Too Much if Silence is Guarantee Price*, LIVINGSTON COUNTY NEWS, Sept. 17, 1992, at 4; Letter from Akzo Salt to Livingston County News (Sept. 21, 1992) (copy on file with *Buffalo*

to balance the protection of their homes against their right of free speech. This type of "gag order" is offensive to the spirit of public participation in environmental decisions and should be strongly discouraged.

Guarantees should be expansive in their coverage of property interests. To allay community fears raised when it announced plans to use empty salt mine cavities to dispose of incinerator ash, Akzo Salt offered a property value guarantee to residents within one mile of the mine.[293] However, the contract only covered sales of residences.[294] The area includes many farms and businesses, which were unprotected by the program.[295] Communities should address all property interests which would be adversely affected by disposal facilities.

By addressing only sales, the Akzo program offers no help to those who do not wish to move but, like the Farmersville resident, are unable to obtain a home equity loan. From a practical perspective, mortgage values can be more difficult to guarantee than sales values.[296] However, the inability to obtain financing using the home as collateral can be just as injurious to the owner. Communities can adopt flexible approaches to help those harmed by facility siting, but who do not wish to leave the community. One method is to use a portion of any host fees for revolving loan programs. Another is for the disposal company to act as guarantor on the loan, to the extent the available equity has been damaged by the presence of the facility.[297]

When working with disposal companies it is important for communities to ensure the long-term financial viability of the promises the companies make. Promises made when a facility is still in the planning stages are only as strong as the company making them. If a

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Environmental Law Journal).

293. Akzo Contract, *supra* note 292.

294. *Id.* para. 2.

295. The area includes the Towns of York, Geneseo, and Leicester in Livingston County, N.Y.

296. The amount of a potential home equity loan depends not only on the value of a property, but also on such factors as the credit rating of the owner, economic conditions in the community unrelated to the disposal facility, the amount and interest rate of other loans on the property, and the prevailing interest rate at the time the loan is requested.

297. For example, assume a resident could have borrowed $180,000 against the value of a $200,000 house, but because of the decreased home value caused by the presence of the disposal facility can only borrow $100,000. The facility operator would act as guarantor on $80,000 of the loan, in effect giving the bank the collateral it lost due to the facility being built.

facility is a financial bust, then so are the promises to the community. When the firm operating the Orleans Sanitary Landfill went bankrupt, the Town of Albion, N.Y., was among its unpaid creditors, and was owed a total of $2.13 million.[298] A well drafted property value guarantee program should include financial guarantees similar to those employed by the DEC as part of its landfill permitting program.[299] Additionally, the program's liability must be shared by the operator, owner, and their parent companies, or any successor.

Other promises by companies may not be valid when they are most needed. The Akzo property guarantee was not valid for the first six months of facility operation,[300] expired after ten years of facility operation or fifteen years after signing, whichever was sooner,[301] and would expire immediately if the plant stopped processing waste.[302] This last clause means that the company would have no liability if the plant shut down due to environmental problems, even though at this point property value protection is most important. Together these provisions effectively limit Akzo's window of liability to when the plant is operating safely, and shut out the most important and vulnerable time periods – when the operation is first started and when it is closed. The time frame of a useful guarantee program protects the value of the property for a substantial period after the facility is closed.

B. *Minimizing the Environmental Risks*

In addition to the strategies previously mentioned, communities

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298. M. Sharon Baker, *Smiths Built Business From 1 Truck*, BUSINESS FIRST, June 22, 1992, at 32. The landfill went bankrupt because of criminal and civil fines of over $3 million for illegal and excessive dumping, and an inability to expand the landfill. *Id.*

299. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.13 (1991).

300. The Akzo contract states that the reason for the six month delay is to avoid panic selling. Akzo Contract, *supra* note 292, para. 4. But any panic selling is likely to occur when the plant is about to begin operations, not after it has been operating for six months. The Akzo contract does not cover this time frame, so the property owners are not protected. Further, people who fear the environmental hazards of a facility should not have to wait until the facility has been proven safe before they can move.

301. Akzo Contract, *supra* note 292, para. 8. The Akzo project involves disposal of incinerator ash, which, because of the concentration of heavy metals and chemicals, could be hazardous. *See supra* note 77. Problems could first appear years after the operation ceases, but the proposed property value guarantee program will have long since expired.

302. Akzo Contract, *supra* note 292, para. 8.

can use the ideas listed below to minimize the risk of environmental damage from solid waste facilities.

1. *Limits on Certain Facilities.* Municipalities have the right to limit siting of solid waste facilities. This power can be used to ban all solid waste management facilities,[303] or specific types of facilities. For example a community may wish to ban incinerators to preserve the local environment and protect the public health.[304] Incinerator emissions include toxic wastes (e.g. dioxin, particulates, sulfur dioxide, hydrogen chloride) and heavy metals (e.g. lead, arsenic, cadmium).[305] Health hazards are not limited to emissions; ash residue and water runoff are also concerns.[306] A community must consider whether safe incinerators are actually being built, rather than whether incinerators are safe disposal facilities. A 1987 report by the DEC determined that six of seven incinerators tested exceeded permitted emissions levels.[307] Given the sharply reduced ability of the DEC to adequately monitor existing facilities due to budget cuts,[308] it is highly unlikely that the state can satisfactorily monitor emissions. Thus, any permission to construct such a facility should, at a minimum, provide a guaranteed source of revenue to afford such testing. The agreement should specify substantial financial penalties to deter non-compliance. Given the risks, communities may decide that they are better off without this disposal method.

Other types of facilities may be acceptable — even desirable — but only if operated in a certain manner or at a particular location. An

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303. An example of a statute banning waste facilities is found in the Town of Champlain, N.Y., Town Code § 107-4 (1992):

> A. The dumping, storing, placing or incineration of any kind of solid or liquid waste material, hazardous or non-hazardous, toxic or nontoxic, within the Town of Champlain which is picked up, brought or transported from inside or outside the Town of Champlain is hereby prohibited.
>
> B. The creation and/or operation of sanitary landfills, dumps, dumping grounds or incinerators within the Town of Champlain for solid or liquid waste material coming from inside or outside the boundaries of the Town of Champlain is prohibited.

304. *See supra* note 77.

305. ERIC A. GOLDSTEIN & MARK A. IZEMAN, THE NEW YORK ENVIRONMENT BOOK 36-40 (1990).

306. *Id.*

307. Christy Casamassima, *Disposal of Toxic Ash Posing Problems*, N.Y. TIMES, Sept. 17, 1989, § 12 (Long Island), at 1.

308. *See supra* note 36 and accompanying text.

example would be a composting facility, which can be utilized to keep food scraps, yard waste, and other organic materials out of landfills. Composting uses naturally occurring bacteria to break down material, without pollution, into nutrient rich compost.[309] One test found that composting resulted in a 40% reduction in waste sent to landfills, and that up to 50% of the nation's waste stream could be composted.[310] However, composting facilities in Florida and Oregon have closed as a result of the noxious odors they produced.[311] If these facilities were properly located, odors may have been less of a concern. In addition, enclosing composting facilities can control odors, but may make such a facility unprofitable.

2. *Limits Based on Type of Waste.* As previously discussed,[312] certain wastes not classified as hazardous, such as incinerator ash, may still pose a threat to the local environment. Therefore, communities may wish to ban the receipt of certain types of waste. In *Minnesota v. Clover Leaf Creamery*,[313] a challenge was made to a Minnesota statute requiring that milk, but no other item, could not be sold in plastic non-returnable, non-refillable containers. The Supreme Court held that the ban applied evenhandedly to all milk, and was reasonably related to an attempt by the state legislature to control plastic (non-recyclable) waste.[314] Thus, if a waste ban is effected evenly, the statute should withstand scrutiny.

An example of a waste ban is the prohibition of landfilling or burning of recyclable materials. In New York, this is based on the state waste management policy that recycling is a priority, even over energy recovery.[315] Thus, communities can reduce incinerator ash and extend landfill life by requiring separation and recycling of materials, and prohibiting the destruction of recyclable materials. In doing so they would be promoting the state's goal of encouraging recycling.

Under the newest EPA regulations, landfills will be more secure.[316] But consider the following: "A landfill is a bathtub in the

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309. John Holusha, *All About Composting; Two Towns Experiment With the Alchemy of Trash*, N.Y. TIMES, Aug. 9, 1992, § 3 (Financial), at 12.

310. *Id.*

311. *Id.*

312. *See supra* note 77.

313. 449 U.S. 456 (1981).

314. *Id. See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978).

315. N. Y. ENVTL. CONSERV. LAW § 27-0106 (McKinney 1991).

316. *See supra* note 25.

ground. When fluids, such as rain, get into the bathtub and combine with the wastes they produce a toxic soup that, sooner or later, will contaminate the local environment."[317] Any steps that can be taken to reduce the potential damage should be considered. Even if a municipality allows a landfill, it can outlaw the use of ash as part of the daily ground cover. Another step that may reduce damage is banning the acceptance of tires at landfills. Both actions would reduce the potential toxicity of the leachate that could threaten the local water supply.

3. *Limits Based on Source of Waste.* The most controversial efforts to limit solid waste facilities are those based on limiting imported waste.[318] Ever since the Supreme Court declared garbage to be an article of commerce protected by the Constitution in *City of Philadelphia v. New Jersey*,[319] states and communities have been seeking acceptable methods to prevent their areas from becoming the dumping ground of other communities.

The ruling of *Philadelphia* was applied in New York in two cases decided together, *Dutchess Sanitation Service, Inc. v. Town of Plattekill*,[320] and *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*.[321] In *Dutchess Sanitation*, the Town of Plattekill attempted, under its authority granted by Town Law section 130, to prohibit out-of-town imports of waste to a local facility.[322]

The sole criteria of the ordinance was the place of origin of the waste. The landfill operator presented uncontroverted evidence that out-of-state refuse haulers wished to use its landfill. The court unanimously invalidated the ordinance, because "[i]n the absence of a reason, apart from its origin, to treat the out-of-town garbage differently from an equivalent quantity of the local product - and none is suggested - in actual operation [the] ordinance violates the principle of nondiscrimination imposed by the commerce clause."[323]

The ordinance at issue in *Caledonia* was virtually identical.[324]

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317. *EPA's New Landfill Rules Protect Only the Largest Garbage Haulers*, RACHEL'S HAZARDOUS WASTE NEWS, No. 268, Jan. 15, 1992.

318. *See* Meltz, *supra* note 160.

319. 437 U.S. 617 (1978).

320. 417 N.E.2d 74 (N.Y. 1980).

321. 417 N.E.2d 78 (N.Y. 1980).

322. 417 N.E.2d at 77 n.2.

323. 417 N.E.2d at 77.

324. Town of Caledonia, N.Y., Sanitary Landfill Ordinance of July 17, 1976.

Nevertheless, by a 4 to 3 vote it survived intact. The majority noted that unlike the situation in *Dutchess Sanitation*, there was no evidence of any impact on interstate commerce. The discriminatory effect was felt only by other New York State communities.[325] Thus, there was no showing by the operator of a harm to interstate commerce.

In dissent, three judges would have found the ordinance invalid on its face. They argued that 1) those companies producing the trash that was banned from the town were engaged in interstate commerce; and 2) the effect of the statute was to prevent out-of-state operators from seeking the landfill's business.[326] "Where legislation thus conceptually affects interstate commerce, there need be no quantitative showing of the impact . . . . The test is whether viewed cumulatively alongside like potential conduct by others similarly situated, there is enough to activate the clause." [327] The majority rejected the application of this "ripple effect" and "cumulative burdens" argument, holding that virtually no municipal ordinance could withstand such constitutional scrutiny.[328]

The lessons of *Caledonia* may be more about bad lawyering than a precedent upon which communities can base their ordinances. The basis of the outcomes in *Caledonia* and *Dutchess Sanitation* are differentiated solely by the lack of proof of interstate discrimination. Evidence of such discrimination, such as rate inquiries by out-of-state hauling firms and municipalities, should not be difficult to obtain. Further, the Town of Caledonia is located far from the state's borders, while communities closer to the border would provide a more attractive location for importing solid waste.

The holding in *Caledonia* and other cases allowing similar limits on interstate waste[329] may have been effectively overruled by the

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325. 417 N.E.2d at 80. Caledonia passed its ordinance after a public outcry about the landfill's negotiating a new contract to handle substantial amounts of trash from Rochester and Monroe County. *Id.* at 79.

326. *Id.* at 82 (Fuchsberg, J., dissenting).

327. *Id.* (Fuchsberg, J., dissenting) (citations omitted).

328. *Id.* at 80-81.

329. *See, e.g.*, County of Washington v. Casella Waste Management, Inc., In. 90-CV-513, 1990 U.S. Dist. LEXIS 16941 (N.D.N.Y. Dec. 6, 1990); Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987); Omni Group Farms, Inc. v. Cayuga Meadows, Inc., 766 F. Supp. 69 (N.D.N.Y. 1991); *In re* Southeast Arkansas Landfill, Inc., 137 B.R. 735 (Bankr. E.D. Ark. 1991). However, other courts found that bans on out-of-county and out-of-state waste violate the Commerce Clause. Diamond Waste, Inc. v. Monroe County, 939 F. 2d 741 (11th Cir. 1991); BFI Medical Waste Systems, Inc. v. Whatcom County, 756 F. Supp. 480 (W.D. Wash. 1991).

Supreme Court in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*.[330] The Town of Caledonia's statute regulated against all waste produced outside the Town, whether generated in or out of New York State. Under authority of the Michigan statute challenged in *Fort Gratiot*, St. Clair County banned importation of waste from out-of-state and from other counties within the state.[331] The suit was initiated by a landfill operator denied permission to import out-of-state waste.[332] Michigan asserted that there was no Commerce Clause violation because in-state and out-of-state waste were treated equally.[333] However, the Court held that there was still an impermissible burden placed on interstate commerce, and that it was immaterial that other Michigan counties were similarly discriminated against.[334] The Court also noted that the actual volume of interstate waste discriminated against was irrelevant.[335] The lack of a substantial actual interstate effect was a key point in upholding the statute in *Caledonia* decision. Under the *Ft. Gratiot* ruling, a community could not prevent a facility operator handling local waste from processing out-of-state waste.

Some communities prefer to write ordinances prohibiting shipments of intrastate waste into their communities while not addressing interstate waste.[336] Although communities are precluded from banning interstate waste imports, they can limit the receipt of intrastate wastes. Because interstate waste is not affected by such laws, the Commerce Clause is not implicated. This method may not serve communities near the state's borders or on major transportation routes, but it will make any community a less tempting site for a regional landfill.

A Commerce Clause attack was unsuccessfully leveled against an ordinance that restricted the total land available for landfills within a town in *Al Turi Landfill, Inc., v. Town of Goshen*.[337] Here the ordinance in question held that no more than 300 acres within the Town

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330. 112 S. Ct. 2019 (1992).

331. *Id.* at 2024.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* The Court held that the fact that several Michigan counties accepted out-of-state waste only reduced the scope of the discrimination, it did not eliminate it.

336. Town of Lewiston, N.Y., Local Law No. 2 of 1988.

337. 556 F. Supp. 231 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 287 (2d Cir. 1982).

could be used for landfills;[338] also, any new facility had to be at least 10 and no more than 50 acres. Because the plaintiff operated a facility of 43.6 acres, an existing county dump was 244 acres, and another landfill covered 7-8 acres, no new facility could ever be built.[339] The law was upheld despite the apparent end this put to the landfill business in the Town.

In enacting prohibitions based on total acreage, communities should be careful in the language they use to avoid impacting current and future economic opportunities. Many manufacturing operations entail use of facilities defined as solid waste facilities that could be prohibited by the local law. Careful drafting, and use of the definitions separating on-site from off-site private landfills should address this problem. Reasonable use of different classifications should withstand an attack on equal protection grounds.

4. *Aesthetic Restrictions.* The potential consequences of siting solid waste management facilities on the quality of life in a community are not limited to environmental considerations. Communities can act to reduce impacts relating to the size and location of facilities. The state has granted local governments, in the zoning power enabling statutes, the power to regulate facilities, if done as part of a comprehensive plan to protect the health, safety, and general welfare of the community.[340] Local governments can restrict the height of a facility, establish setbacks from other property,[341] limit the areas in a community which can be used for solid waste facilities,[342] and limit the hours of operation of a facility.[343]

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338. Town of Goshen, N.Y., Local Law No. 3 of 1981, § 80-9(D)(1) (1981).

339. *Id.*

340. N.Y. TOWN LAW § 261 (McKinney 1991); N.Y. VILLAGE LAW § 7-700 (McKinney 1991); N.Y. GEN. CITY LAW § 20 (24)-(25) (McKinney 1991).

341. "No sanitary landfill shall be located within two hundred (200) feet from any highway, five hundred (500) feet from any stream or property line or within one thousand (1,000) feet from any existing dwelling, church, school, public building or place of public assembly." Town of Le Roy, N.Y., Town Code, § 122-12(B) (1992).

342. Town of LaGrange v. Giovenetti Enterprises, Inc., 507 N.Y.S.2d 54 (App. Div. 2d Dep't 1986) (upholding use of zoning ordinance to completely prohibit commercial solid waste transfer stations).

343. For example, deliveries to a landfill could be limited from 7:00 a.m. to 7:00 p.m., to reduce noise at night. The Town of Mamaroneck, N.Y., has adopted a law to limit the time of operation of incinerators within the Town:

> No person shall permit the operation of an incinerator with a rated capacity of two thousand (2,000) pounds per hour or less at any time other than between the hours of 8:00 a.m. and 4:00 p.m. of the

Ordinances can be drafted to limit the size of a particular type of facility and the overall amount of land that can be utilized for solid waste management facilities in a community. The Town of Goshen, N.Y. reacted to a proposed expansion of an existing landfill by enacting an ordinance limiting the size of any one landfill to no more than 50 acres[344] and the total size of all landfills in the community to 300 acres.[345] The acreage limits were upheld as rationally related to the valid local objective of protecting public health and welfare.[346]

5. *Closure Costs and Opportunities.* Communities must recognize that all solid waste facilities will one day close. That does not mean that the environmental threats from such facilities will also terminate.[347] To achieve the maximum benefit and limit the risk, local governments should plan for the closing and post-closing of a facility

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same day, except with the written approval of the town. No burning within an incinerator may be commenced later than 2:00 p.m. so as to ensure compliance with the regulations concerning hours of operation.

Town of Mamaroneck, N.Y., Local Law No. 3 of 1992, § 126-7 (1992).

344. Town of Goshen, N.Y., Local Law No. 3 of 1981, § 80-9(B)(1) states that "[n]o permit shall be issued for the construction of a solid waste management facility unless such facility contains not less than ten (10) and not more than fifty (50) acres of land." Section 80-9(C)(1) makes a similar prohibition against expanding existing facilities.

The Goshen ordinance reflects a comprehensive approach to disposal facility regulation. Although the Town Board was concerned with the expansion of a specific landfill, the ordinance provides a comprehensive ban by reference to solid waste management facilities, rather than just landfills. Compare Town of North Greenbush, N.Y., Town Code § 133-3 (1981), which only refers to dumps and dumping grounds.

345. Town of Goshen, N.Y., Local Law No. 3 of 1981, § 80-9(D) provides:

> (1) Notwithstanding anything to the contrary contained in this section, no permit shall be issued for the construction of solid waste management facilities or the modification to such a facility, if the amount of land comprising the proposed or modified facility when added to land comprising all other existing and closed solid waste management facilities within the Town of Goshen shall exceed three hundred (300) acres.

346. Al Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231, 239 (S.D.N.Y.), *aff'd*, 697 F.2d 287 (2d Cir. 1982). The ordinance was also upheld against Commerce Clause claims, *see supra* text accompanying notes 337-35, and against arguments that the ordinance was irrational and arbitrary simply because the Town prohibited what the DEC would allow, 556 F. Supp. at 259.

347. For example, DEC regulations require environmental monitoring for up to thirty years after a landfill is closed. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-2.15(i)(4) (1991).

during the licensing process. New York State has extensive requirements in its regulations to guarantee safe facility closings.[348] Furthermore, communities can impose stricter requirements for closings or require that the facility be adapted for a subsequent use, such as a park.[349]

The costs of closure to a community can include the loss of jobs and revenue. Communities can become quite financially attached to the host fees that facilities can generate. Host fees are usually tied to the amount of waste received; thus closure of a facility can substantially impact a community's financial well-being. To provide the same level of services, other revenues, such as taxes, would have to be increased.

Communities should be wary of deals by which they will acquire ownership of a facility after closure. In addition to removing land from the tax rolls, the community may be inheriting a liability nightmare if the facility was improperly operated. Municipalities can be held liable, as current owner, for clean up costs of waste facilities.[350] Before assuming ownership of any former solid waste facility, the community should be indemnified by the owners and operators of the facility against any and all costs resulting from contamination of the facility.

V. CONCLUSION

In a perfect world there would be no solid waste disposal facilities, neither incinerators nor landfills. The amount of waste would be minimal and this waste would be recycled. Ours is not such a world. We must be prepared to deal with our solid waste. But as one official involved in the waste industry has noted, we are moving from "NIMBY" (Not In My Back Yard) to "BANANA" (Build Absolutely Nothing Anywhere Near Anybody).[351]

All solid waste facilities represent some threat to the environment, whether from air or water pollution, loss of open space, or the loss of resources due to shortsighted programs. If communities are going to accept these risks, they must be fully compensated. In order to achieve this goal, communities must use their direct authority to regulate, in

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348. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-2.15 (1991).

349. One community uses closed landfills as parks and even ski slopes. *20/20: The Town that Loved Garbage* (ABC television broadcast, Jan. 3, 1992).

350. Liability occurs under the federal superfund law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107(a), 42 U.S.C. § 9607 (1988).

351. Comment of Allen Moore, president of the National Solid Waste Management Association, *quoted in* Fagin, *supra* note 15.

conjunction with their zoning powers and comprehensive master plans. Furthermore, the law can be utilized to prevent the most onerous of these facilities from presenting health hazards to the members of the community.

Local governments can enact stricter controls than the state. This is a power that should be exercised with all force, so that the local governments are acting from a position of strength. In addition, the localities must maintain their pressure on the New York State Legislature to preserve this right. All local government power flows from delegations by the state. Vigilance is necessary to ensure that this wellspring of local environmental protection remains free-flowing. This is particularly essential in light of the inability of the DEC to adequately represent local values in its licensing process.

Inevitably, solid waste facilities must be sited. New York law empowers local governments with a full range of responses to address siting concerns. The key to success is a proactive stance, so that local communities can assume control of their environmental destiny by affirmatively adopting solid waste legislation as part of a comprehensive plan.