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## COMMENTS

### EXPANDING THE ROLE OF MUNICIPAL POLICE POWER IN POLLUTION CONTROL: A PRAGMATIC APPROACH

#### I. INTRODUCTION

While the rapid deterioration of the environment is a commonly reiterated fact of contemporary American life, reactions to this problem run the gamut from indifference to intrepidation. Since the fight against pollution has come into vogue, a flurry of action has taken place to save our environment from impending disaster. Many of these efforts, however, have not been as effective as the exigencies of the situation warrant. This ostensible paradox has many sources at the federal level: the congressional committee system, based on seniority and dominated by a handful of powerful and firmly entrenched congressmen and senators, is a formidable obstacle to environmental reform; dozens of federal agencies develop independent policies toward the environment and often work at cross purposes;<sup>1</sup> and the enforcement procedures provided by much of the recent federal pollution legislation is thoroughly cumbersome. Generally, there is no centralized, integrated system of environmental control at the state level either.<sup>2</sup> Authority and policy making functions are spread among such diverse agencies as public health departments, state land boards, fish and game departments, and agricultural divisions.<sup>3</sup> At the local level the difficulties of jurisdictional limitations, state preemption, and proprietary political interests make it burdensome, if not impossible, to synchronize a single pollution policy among several localities. This predicament becomes increasingly severe where the source and effects of the pollutants extend beyond the borders of many political subdivisions.

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1. Reitze, *Pollution Control: Why has it Failed?*, 55 A.B.A.J. 923, 926 (1969).

2. Some progress towards coordination, although not necessarily effectiveness, has been recently made in New York State with the passage of the Environmental Conservation Law which vests a single department with authority to formulate state-wide environmental policy. N.Y. ENVIRONMENTAL CONSERV. LAW (McKinney 1970).

3. Hansen, *Creating New Institutional Arrangements for Environmental Quality Control*, 3 NATURAL RESOURCES LAW. 739, 751 (1970).

A. *Scope of this Comment*

The structure and legal powers of local government may not always be a handicap in matters of ecological concern. The closeness of the local legislators to their constituents and the absence of the need to coordinate the policies and interests of different governmental units may enable the local government, in some situations, to recognize and respond more quickly to pressing environmental crises.

It is posited that local government may be an effective mode through which current ecological problems can be solved. The greater flexibility and responsiveness of local government enables it to apply a pragmatic approach to the abatement of pollution where the higher levels of government have failed. The question remains, however, as to whether local governments are equipped with the constitutional and statutory powers required to correct today's environmental abuses. Of assistance in undertaking this inquiry is an analysis of a recent local law which controls the phosphate contamination of water supplies.<sup>4</sup>

B. *An Example of the Pragmatic Use of Local Police Power*

Suffolk County, New York, a rapidly urbanizing county on Long Island, depends entirely upon ground water as its source of potable water.<sup>5</sup> There are no sewers in the county and homes and businesses are serviced by cesspools and septic tanks.<sup>6</sup> As a result of these circumstances, sewage effluents permeate the aquifers<sup>7</sup> and mingle with the ground waters.<sup>8</sup> This dilemma is coupled with the presence of phosphate detergents in these effluents. The deleterious effects of phosphate on water are recognized as a potentially dangerous condition to the health and

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4. Suffolk County, New York, Resolution No. 962 (1970).

5. DETERGENTS AND ASSOCIATED CONTAMINANTS IN GROUNDWATER AT THREE PUBLIC SUPPLY WELL FIELDS IN SOUTHWESTERN SUFFOLK COUNTY LONG ISLAND, NEW YORK, Geological Survey Water Supply Paper 2001-B at 1 (1970) [hereinafter referred to as WATER SUPPLY PAPER].

6. *Id.*

7. An aquifer is defined as "[a] geological formation which holds groundwater, or more accurately, through which groundwater moves . . ." Widman, *Ground Water—Hydrology and the Problem of Competing Well Owners*, 14 ROCKY MT. MINERAL L. INST. 523, 525 (1968).

8. WATER SUPPLY PAPER at 3.

welfare of the inhabitants.<sup>9</sup> Such a condition existed throughout virtually all of the upper aquifer in an area studied in Suffolk County.<sup>10</sup> Faced with this growing hazard, the Suffolk County Legislature decided to take the initiative and devise a prevention and cure to this threat.

The County Legislature realized that until an adequate (and tremendously costly) system of public sewers was developed in the county, the only feasible method of preventing the contamination of ground water by phosphate detergents was to render them unavailable to consumers in the county. To accomplish this, a new law bans the sale, exchange or disposal to another of any detergent containing prohibited substances.<sup>11</sup> The local law provides three remedies for non-compliance: (1) a fine of up to \$250 and/or imprisonment for up to 15 days;<sup>12</sup> (2) a civil penalty of \$50 for each infraction;<sup>13</sup> and (3) an action brought by the county to compel compliance and restrain violation.<sup>14</sup> If the law is strictly enforced and adhered to, (assuming that the greatest portion of all phosphate detergents used in Suffolk County are purchased within its borders) the amount of phosphates entering the ground water from septic tanks would be greatly reduced.

## II. CRITERIA FOR THE EXERCISE OF MUNICIPAL POLICE POWER

The postulation that municipal police power is a means of controlling contemporary ecological problems, as was demonstrated in Suffolk County, must be prefaced with a discussion of the powers and constraints of municipal legislation. Since the aforementioned example was a Suffolk County, New York law, the treatment of local governmental autonomy will focus on that state. To facilitate discussion, a sketch of the constitutional grant will first be set forth.

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9. See generally *Phosphates in Detergents and the Eutrophication of America's Waters, Hearings Before the Subcomm. on Conservation and Natural Resources of the House Comm. on Government Operations*, 91st Cong., 1st Sess. (1969).

10. WATER SUPPLY PAPER at 21.

11. Suffolk County, New York, Resolution No. 962 § 1 (1970).

12. *Id.* § 6.

13. *Id.* § 7.

14. *Id.* § 8.

A. *Enabling Authority*

In the past, local legislative power in New York State has been restricted to those areas within the ambit of property, affairs or government.<sup>15</sup> Even within this narrow, and often vague, definition, local governments were severely limited.<sup>16</sup> Surprisingly, even the area of public health was held to be outside the realm of local legislation because it was said not to be covered by property, affairs or government, but was a matter primarily of state concern.<sup>17</sup>

With the passage of the present article IX of the New York State Constitution in 1963, local governments, which include towns, villages, counties and cities,<sup>18</sup> have been given expanded and more clearly defined powers of local legislation without an initial resort to the state legislature for special enabling legislation.<sup>19</sup> The revised article IX directs that the powers granted to municipalities shall be "liberally construed."<sup>20</sup> In so directing, the legislature overruled the strict tenets of construction against home rule powers that had been traditionally applied.<sup>21</sup>

Section 2 (c) (ii) of article IX states that local governments shall have the power to adopt all local laws not inconsistent with the constitution or any general laws "whether or not they relate to property, affairs, or government."<sup>22</sup> In addition, subdivision 10 of section 2 (c) empowers localities to pass such laws where they relate to the "government, protection, order, conduct, safety, health and well-being of persons or property . . ." <sup>23</sup> of the municipality. These powers, literally read, are strikingly broad and implicitly, at least, abrogate the announcement in *Ainslee v. Lounsberry*<sup>24</sup> that public health is a matter

15. See *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929). See generally Richland, *Property Affairs and Government*, Home Rule Handbook 18 New York State Office for Local Government, Municipal Law Seminar 15 (1964).

16. See, e.g., *County Securities, Inc. v. Seacord*, 278 N.Y. 34, 15 N.E.2d 179 (1938).

17. *Ainslee v. Lounsberry*, 275 App. Div. 729, 730, 86 N.Y.S.2d 857, 858 (3d Dep't 1949).

18. N.Y. CONST. art. IX, § 3(d)(2).

19. *Id.* § 2(c).

20. *Id.* § 3(c).

21. See Hyman, *Home Rule in New York 1941-1965: Retrospect and Prospect*, 15 BUFFALO L. REV. 335, 354 (1965).

22. N.Y. CONST. art. IX, § 2(c)(ii).

23. *Id.* § 2(c)(10).

24. 275 App. Div. 729, 86 N.Y.S.2d 857, 858 (3d Dep't 1949).

primarily of state concern. With this provision, the state has relegated itself to a supervisory role.

To implement the revised home rule provisions of the state constitution, the legislature enacted a revised Municipal Home Rule Law in 1963.<sup>25</sup> Under article II, section 10 of that law, which took effect March 10, 1970, the legislature gives municipalities power to enact all laws for the "protection and enhancement" of their "physical and visual environment"<sup>26</sup> and the "protection, order, conduct, safety, health and well-being"<sup>27</sup> of their inhabitants. Such broad enabling enouncements must dispel any lingering doubts as to the legislative autonomy of the municipality in the area of local health and safety. Public health and safety, of necessity, includes all facets of pollution whether they be a threat to the "physical or visual environment."

While the municipality is empowered with a modicum of legislative autonomy in matters of health and well-being of local inhabitants, such power is confined by the doctrines of inconsistency with and preemption by the state constitution and general laws.<sup>28</sup> Also, local enactments must not run afoul of federal powers and legislation.

### B. *Inconsistency and Preemption*

As a condition to the exercise of local police power, the New York State Constitution provides that all local laws must be consistent with its provisions and those of any generally applicable statute.<sup>29</sup> A state statute dealing with the same subject as a local law may or may not preempt the entire field depending upon its legislative purpose, and therefore laws dealing with the same subject are not necessarily incompatible simply because they are not identical.<sup>30</sup> Indeed, "[a] municipality which is empowered to adopt health regulations may, in spite of general regulations by the state, adopt additional regulations or require-

25. N.Y. MUN. HOME RULE LAW (McKinney 1969).

26. *Id.* art. 2, § 10(1)(a)(11) (McKinney Supp. 1970-71).

27. *Id.* § 10(1)(a)(12).

28. See Radlein, *The Police Power*, Home Rule Handbook 18 New York State Office for Local Government, Municipal Law Seminar 27 (1964).

29. N.Y. CONST. art. IX, § 2(c).

30. *People v. Lewis*, 295 N.Y. 42, 51, 64 N.E.2d 702, 704 (1945).

ments where there is a real distinction between the municipality and other parts of the state."<sup>31</sup>

In a recent lower court case,<sup>32</sup> it was held that a New York City gun control law was constitutional despite the existence of a state law that regulated the possession of rifles and shot-guns by persons under the age of sixteen, aliens, convicted felons, and adjudicated incompetents.<sup>33</sup> In sustaining a city ordinance that further prohibited the possession of a rifle or a shot-gun to any person unless that person first obtained a permit, the New York State Supreme Court, New York County, stated that the statute "does not treat so extensively with the subject matter of the control of such weapons as to evince any design or intention by the state to preempt the entire field."<sup>34</sup>

A general statement that state laws in a particular field are only meant as minimum standards would, however, be erroneous. In *Wholesale Laundry Board of Trade, Inc. v. City of New York*,<sup>35</sup> the Court of Appeals struck down a city law that established a minimum wage of \$1.50 per hour where the parallel state law provided for \$1.25 per hour. One of the reasons given for the decision was that the state legislature had evinced a purpose to occupy the entire field.<sup>36</sup> It appears that where a state law does not explicitly preempt a field of legislation, the decision must be based in part on the nature of the legislative purpose.

### C. Reasonableness and Valid Local Objectives

Local laws must be directed to the achievement of a legitimate public purpose, and must be designed to reasonably attain valid local objectives; these criteria are essential for compliance with due process. As the Supreme Court has stated: "[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object

31. *S.H. Kress v. Department of Health*, 283 N.Y. 55, 59, 27 N.E.2d 431, 432 (1940).

32. *Grimm v. City of New York*, 56 Misc. 2d 525, 289 N.Y.S.2d 358 (Sup. Ct. 1968).

33. N.Y. PENAL LAW § 265.05 (McKinney 1967).

34. *Grimm v. City of New York*, 56 Misc. 2d 525, 289 N.Y.S.2d 358, 363 (Sup. Ct. 1968).

35. 12 N.Y.2d 998, 189 N.E.2d 632, 239 N.Y.S.2d 128, *aff'g* 17 App. Div. 2d 327, 234 N.Y.S.2d 862 (1st Dep't 1962); *see* Comment, *Home Rule: A Fresh Start*, 14 BUFFALO L. REV. 484, 489 n.37 (1965).

36. 17 App. Div. 2d at 330, 234 N.Y.S.2d at 865; *cf.* *Hudson Valley Light Weight Aggregate Corp. v. Schovel*, 64 Misc. 2d 814, 316 N.Y.S.2d 477 (Sup. Ct. 1970).

sought to be attained."<sup>37</sup> The traditional view of the New York Courts as to the limitations of local police power is illustrated by *Safee v. City of Buffalo*<sup>38</sup> where the Appellate Division, Fourth Department, held constitutional a Buffalo city ordinance that prohibited soft drink dealers from operating between midnight and six A.M. The court restated the two tests that were to be applied to the exercise of local police powers: "Is there a real evil, reasonably to be anticipated and to be guarded against? Is there a real relation between the evil and the proposed remedy?"<sup>39</sup>

In applying these standards at the time of the *Safee* decision, the burden of proof and the presumption favoring the exercise of such powers differed with regard to whether the local law was exercised pursuant to a specific grant by the state, or whether it was enacted under the aegis of general authority. Where the ordinance was enacted in pursuance of general authority, it may have been opposed as unreasonable, and evidence may have been introduced on the question; where it was enacted under specific authority of the legislature, the contrary was true.<sup>40</sup> The operation of this standard was construed in light of the rule that "[a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipality], and the power is denied."<sup>41</sup> Today, this strict standard has been said not to apply where the power is given directly to the municipality.<sup>42</sup> Where the nature of the power is direct, an ordinance that seeks to protect the health, safety or welfare of local inhabitants will not be invalidated unless found to be essentially arbitrary.<sup>43</sup> By virtue of this present lenient standard of review, and the constitutional admonition that powers granted to local governments shall be liberally construed,<sup>44</sup> a local law passed under the direct grant of section 2 (c) of the New York State Constitution will be upheld unless found to be arbitrary.

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37. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

38. 204 App. Div. 561, 198 N.Y.S. 646 (4th Dep't 1923).

39. *Id.* at 563, 198 N.Y.S. at 649.

40. *Id.*

41. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).

42. Hyman, *supra* note 21, at 354.

43. See *Stracquadanio v. Department of Health*, 285 N.Y. 93, 97, 32 N.E.2d 806, 808 (1941). *But see* *People's Dairy v. City of Lackawanna*, 1 Misc. 2d 700, 703, 149 N.Y.S.2d 392, 396 (Sup. Ct. 1956) (*dictum*).

44. N.Y. CONST. art. IX, § 3 (c).



This gives the municipality great discretion in fashioning methods to protect the environment.

#### D. Conflict with Federal Powers and Legislation

In *Huron Portland Cement Co. v. City of Detroit*,<sup>45</sup> a city smoke abatement law was held constitutional even as applied against steam vessels operating within interstate commerce. In an opinion delivered by Mr. Justice Stewart (Douglas and Frankfurter, JJ., dissenting), the Court held that the promotion of the health or welfare of the public in this field by a state or its instrumentalities may be exercised concurrently with the federal commerce power.<sup>46</sup> Concurrent power is authorized provided that the local law is neither arbitrary nor unduly burdensome upon interstate commerce.<sup>47</sup>

Preemption by federal statute must also be considered. Such preemption will not be inferred merely because the federal government has provided for limited regulation in a given field occupied by the local regulation.<sup>48</sup> Hence, in a recent New York case, a town ordinance prohibiting seaplanes from taking off or landing upon any portion of the town's channel system was held constitutional.<sup>49</sup> The court's rationale was that federal legislation preempts a field only where the "scheme of federal legislation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."<sup>50</sup> Preemption may not exist, for example, where a municipality controls pollution concurrently with a federal water pollution statute.<sup>51</sup> Indeed, absence of preemption is manifested by the

45. 362 U.S. 440 (1960).

46. *Id.* at 442; see *People v. Carbone*, 54 Misc. 2d 762, 765, 283 N.Y.S.2d 468, 471-72 (New York City Crim. Ct. 1967).

47. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. See *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 429-32 (1963); *Cohen v. Bredehoeft*, 290 F. Supp. 1001, 1003-04 (S.D. Tex. 1968); *Canton Poultry, Inc. v. Conner*, 278 F. Supp. 822, 825 (N.D. Fla. 1968); *Consolidation Coal Co. v. Kandle*, 105 N.J. Super. 104, 251 A.2d 295 (Super. Ct. App. Div. 1969) (smoke abatement statute).

48. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

49. *People v. Altman*, 61 Misc. 2d 4, 304 N.Y.S.2d 534 (Nassau County Ct. 1969).

50. *Id.* at 5, 304 N.Y.S.2d at 535.

51. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. §§ 466 (b)&(c) (Supp. V, 1970).

legislative history of the Federal Water Pollution Control Act.<sup>52</sup> The House Report accompanying the 1961 amendments to the act states that: "There certainly can be no assumption that the Federal interests in the field of water pollution abatement authorized by this bill are so dominant as to preclude State action. The proposition is well established that the protection of the health and welfare of citizens of a State is a proper subject for the exercise of the State police power."<sup>53</sup> Since the New York State Legislature has delegated these powers to local government, a municipality may deal with local pollution problems and do so where a federal pollution statute has not explicitly precluded state and local authority.

### III. MEETING THE CRITERIA—DOES THE LAWS PASS CONSTITUTIONAL MUSTER?

In enacting their ordinance, the Suffolk County Legislature relied upon article IX, section 2 (c) (10) of the New York State Constitution as the source of enabling power.<sup>54</sup> To determine the constitutionality of the ordinance, it must be measured against the various criteria for the exercise of local police power advanced above.

Section 2 (c) (10) broadly provides that a local government may pass all laws not inconsistent with the constitution or any general state laws, whether or not they relate to property, affairs, or government for the "government, protection, order, conduct, safety, health and well-being of persons or property."<sup>55</sup> These powers are to be liberally construed;<sup>56</sup> and the ability to pass such laws is extended to counties, cities, towns or villages.<sup>57</sup> Given the gravity of the ground water situation in Suffolk County, a law that seeks to alleviate it comes within the purview of "health and well-being" of inhabitants.

Nothing contained in the ordinance appears to be in conflict with state constitutional provisions, but the measure must also

52. 75 Stat. 204 (1961), codified at 33 U.S.C. § 466 *et seq.* (Supp. V, 1970).

53. H.R. REP. No. 306, 87th Cong. 1st Sess. (1961).

54. Letter from Suffolk County Attorney's office to the author, January 4, 1971.

55. N.Y. CONST. art. IX, § 2 (c) (10).

56. *Id.* § 3 (c); see *Kroleck v. Lowery*, 32 App. Div. 2d 317, 322, 302 N.Y.S.2d 109, 114 (1st Dep't 1969).

57. N.Y. MUN. HOME RULE LAW art. 2, § 10 (1) (ii) (a) (McKinney 1969).

be consistent with all general laws of the state. The Environmental Conservation Law<sup>58</sup> sets forth the policy of the state concerning pollution—the posture of which is one of coordination and cooperation rather than preemption of local governmental entities. Under section 77 of that same statute, certain powers of the State Health and Conservation Departments relating to pollution are transferred to the newly created Department of Environmental Conservation.<sup>59</sup> The Department is therefore vested with the power to enforce the remedies against pollution created under the Public Health Law.<sup>60</sup> The Public Health Law, in turn, provides that it is the purpose of its article 12 to provide cumulative remedies to abate water pollution and not to abridge or alter the remedies presently existing, “nor shall any provision . . . be construed as estopping the state, persons or municipalities . . . in the exercise of their rights to suppress nuisances or to abate pollution . . . .”<sup>61</sup> Also, while the existing condition in the public supply wells of Suffolk County appears to have been in violation of the water quality standards promulgated pursuant to the Public Health Law,<sup>62</sup> due to the particular source of the pollutants, these statutory remedies were inadequate.<sup>63</sup>

There also existed a general state statute on the regulation of phosphate detergents. The law, former section 391-c of the General Business Law,<sup>64</sup> merely required that soaps and detergents be plainly labeled with their phosphate content. The law’s efficacy was premised on the assumption that ecologically-minded consumers would not purchase detergents with a high

58. N.Y. ENVIRONMENTAL CONSERV. LAW (McKinney 1970).

59. *Id.* § 77.

60. N.Y. PUB. HEALTH LAW art. XII (McKinney 1971).

61. *Id.* § 1260 (emphasis added).

62. *See Id.* § 1205 (8). The standards applicable to fresh groundwaters used as a source of potable water supply call for a level of nitrate not to exceed 20.0 milligrams per liter of groundwater, and levels of alkybenzenesulfonate (ABS—a component of laundry detergents) not to exceed 1.5 milligrams per liter of groundwater. 6 OFFICIAL COMPILATION, CODE RULES AND REGULATIONS OF THE STATE OF NEW YORK § 703.4 (1968). However, the levels of both nitrate and ABS present in the groundwater supply, at times, exceeded these statutory limits. WATER SUPPLY PAPER, *supra* note 5, at 13. Therefore, a violation existed for which a potential remedy was available. *See, e.g.*, N.Y. PUB. HEALTH LAW §§ 1101-03, 1210, 1250-52, 1254-55 (McKinney 1971).

63. While there existed civil and criminal penalties for violation of the potable water standards, a suit to enjoin the sources of the pollutants (privately owned washing machines) would not be practical to enforce against thousands of potential, individual offenders.

64. [1970] N.Y. Sess. Laws, ch. 991.

phosphate content, thus alleviating this as a source of water pollution. The control that this law offered was recognized as inadequate to relieve the near crisis situation existing in Suffolk County. The county law went far beyond the state statute in prohibiting the sale of such detergents entirely,<sup>65</sup> and in doing so raises the issue of whether a municipality may bar that which a state law permits. The answer lies in a "special conditions" doctrine announced by the courts. That is, a municipality may adopt higher standards where they are based upon special conditions existing in the locale.<sup>66</sup> Because the state's relatively permissive anti-detergent law recognized the dangers of phosphates, while manifesting no intention to cover the entire field, and there clearly existed in Suffolk County special conditions upon which stricter standards could be sustained, the law was not inconsistent with section 391-c of the General Business Law. In light of the above discussion, the local law does not appear to have been either inconsistent with or preempted by any general state law.

The local law is directed towards the achievement of a legitimate public purpose—namely, the health of local inhabitants. The method devised to attain this objective seems reasonably designed to do so, and does not appear to be arbitrary.<sup>67</sup> Furthermore, the classification adopted between phosphate and phosphate-free detergents is reasonable in view of the scientific evidence available as to the detrimental effects of phosphates on water.<sup>68</sup> Since the law is a legitimate exercise of the police power and promotes the general welfare of the community, it may not be disturbed on state grounds.<sup>69</sup>

65. Suffolk County, New York, Resolution No. 962, § 3 (1971). In the last moments of the 1971 session of the New York State Legislature, a law was passed that mandates the phasing out of phosphate detergents by June 1, 1973. N.Y. Sess. Laws 1971, ch. 716.

66. See, e.g., *S.H. Kress v. Department of Health*, 283 N.Y. 55, 27 N.E.2d 431 (1940). But see *Westwood Forest Estates, Inc. v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969).

67. See *supra* note 43 and accompanying text.

68. INTERNATIONAL JOINT COMMISSION OF CANADA AND THE UNITED STATES, POLLUTION OF LAKE ERIE, LAKE ONTARIO AND THE INTERNATIONAL SECTION OF THE ST. LAWRENCE RIVER 81-82 (1970).

69. If challenged, the person asserting the law's invalidity must bear the burden of overcoming the presumption favoring the constitutionality of municipal enactments. See *Wigins v. Town of Somers*, 4 N.Y.2d 215, 218-19, 149 N.E.2d 869, 871, 173 N.Y.S.2d 579, 581-82 (1958); *Defiance Milk Products Co. v. Du Mond*, 309 N.Y. 537, 540-41, 132 N.E.2d 829, 830 (1956); *Van Curler Develop. Corp. v. Schenectady*, 59 Misc. 2d 621, 626, 300 N.Y.S.2d 765, 772 (Sup. Ct. 1969).

Determinative federal objections to this ordinance are similarly nonexistent. It does not unduly burden interstate commerce given the seriousness of the local interest involved. Moreover, there is a lack of any conflicting federal pollution statute, since the federal water pollution laws deal only with the abatement of pollution in interstate or navigable waters.<sup>70</sup> The intrastate and subterranean character of the water involved here is therefore outside the circumscription of the Federal Water Pollution Control Act. Thus, the local law, having met all the requirements of legitimacy, is a valid exercise of municipal police power in New York State.

To merely demonstrate that local efforts may provide a cure for pollution is not enough; for admittedly, federal and state governments, with greater financial resources and pervasive enabling authority, could be more effective in alleviating certain classes of pollution. The difficulty is that effective federal and state legislation and enforcement are not readily forthcoming.

#### IV. INADEQUACIES OF FEDERAL AND STATE ACTION IN POLLUTION CONTROL

While normally a federal law may preempt that of any state or locality,<sup>71</sup> the federal pollution statutes clearly cast the primary responsibility for cleaning up the environment upon the states. *Huron Portland Cement Co. v. City of Detroit*<sup>72</sup> is a judicial recognition of both the importance of the air pollution crisis and the leeway that the federal government intends to accord local legislative solutions to local ecological difficulties.

Congress and the federal courts, of course, have the power to take jurisdiction over social problems such as pollution.<sup>73</sup> In

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70. 33 U.S.C. § 466 *et seq.* (Supp. V, 1970).

71. See *e.g.*, *Campbell v. Hussey*, 368 U.S. 297 (1961) (provisions of the Georgia Tobacco Identification Act barred by 1935 Federal Tobacco Inspection Act); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (conviction for sedition against the United States under the Pennsylvania Sedition Act barred by the Smith Act and other federal laws); *Chicago v. Atchenson, T. & S.F.R.R.*, 357 U.S. 77 (1956) (federal law precluded Chicago from deciding, by a licensing requirement, whether a transfer company could provide motor vehicle service for the transfer of interstate passengers between Chicago railroads and terminals).

72. 362 U.S. 440 (1960); see *supra* note 45 and accompanying text.

73. See *Zabel v. Tabb*, 430 F.2d 199, 203-04 (5th Cir. 1970), holding, *inter alia*, that destruction of fish in estuarine waters has a substantial effect on commerce and, therefore, Congress has the power to legislate in the area.

*United States v. Bishop Processing Co.*,<sup>74</sup> a federal district court held, *inter alia*, that it was not divested of jurisdiction under the Clean Air Act when an air pollution abatement suit was commenced a year later in a state court by state agencies. The decision on the merits in *Bishop* was bottomed on the commerce power—the court finding that an economic relationship existed between the Clean Air Act's regulation of business and the protection of commerce. The rationale was that air pollution has a deleterious effect on business, decreases property values, and therefore has a detrimental effect on interstate commerce.<sup>75</sup> The reasoning indicates that the federal government has the ability to reach even the most local of pollution problems where there is at least some tangential effect on interstate commerce.<sup>76</sup> With this expansive power at Congress' disposal, however, it has either been unable to produce a piece of legislation commensurate with the crisis, or has been needlessly delayed through the protracted process of congressional compromise.

#### A. *Failure of Congressional Action*

An often mentioned justification for Congress' wait-and-see attitude toward pollution legislation is that Congress does not wish to act on admittedly incomplete information. While Congress is waiting for conclusive scientific information upon which to act, an adversarial atmosphere evolves in which the far-sighted advocates of environmental reform are opposed by the immediate demands of labor, shareholders, and the American desire to increase the gross national product. The purpose of this contest is to persuade a vacillating Congress, as the impartial arbiter of the issue, that based upon available evidence, it should or should not take immediate remedial measures. Almost invariably, the presumption favors inaction, since Congress has little realistic

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74. 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970).

75. 287 F. Supp. at 630-31, *citing* *Brooks v. United States*, 267 U.S. 432, 436 (1959). The "commerce power may be exercised to achieve socially desirable objectives, even in the absence of economic considerations." *Id.* at 630.

76. *Cf.* recent cases enforcing the Civil Rights Act of 1964: *Daniel v. Paul*, 395 U.S. 298 (1969); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). *See also notes* 121-31, *infra* and accompanying text.

choice but to give the advice of industry more than its due deference.<sup>77</sup>

1. *Delay and compromise.* A graphic example of the congressional aptitude for compromise in ecological matters is present in the closely related area of conservation. For example, the passage of the Wilderness Act of 1964,<sup>78</sup> was a slow and agonizing process spread over many years. The bill, vehemently opposed by interests from the lumber, mining, power and irrigation industries, was originally introduced in the United States Senate in 1956.<sup>79</sup> From that date until the passage of a watered down version of the bill in 1964, eighteen hearings were held, sixty-five bills were introduced, and thousands of pages of transcript were compiled.<sup>80</sup> Opponents of the bill relied upon Representative Wayne Aspinall of Colorado to secure the weakest measure possible. As Chairman of the key House Interior and Insular Affairs Committee, his past record consistently favored industrial interests, particularly where they clashed with those of conservationists.<sup>81</sup> Aspinall refused to report the bill out of committee until his version received endorsement. In 1963 conservationists acceded to Aspinall's demands, realizing that a compromise act was better than none.<sup>82</sup>

A similar illustration of congressional ineptitude in environmental areas was the Indiana Dunes National Lakeshore affair. The Dunes, a valuable scenic, scientific and recreational resource, stood in the way of the expansion plans of several giant steel producers on the southern end of Lake Michigan.<sup>83</sup> Commencing in 1958, legislation that sought to preserve the area as a national lakeshore was introduced in each session of Congress.<sup>84</sup> In 1963 steel producers succeeded in their attempt to expand onto the priceless dunes at the expense of one of the most scenic sections of the lakeshore.<sup>85</sup> Much of the blame for the loss can be

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77. Lack of Congressional expertise in the technologies of pollution control compels Congress to rely upon the biased advice of those whose interests it must regulate.

78. 16 U.S.C. §§ 1131-36 (1964).

79. Mercure & Ross, *The Wilderness Act: A Product of Congressional Compromise*, in CONGRESS AND THE ENVIRONMENT 53 (R. Cooley & G. Wandesforde-Smith eds. 1970).

80. *Id.*

81. *Id.* at 55.

82. *Id.* at 58-59.

83. Kyle, *Indiana Dunes National Lakeshore: The Battle for the Dunes*, in CONGRESS AND THE ENVIRONMENT 17 (R. Cooley & G. Wandesforde-Smith eds. 1970).

84. *Id.* at 19.

85. *Id.* at 20.

attached to congressional inaction. It was not until 1966 that the Indiana Dunes Bill was reported out of the House Interior Committee;<sup>86</sup> too late to save the Dunes in their undespoiled splendour, the compromise produced a national lakeshore bisected by a steel complex.

2. *Cumbersome enforcement procedures.* Where Congress acts at all, the procedure provided for enforcement of the remedies created is almost deliberately cumbersome, as in the Federal Water Pollution Control Act.<sup>87</sup> With respect to water pollution, the effects of which are limited to the state in which the discharges originate, the act provides that federal action may be taken only at the request of a state's governor, a state pollution control agency, or a municipality with the approval of both the governor and the state water pollution control agency.<sup>88</sup> The result of such a request is the convening of a "conference" which initiates the enforcement mechanism. The conference involves public hearings with participating pollution control agencies,<sup>89</sup> followed by notice specifying a period in which remedial action must be taken<sup>90</sup> and, eventually, provisions for judicial enforcement if "action reasonably calculated to secure abatement of the pollution within the time specified in the notice . . . is . . . not taken . . . ."<sup>91</sup> At a time when water contamination is threatening the continued existence of the human race, such procedural safeguards granted to polluters are indefensible.

Enforcement difficulties also existed in the Federal Clean Air Act prior to its 1970 amendments,<sup>92</sup> where lack of legal muscle led to only one abatement suit pursuant to the act.<sup>93</sup> In the wake of an air pollution dilemma that has been increasing for years, Congress in 1970 finally passed a law that, if zealously enforced, could begin to vitiate the air contamination crisis.<sup>94</sup> The

86. *Id.* at 21. Pub. L. No. 89-761, 80 Stat. 1309 (1966), *codified at* 16 U.S.C. § 460 (Supp. IV, 1969).

87. 33 U.S.C. § 466 *et seq.* (Supp. V, 1970).

88. *Id.* § 466g(d).

89. *Id.*

90. *Id.* § 466g(e).

91. *Id.* § 466g(g).

92. 42 U.S.C. § 1857 *et seq.* (Supp. V, 1970), *as amended*, 42 U.S.C.A. § 1857 *et seq.* (Supp. May, 1971).

93. *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970).

94. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 1705 (1970), *codified at* 42 U.S.C.A. § 1857 *et seq.* (Supp. May, 1971).



amended act shifts to the Administrator of the newly created Environmental Protection Agency the initiative in the pollution abatement process; although ultimate enforcement is still recognized as primarily the responsibility of the states involved. Under the act, the Administrator formulates and publishes: (1) primary and secondary ambient air quality standards;<sup>95</sup> (2) pollution sources that must comply with the standards formulated;<sup>96</sup> and (3) emission standards for hazardous pollutants for which national ambient air quality standards have been designed.<sup>97</sup> For violation of these standards, the Administrator himself may issue orders of compliance and commence civil action to force obedience.<sup>98</sup> The burden of formulating plans to meet the criteria set by the Administrator rests upon the states. As with the plan to meet primary and secondary ambient air quality standards, the states have nine months to submit an acceptable implementation plan<sup>99</sup> with up to an eighteen month extension.<sup>100</sup> The plan must be designed to achieve the standards within three years;<sup>101</sup> however, an extension not to exceed two years is available.<sup>102</sup> If, in the end, the state fails to produce an acceptable plan, the Administrator is empowered to impose his own plan on the state for implementation.<sup>103</sup>

If the amended act is vigorously enforced, has adequate financial and manpower backing, and obtains the vital cooperation from state and municipal governments without the interference of politically motivated obstacles, it may achieve what has eluded federal efforts up to now. However, while there has been activity under the law in the way of formulation of standards to be met,<sup>104</sup> it remains to be seen if the law can overcome the prob-

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95. 42 U.S.C.A. § 1857c-4 (Supp. May, 1971).

96. *Id.* § 1857c-6.

97. *Id.* § 1857c-7.

98. *Id.* § 1857c-8.

99. *Id.* § 1857c-5 (a) (1).

100. *Id.* § 1857c-5 (b).

101. *Id.* § 1857c-5 (a) (2) (A) (i).

102. *Id.* § 1857c-5 (e).

103. *Id.* § 1857c-5 (c).

104. *See, e.g.*, 36 Fed. Reg. 1503 (1971) (publication of primary and secondary ambient air quality standards for various pollutants); 36 Fed. Reg. 1515 (1971) (nitrogen oxide designated as a hazardous air pollutant, and air quality standards issued for it); 36 Fed. Reg. 1486 (1971) (notice of proposed rule making with respect to the lead content of gasoline); 36 Fed. Reg. 3825 (1971) (notice of proposed rule making for the control of air pollution from new motor vehicles, and standards for exhaust emissions); 36 Fed. Reg. 3528 (1971) (regulations issued for vehicle emission standards). *See generally* 42 C.F.R. ch. IV (1971).

lems that have historically plagued federal attempts to ameliorate pollution.<sup>105</sup>

3. *Inaction on proposed reform legislation.* In 1970 a number of bills were introduced in Congress that would have rendered enforcement of the federal water pollution laws a less enigmatic procedure. S. 3471 sought to extend the jurisdiction of the Federal Water Quality Act to navigable intrastate waters and groundwaters.<sup>106</sup> The bill would have also empowered the Secretary to take action directly against individual polluters without involving the state concerned; eliminated the post enforcement conference hearing prior to court action; and given the Secretary power to go directly to court for injunctive relief without the need for either an enforcement conference or a 180 day delay period as provided under the current law.<sup>107</sup> S. 3687 would have authorized fines and penalties of \$25,000-50,000 per daily violation of an order of the Secretary, after a compliance period has elapsed; eliminated enforcement hearings; and eliminated mandatory enforcement conferences.<sup>108</sup> However, no action has yet been taken on either of these measures.<sup>109</sup>

Where Congress has ample information upon which to act, the tides of political fortune may preclude it from acting in a publicly responsive manner. In the area of phosphate pollution, a recent House Report,<sup>110</sup> based on voluminous scientific evidence, emphatically urged that the manufacture and importation of detergents containing phosphorous in any quantity should cease by 1972;<sup>111</sup> manufacturers of detergents should promptly begin substantial reductions of the phosphate content in their products;<sup>112</sup> and phosphate (enzyme) pre-soaks should be removed from the market.<sup>113</sup> The report gave rise to H.R. 12435, introduced on

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105. It has been reported that, in at least one region, failure to meet deadlines set by the Environmental Protection Agency (EPA) is far more common than compliance. Also, the EPA has not as yet achieved the administrative coordination that underlies its purpose. Buffalo Evening News, July 2, 1971, at 32, col. 1 (city ed.).

106. Riley, *Report of Comm. on Legal Problems of Sewage Disposal*, 34A NIMLO NAT'L MUN. L. REV. 250, 258 (1971).

107. *Id.* at 259.

108. *Id.*

109. *Id.* at 257.

110. H.R. REP. No. 1004, 91st Cong., 2d Sess. (1970).

111. *Id.* at 65.

112. *Id.* at 66.

113. *Id.*

June 25, 1969, which would have banned the importation and manufacture of such substances in the United States after June 1, 1971. At the close of the first session of the 91st Congress, however, the bill was still pending with no action on it scheduled.<sup>114</sup>

4. *The Refuse Act—1899 remedy for 1971 problems.* Perhaps most discouraging commentary on the current federal pollution effort is the use of the recently reactivated Rivers and Harbors Act of 1899.<sup>115</sup> While the act is proving to be a potentially efficacious tool, the 72 year old law was premised on maintaining the navigability of interstate waters. As a matter of fortuity for the ecologically concerned, section 13 of the act controls the discharge of "any refuse matter of any kind or description whatever other than that flowing from streets or sewers and passing therefrom in a liquid state"<sup>116</sup> into any navigable water. The Supreme Court has held that the act's proscription includes municipal wastes<sup>117</sup> and petroleum products.<sup>118</sup>

The law, however, appears to be too effective for the present administration due to the fact that under its *qui tam* feature, multiple, separate violations of the act in cases of continuing discharges could produce a substantial penalty to polluters and turn pollution searching into a profitable adventure. In response to this, the Department of Justice on June 15, 1970, attempted to clarify to United States Attorneys the limits of enforcement of the law.<sup>119</sup> The announced guidelines advised not to commence suit

114. During 1970, no less than seven bills were introduced in the House of Representatives calling for the prohibition of phosphate detergents. H. 17,608; H. 17,778; H. 18,336; H. 18,840; H. 19,383; H. 19,864; H. 19,999. At the close of the 1970 session, however, no action had been taken on any of these proposals. This pattern is repeating itself in the 92nd Congress as well.

115. 33 U.S.C. §§ 407, 411, 413 (1964). The law has been used in the past by the Army Corps of Engineers to require industry to dredge where shipping channels have become unnavigable due to the accumulation of industrial wastes. *See, e.g.*, *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

116. 33 U.S.C. § 407 (1964).

117. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

118. *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

119. JUSTICE DEP'T, GUIDELINES FOR LITIGATION UNDER THE REFUSE ACT (June 15, 1970). *See generally* STAFF OF THE HOUSE COMM. ON GOVERNMENTAL OPERATIONS, 91ST CONG., 2d Sess., *Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways* (Comm. Print 1970).

According to a recent report, the effectiveness of the Refuse Act may be further diluted by the difficulties of formulating and enforcing standards for innumerable and diverse waterways. TIME, Aug. 2, 1971, at 47. This adds credence to the central theme of this comment that localities may be better able to deal with their peculiar ecological problems.

without prior approval of the Department in cases of: (1) Civil or criminal actions against continuous discharges from ordinary operations of a manufacturing plant (for which Congress created the Federal Water Quality Administration); (2) Injunctive actions against activities already subject to administrative proceedings of the FWQA, and; (3) Criminal or civil action against a state, county, municipality, or other political subdivision of a state, or any person acting pursuant to a license from such state, county, municipality or other political subdivision.<sup>120</sup> Whether the purpose of this directive to limit the unrestrained use of the 1899 act is viewed as an attempt to coordinate overall pollution policy or as an effort to protect vested interests, it is clear that the 72 year old act is too forceful for the government's present tread-lightly approach to the amelioration of water pollution.

Nevertheless, to those concerned with the future of the environment the law is a fortunate rediscovery. It cannot, however, compensate for the loopholes in the present federal pollution legislation. This legislation, on the whole, does not prevent the actual manufacture of ecologically harmful substances. Rather, the federal laws are aimed at ensuring that the process of manufacturing does not have ill-effects. In focusing on this aspect of the total problem only, the federal laws ignore some most harmful substances—the products of industry itself. Although phosphates continue to destroy our lakes and estuaries and non-returnable glass bottles and cans accumulate, creating severe solid waste disposal problems, as long as industry abstains from polluting the air and water in the manufacture of these products, the federal laws are satisfied. This anomalous situation can be rectified, in theory, by a bolder exercise of the national police power, premised on the commerce clause.

#### B. *Potential of the Federal Commerce Power to Curtail Pollution*

As stated by the Supreme Court in *United States v. Darby*,<sup>121</sup> "Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on

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120. JUSTICE DEP'T, GUIDELINES FOR LITIGATION UNDER THE REFUSE ACT (June 15, 1970).

121. 312 U.S. 100 (1941).

interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use."<sup>122</sup> Embodied in this opinion is the notion that the commerce power encompasses the ability to prohibit items from interstate commerce for the achievement of some socially desirable objective<sup>123</sup>—one of which is certainly the elimination of pollution.

Federal jurisdiction over *intrastate* air pollution is premised upon the fact that pollution affects interstate commerce; that it obstructs the navigable airspace;<sup>124</sup> or that the movement of polluted air is itself commerce.<sup>125</sup> Even where pollution appears purely local in nature, "if it is interstate commerce that feels the pinch it does not matter how local the operation which applies the squeeze."<sup>126</sup> Since the contribution of individual polluters, while itself insignificant, may still be proscribed because of its cumulative effect,<sup>127</sup> potential harm to commerce is therefore sufficient. Indeed, where the activities regulated appear to be solely intrastate, but in the aggregate will probably affect commerce, the Supreme Court has stated that "it will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."<sup>128</sup>

Despite this broad enabling power, Congress excuses its lethargy over ecological reform legislation by professing a lack of the scientific development necessary to abate contemporary pollution problems—problems that will not await perfect knowledge. Congress has also failed to exert its plenary power over wholly intrastate water pollution on unnavigable waters, seeking only to abate pollution in "interstate or navigable waters."<sup>129</sup>

122. *Id.* at 114.

123. *See, e.g.*, *United States v. Sullivan*, 332 U.S. 689 (1948); *Electric Bond & Share Co. v. S.E.C.*, 303 U.S. 419 (1938); *Kentucky Whip & Collar Co. v. Illinois Central R.R.*, 299 U.S. 334 (1937); *Gooch v. United States*, 297 U.S. 124 (1936).

124. Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 *Geo. Wash. L. Rev.* 1067, 1080-86 (1965).

125. *See, e.g.*, *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970).

126. *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

127. *Cf. Wickard v. Filburn*, 317 U.S. 111 (1942).

128. *Stafford v. Wallace*, 258 U.S. 495, 521 (1922).

129. 33 U.S.C. § 466 (g) (b) (Supp. V, 1970).

As limitations upon the power of Congress to regulate polluters, lack of fully developed scientific evidence and wholly intrastate waters are barriers more self-imposed than they are legal.

The pervasiveness of interstate commerce as an enabling power to reach socially desirable ends is illustrated by *Heart of Atlanta Motel v. United States*<sup>130</sup> where the Supreme Court held constitutional, public accommodations provisions of the Civil Rights Act of 1964 as applied to racial discrimination practiced by a motel operating solely within the state. In upholding the exercise of the plenary power of Congress based upon the commerce clause the Court stated, "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . ." <sup>131</sup>

When the above discussion is read in conjunction with the evidence proving the harmful effects that substances such as phosphate detergents and nonreturnable glass bottles and cans have upon health and welfare, and the depressing effect intrastate water pollution can have upon commerce, there remains little realistic barrier to Congress' power over all polluters regardless of their local nature. But as with the inaction on H.R. 12435, Congress has been unable to reach a decision.

A politico-economic explanation for all this indecision is obvious. To place sanctions upon the methods by which industry produces its products is, while difficult to accept, bearable from a profit-motive point of view. But the curtailment of the fruits of industry itself becomes entirely unacceptable. Industry naturally responds that such demands are unwarranted, reactionary, and can only injure the nation. For the sake of national welfare, therefore, industry must be given time to work out their problems consistent with American laissez-faire capitalism. Industry is then left to go about decreasing the damaging effects of their products in a profit maximizing manner. As a course of action to save the environment, this is patently ludicrous; and, as the traditional approach of Congress to business, it must change if real reform is to take place.

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130. 379 U.S. 241 (1964).

131. *Id.* at 258, quoting *United States v. Darby*, 312 U.S. 100 (1941).

C. *Failure of State Action*

State pollution efforts are often guilty of the same shortcomings. In the area of phosphate control, as discussed earlier, the New York State Legislature responded in 1970 with a law that merely required that the manufacturer clearly indicate phosphate content on the container.<sup>132</sup> The governor's memorandum accompanying the law<sup>133</sup> recognized the significant contribution that phosphate detergents make toward water pollution. Apprised of the nature of these chemicals and armed with the legislative power to ban them, the legislature produced a law that was premised on the theory that environmentally oriented consumers would make the correct decision which should have been made by the legislature in the first place. The naïveté of the law's assumption was clear and it is of little wonder that a mere two weeks after its passage it was assailed as grossly inadequate.<sup>134</sup>

1. *Broad enabling power is not enough.* The approach of the state pollution laws is similar to that of the federal—ignoring the products themselves and merely mandating the way in which they are manufactured. Yet, unlike federal regulation of some aspects of pollution, where a requisite federal interest must be demonstrated, state police power to ameliorate pollution for the protection of the health and welfare of inhabitants is a major function of the state and its instrumentalities.

Despite broad language,<sup>135</sup> the New York Public Health Law has some serious shortcomings substantively as well as procedurally. For example, subdivision 5 of section 1230 excepts discharges of sewage effluents from private dwellings of less than three families from the proscription of the act and the requirement of a permit.<sup>136</sup> With regard to the problem of the domestic use of phosphate detergents, prior to the recently enacted state detergent law,<sup>137</sup> the only method of eliminating the problem through the mechanisms of the Public Health Law would have been to require municipalities to treat sewage in a manner elimi-

132. [1970] N.Y. Sess. Laws, ch. 991. The recently passed New York statute dealing with detergents postpones final prohibition until June, 1973. N.Y. Sess. Laws 1971, ch. 716.

133. [1970] N.Y. Sess. Laws at 3138.

134. Buffalo Evening News, Jan. 9, 1971, at 4, col. 2 (city ed.).

135. See, e.g., N.Y. PUB. HEALTH LAW §§ 1202 (b), 1205, 1220 (McKinney 1971).

136. N.Y. PUB. HEALTH LAW § 1230 (5) (McKinney 1971).

137. N.Y. Sess. Laws 1971, ch. 716.

nating the threat.<sup>138</sup> The technology needed to remove such substances from sewage, however, has not yet been developed to the point of economic feasibility.<sup>139</sup> It is therefore apparent that article 12 of the Public Health Law cannot provide a remedy for all sources of water pollution. These newly arising sources, not contemplated by the drafters of the present pollution law, require specific legislative initiative and action to be solved—action that is not always readily forthcoming.

The enforcement procedures provided for in New York's law seem too inflexible to deal with many ecological problems. Section 1210 (3) empowers the commissioner to order the discontinuance of pollution of any waters of the state or cause proceedings to be brought to force compliance with the law.<sup>140</sup> Before the commissioner may issue an abatement order, however, the law mandates that public hearings be held,<sup>141</sup> preceded by due notice.<sup>142</sup> Moreover, hearings are accorded to any person aggrieved by a determination of the commissioner *prior* to the execution of the order.<sup>143</sup> It is, however, an established principle of administrative law that where only property rights are concerned, due process is satisfied if *at some stage* of the proceeding, an opportunity for a hearing and judicial determination are made available.<sup>144</sup> This should be particularly true where the legislative choice has already been made against pollution and standards have been prescribed by administrative agencies. In such a case, where the only issue might be whether the petitioner has in fact violated pollution standards, inspection, examination and testing could be used as substitutes for hearings.<sup>145</sup> Equipped with these flexible, expedient procedural alternatives, the state insists on according polluters the full spectrum of procedural safeguards. Coupled with the difficulties of effective enforcement and the lack of adequate manpower to both investigate and prosecute violations, these procedural intricacies demonstrate

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138. See N.Y. PUB. HEALTH LAW §§ 1225, 1250-52 (McKinney 1971).

139. *Hearings on Phosphates in Detergents and the Eutrophication of America's Waters Before the Subcomm. on Conservation and Natural Resources of the House Comm. on Governmental Operations*, 91st Cong., 1st Sess. 184-85 (1970).

140. N.Y. PUB. HEALTH LAW § 1210 (3) (b) (McKinney 1971).

141. *Id.* § 1240.

142. *Id.* § 1241.

143. *Id.* § 1243.

144. *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1949).

145. See I K. DAVIS, ADMINISTRATIVE LAW TREATISE § 709 (1958, Supp. 1970).



that no amount of broad enabling power can compensate for the absence of actual remedial action.

2. *Air pollution control in New York—lack of enforcement.* Air pollution in New York State is governed by article 12-A of the Public Health Law. Again there is the presence of a broad definition of pollution subject to proscription.<sup>146</sup> Of special interest to current pollution concern is section 1271, which empowers the air pollution control board to promulgate "standards for the composition or use of fuels or energy sources in any type or class of air contamination . . . ."<sup>147</sup> This would include motor vehicle fuels. Subdivision (c), however, which goes on to provide for the promulgation of standards for crankcase ventilating systems and air contaminant emission control systems<sup>148</sup> has since been expressly preempted by federal law.<sup>149</sup>

Notwithstanding, the article has the potential, if effectively enforced and developed, to abate any existing or newly arising source of air pollution. The problem is, as with motor vehicle fuel standards, that the board has not met the crisis that such fuel emissions pose. The state has the authority, but has not fulfilled its responsibility. This is due in part to the failure of the legislature to enact self-executing measures that create enforcement divisions comprised of inspectors and investigators. Without these vital provisions, investigation and prosecution must rely on the often tedious process of administrative evolution to develop the necessary enforcement machinery. When such efforts fail, promising pollution legislation is rendered little more than ecological lip service.

In the final analysis, the federal laws are cumbersome and profess to give great flexibility and deference to state and local governments as the units with the primary responsibility in the protection of the environment. The states have reneged on

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146. N.Y. PUB. HEALTH LAW § 1267(6) (McKinney 1971). The law defines "air contamination source" as including "any source at, from or by reason of which there is emitted into the atmosphere any air contaminant, regardless of who the person may be who owns or operates the building, premises or other property in, at or on which such source is located or the facility, equipment or other property by which the emission is caused or from which the emission comes." *Id.* Among other things, the terms include "heating and power plants . . . single and multiple family residences . . . automobiles, trucks, . . . buses and other motor vehicles . . . ." *Id.*

147. *Id.* § 1271 (1) (b) (3).

148. *Id.* § 1271 (1) (c).

149. 42 U.S.C.A. § 1857f-6a (Supp. May, 1971).

the responsibility that the federal government says they have, partly out of technical incompetence, callousness to local problems, and over-compromise in favor of industrial interests. This leaves local governments with the burden of pollution control foisted upon their shoulders. The dilemma is compounded by the degenerating quality of the urban environment, which is a contributing factor to the increasing abandonment of the central city. Consequently, local governments are losing the revenues necessary to upgrade urban life.

Municipal government, however, has the ability to meet this challenge; indeed, it is well-suited to solve local environmental problems. For example, conflicting interests among divergent localities are circumvented by the needlessness of formulating a uniform rule of law to satisfy innumerable political subdivisions. Furthermore, because of their proximity to local feelings and problems, local legislative bodies are better able to respond to local ecological crises.<sup>150</sup> The potential problems of conflicting policies among several localities and jurisdictional limitations cannot be ignored, but, in a limited area, the use of municipal police power appears to hold promise as an effective resource in the battle to preserve our environment.

## V. PRAGMATIC SOLUTIONS TO CURRENT ECOLOGICAL PROBLEMS

The peculiar situation in Suffolk County that gave rise to local legislative action was a fertile basis for the passage of the ordinance. The situation is admittedly a narrow one from which generalizations are difficult and it therefore raises the issue of whether the Suffolk County experience is a precedent for future action at the municipal level or whether it is a local legislative curiosity. Where the problem of phosphate pollution is more generalized, and less exigent, it is less likely that the public health and welfare would mandate a ban on the sale of detergents.

A recently released report of the International Joint Commission of Canada and the United States stated that the major factor contributing to the degradation of waters in Lakes Erie, and Ontario is nutrients, of which phosphorous is the only one

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150. See, e.g., Comment, *Local Regulation of Air Pollution*, 1968 WASH. U.L.Q. 232, 234-35.

that is controllable effectively by man with present technology.<sup>151</sup> The report found that seventy percent of the phosphorous in sewage originates from detergents.<sup>152</sup> This fact alone might sanction a local law that bans the sale of detergents, where state and federal governments fail to act. Such newly arising scientific evidence bridges the technology gap and allows for a finding that the sanction is reasonably designed to achieve the valid objects of public health and welfare.

The answer to whether other current ecological threats can be dealt with at the local level lies in a review of past and present local legislative action. Such action demonstrates the pragmatic application of municipal police power to abate pollution.

### A. Air Pollution

There can be but little doubt that generally localities have the requisite powers to abate air pollution when done within the confines of due process. In *Department of Health v. Ebling Brewing Co.*,<sup>153</sup> the court held that conditions resulting from the emissions of factories, buildings and houses were within the regulatory powers of localities. *Board of Health v. New York Central R.R.*<sup>154</sup> recognized that the proscription of smoke emissions was necessary and reasonable and therefore a valid exercise of local police power.

It is apparent that local police power was utilized to deal with traditional air contamination sources. A presently growing source of air pollution, the effects of which have been recently documented, is that of motor vehicle exhaust emissions. The permissible scope of municipal legislation in this field has been specifically curtailed by the Air Quality Act of 1967.<sup>155</sup> In an

151. INTERNATIONAL JOINT COMMISSION OF CANADA AND THE UNITED STATES, POLLUTION OF LAKE ERIE, LAKE ONTARIO AND THE INTERNATIONAL SECTION OF THE ST. LAWRENCE RIVER 81-82 (1970).

152. *Id.* at 82.

153. 38 Misc. 537, 78 N.Y.S. 13 (New York Mun. Ct. 1906); *accord* State v. Mundet Cork Corp., 8 N.J. 359, 86 A.2d 1 (1952); Penn-Dixie Cement Co. v. Kingsport, 189 Tenn. 450, 225 S.W.2d 270 (1949). *See generally* Annot., 78 A.L.R.2d 1305 (1961); Comment, *Local Regulation of Air Pollution*, 1968 WASH. U.L.Q. 232.

154. 4 N.J. 293, 72 A.2d 511 (1950); *accord* Northwestern Laundry Co. v. Des Moines, 239 U.S. 486 (1916); *Ex parte* Junqua, 10 Cal. App. 602, 103 P. 159 (3d Dist. 1909); Huron Portland Cement Co. v. Detroit, 355 Mich. 227, 93 N.W.2d 888 (1959), *aff'd*, 362 U.S. 440 (1960).

155. Pub. L. No. 90-148 § 208, 81 Stat. 501 (1967), amending 42 U.S.C. § 1857 (Supp. V, 1970) (codified at 42 U.S.C.A. § 1857f-6a (Supp. May, 1971)).

effort to preempt the area of automobile emissions the statute provides,

[n]o state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this subpart. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial retail sale, titling . . . or registration of such motor vehicle . . . .<sup>156</sup>

Local government cannot therefore proscribe automobile pollution in terms of emissions standards, but it can act in other limited ways. New York City has prohibited the idling of a motor vehicle for greater than three consecutive minutes,<sup>157</sup> and has made it illegal for a vehicle to emit visible exhaust under certain conditions.<sup>158</sup> Such limited control, however, is not enough for effective alleviation of this source of pollution given the ever increasing number of vehicles in the United States.

A recent report of the National Institute of Municipal Law Officers (NIMLO)<sup>159</sup> concludes that even with the preemptive effect of the federal Air Quality Act, there is much a municipality can do while avoiding conflicts with federal law.<sup>160</sup> The report suggests that a locality may: (1) limit or ban the sale of leaded gasoline; (2) require the city fleet and taxi fleets to run on unleaded fuel; (3) require the city fleet and taxi fleets to install catalytic converters as pollution control devices as soon as possible.<sup>161</sup>

156. *Id.*

157. NEW YORK CITY AIR POLLUTION CONTROL CODE § 1109 (1966); see ORDINANCES OF THE CITY OF BUFFALO, ch. XXV, § 134 (1969).

158. NEW YORK CITY AIR POLLUTION CONTROL CODE §§ 905 (b) & (c) (1966). It should also be noted that on July 14, 1971, the New York City Council unanimously approved a more stringent air pollution code. The code increases the maximum penalty for violators to \$5,000 and four months imprisonment. Twenty-five percent of the fines go to persons giving information leading to the conviction of violators. The code also requires industries and utilities (with the significant exception of Consolidated Edison Company) to use fuel containing no more than three percent sulphur by October 1, 1971. Buffalo Evening News, July 14, 1971, at 16, col. 3 (city ed.). Short of an emergency situation, it is doubtful at best whether similar action could be taken at the national and state levels.

159. NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, LAW AND THE MUNICIPAL ECOLOGY, RESEARCH REPORT No. 156 (1970).

160. *Id.* at 19.

161. *Id.* at 19-22.

Unsatisfied with federal efforts and dismayed by the success of the automobile industry to forestall the technological innovation necessary to halt automobile emissions as a major source of air pollution, a recent piece of local legislation has done exactly what the NIMLO report recommends. The law, a Buffalo, New York city ordinance,<sup>162</sup> calls for the phasing out of the sale of leaded gasoline over a period of ten years<sup>163</sup> and mandates that all service stations make low lead gasoline available by September 1, 1971.<sup>164</sup>

## B. Water Pollution

A municipality may protect its water supply for the benefit of inhabitants; such is within its police powers.<sup>165</sup> As with air pollution ordinances, local water pollution laws, if not unreasonable, arbitrary or capricious, and if demonstrating some reasonable technological connection between the means utilized and the objective sought, will be upheld.<sup>166</sup> Specifically, laws have been upheld that prevent contamination of water supplies by animals;<sup>167</sup> that proscribe the dumping of raw sewage;<sup>168</sup> and that declare water pollution a public nuisance with the abatement of its causes.<sup>169</sup> Methods used in the past to achieve abatement were the prescription of water quality standards that coincide with, or were more stringent than, state or federal standards;<sup>170</sup> the promulgation of stream effluent standards;<sup>171</sup> and

162. ORDINANCES OF THE CITY OF BUFFALO art. V, ch. VII, § 89 (1970).

163. *Id.* § 89 (3).

164. *Id.* § 89 (1).

165. See *Kelly v. New York*, 6 Misc. 516, 27 N.Y.S. 164 (Sup. Ct. 1894). See also *Huber v. Blue Earth*, 213 Minn. 319, 6 N.W.2d 471 (1942); *Parsons v. Town of Smithtown*, 160 Misc. 103, 288 N.Y.S. 470 (Sup. Ct. 1936).

166. See 7 E. McQUILLAN, MUNICIPAL CORPORATIONS § 24.265 (3d ed. rev. vol. 1968).

167. See, e.g., *Salt Lake City v. Young*, 45 Utah 349, 145 P. 1047 (1915); *Ophir v. Ault*, 67 Utah 24, 247 P. 290 (1926).

168. See, e.g., *Huber v. Blue Earth*, 213 Minn. 319, 6 N.W.2d 471 (1942); *Parsons v. Town of Smithtown*, 160 Misc. 103, 288 N.Y.S. 470 (Sup. Ct. 1936). But see *Old Dominion Land Co. v. Warwick County*, 172 Va. 160, 200 S.E. 619 (1939).

169. See, e.g., *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

170. See NIMLO REPORT, *supra* note 159, at 171. See also *State v. Hatco Chemical Co.*, 96 N.J. Super. 238, 232 A.2d 838 (Super. Ct. App. Div. 1967) (standards stricter than those of the state authorized for local air pollution ordinance); *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923). The New York Public Health Law authorizes municipalities to pass air pollution regulations stricter than those promulgated at the state level. N.Y. PUB. HEALTH LAW § 1297 (McKinney 1971).

171. See, e.g., *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969); cf. *Fox River Grove v. Aluminum Coil Anodizing Corp.*, 114 Ill. App. 2d 226, 252 N.E.2d 225 (2d Dist. 1969).

the application of sewage effluent standards that prohibit wastes that cannot be treated by the existing treatment processes or that could damage the treatment facilities.<sup>172</sup> Also, a municipality may enforce the remedies existing under state pollution laws as is provided under New York law.<sup>173</sup>

As opposed to the area of air pollution, recent federal legislation does not purport to preempt state and local efforts to meet current water pollution problems; rather, the Federal Water Pollution Control Act specifically declares it to be the federal government's policy to "recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution . . . ."<sup>174</sup> With this broad leeway announced by the federal government, and the presence of enabling authority from the state, a municipality's only major shortcoming in water pollution control may be that of local jurisdictional conflicts; that is, the exercise of local police power is generally limited to within the corporate boundaries.<sup>175</sup> Where the source of the pollutant is outside the municipality, absent a statute enabling a locality to protect its waters from contamination sources in other localities,<sup>176</sup> the municipality is generally powerless to act on its own.

Within the confines of local authority, however, recent local legislation demonstrates the efficacy of local police power in water pollution control. While the phosphate problem has not been effectively dealt with at the federal and, in many instances, at the state level, quite the contrary is true at the local levels. Aside from the Suffolk County experience, the city of Chicago, Illinois has amended chapter 17 of its municipal code<sup>177</sup> to con-

172. See, e.g., NIMLO REPORT, *supra* note 159, at 173-74.

173. N.Y. PUB. HEALTH LAW § 1255 (McKinney 1971).

174. 33 U.S.C. § 466 (b) (Supp. V, 1970).

175. See, e.g., *City of Oakland v. Brock*, 8 Cal. 2d 639, 67 P.2d 344 (1937). See generally 5 E. McQUILLAN, MUNICIPAL CORPORATIONS § 15.30 (3d ed. rev. vol. 1969).

176. See, e.g., *Wilson v. City of Mountlake Terrace*, 69 Wash. 2d 148, 417 P.2d 632 (1966). *But see* *City of Poughkeepsie v. Vassar College*, 35 Misc. 2d 604, 606, 232 N.Y.S.2d 13, 15 (Sup. Ct. 1961), where the court said that "[a]n exception arises in the instance of a municipal water supply; then the municipality may exercise its power extra-territorially to protect the purity of the water . . . ." See also 7 E. McQUILLAN, MUNICIPAL CORPORATIONS § 24.200 (3d ed. rev. vol. 1968).

177. CHICAGO, ILL., MUN. CODE art. VII, §§ 17-7.1 through 17-7.4 (1970). Erie County, New York, has also passed a local law banning the sale and distribution of synthetic detergents with more than 8.7% phosphorus as of May 11, 1971. The law mandates that all phosphate detergents be banned by January 1, 1972. Excepted from

trol the sale of phosphate detergents. The law provides that all detergents must be labeled with their respective phosphate contents by February 1, 1971.<sup>178</sup> The law also makes it illegal to sell or otherwise furnish any detergents containing more than 8.7% phosphate within the city of Chicago after that same date.<sup>179</sup> Persons violating the law are subject to up to a five hundred dollar fine and six months imprisonment.<sup>180</sup> What is particularly significant about the Chicago law is that it is premised not on the exigent circumstances as existed in Suffolk County, but was based on the general detrimental effects of such substances as announced by the International Joint Commission.<sup>181</sup>

Akron, Ohio passed an ordinance largely similar to that enacted in Chicago.<sup>182</sup> The Akron experience has an additional teaching, however. It was reported that the City Council of Akron is considering the repeal of its new ordinance in return for a firm promise by detergent manufacturers to abide by set standards.<sup>183</sup> These events counsel that: local efforts can succeed in producing needed legislation where state and federal governments will not act; and municipalities are comparatively bolder and in a better bargaining position with (and better able to put pressure on) large firms—an interesting paradox.

### C. *Solid Waste Problems*

Municipalities have the ability to remove and direct the manner of disposal of solid wastes that pose a threatening relationship to the health and safety of the community.<sup>184</sup> It has

the proscription are phosphate detergents designed for the following: machine dishwashers; dairy equipment; beverage equipment; food processing equipment; and industrial cleaning equipment. SANITARY CODE OF ERIE COUNTY, N.Y. art. IV, §§ 7-10 (1971).

178. CHICAGO, ILL. MUN. CODE art. VII, § 17-7.2.

179. *Id.* § 17-7.3.

180. *Id.* § 17-7.4.

181. INTERNATIONAL JOINT COMMISSION OF CANADA AND THE UNITED STATES, POLLUTION OF LAKE ERIE, LAKE ONTARIO AND THE INTERNATIONAL SECTION OF THE ST. LAWRENCE RIVER 81-82 (1970).

182. AKRON, OHIO, MUN. CODE ch. 753 (1970).

183. Buffalo Evening News, May 25, 1971, at 28, col. 5 (city ed.).

184. See, e.g., *Silver v. Los Angeles*, 217 Cal. App. 2d 134, 31 Cal. Rptr. 545 (Dist. Ct. App. 1963); *Strub v. Deerfield*, 19 Ill. 2d 401, 167 N.E.2d 178 (1960); *Medford v. C. & H. Co.*, 319 Mass. 273, 65 N.E.2d 537 (1946); *Grand Rapids v. Vink*, 184 Mich. 688, 151 N.W. 672 (1915); *Rochester v. Gutberlett*, 211 N.Y. 309, 105 N.E. 548 (1914); *Meyers v. Cornwall*, 24 Misc. 2d 286, 192 N.Y.S.2d 734 (Sup. Ct. 1965); *V. & H. Equipment Rental Corp. v. Garfield Heights*, 81 Ohio L. Abs. 605, 161 N.E.2d 646 (Ct. App. Cuyahoga County 1959); *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959).

been held that solid waste disposal is an affirmative duty imposed upon the municipality.<sup>185</sup>

At the federal level, the area of solid wastes is the subject of the Solid Waste Disposal Act of 1965<sup>186</sup> and the Resource Recovery Act of 1970.<sup>187</sup> The first of these laws does little more than authorize studies in waste disposal programs<sup>188</sup> and make funds available for up to two-thirds of the cost of any local facility.<sup>189</sup> The act also sets up a number of experimental pilot projects.<sup>190</sup> The 1970 act emphasizes waste prevention and recycling with attempts at direct federal-local cooperative efforts.<sup>191</sup> Unfortunately, because of a professed lack of technological development,<sup>192</sup> neither law sets any present standards nor proscribes any ecologically damaging products.

The city of South San Francisco, California was not satisfied with these federal efforts, and faced with a growing solid waste disposal problem, promulgated a law that banned the sale of soft drinks in nonreturnable glass bottles and cans.<sup>193</sup> For a violation of its terms the ordinance provided for up to a \$100 fine<sup>194</sup> and as much as 30 days imprisonment.<sup>195</sup> Although the local law has reportedly been recently repealed<sup>196</sup> in favor of a solid waste recycling program, the episode is significant in at least two respects. It demonstrates that a locality is better able to experiment with trial and error techniques when the higher echelons of government are stymied. In this case the local government through experimentation was able to determine what means best suited the peculiar local circumstances. Also, the municipality was able to act swiftly to first enact a stopgap measure to meet local exigencies, and secondly to correct what was later determined

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185. *Rochester v. Gutherlett*, 211 N.Y. 309, 105 N.E. 548 (1914).

186. 42 U.S.C. §§ 3251-59 (Supp. V, 1970).

187. Pub. L. No. 91-512, 84 Stat. 1227 (1970), *codified at* 42 U.S.C.A. § 3251 *et seq.* (Supp. May, 1970).

188. 42 U.S.C. § 3253 (Supp. V, 1970).

189. *Id.* § 3253 (d).

190. *Id.* § 3253.

191. Pub. L. No. 91-512, 84 Stat. 1227 (1970), *codified at* 42 U.S.C.A. § 3251 *et seq.* (Supp. May, 1970).

192. See Schroeder, *Pollution in Perspective: A Survey of the Federal Effort and the Case Approach*, 4 NATURAL RESOURCES LAW. 381, 422-23 (1971).

193. South San Francisco, Calif., Ordinance No. 611 (1971).

194. *Id.* § IV.

195. *Id.*

196. Buffalo Evening News, Aug. 4, 1971, at 13, col. 1 (city ed.).



to be an error in legislative judgment. This exercise in legislative flexibility is something federal and state governments would not be equipped to do for innumerable, diverse local problems.

#### D. *Enforcement of Local Pollution Laws*

The most vital area of pollution control is that of enforcement; for without diligent prosecution of violators, even the most revolutionary environmental reform statutes and ordinances become mere hollow legislative gestures. It has been suggested that locally enforceable pollution laws may have a distinct advantage over their federal and state counterparts.<sup>197</sup> Local police departments could equip their patrol cars with such devices as Ringelmann Charts<sup>198</sup> and have officers issue summonses to violators of air pollution ordinances. Police could also report violations to a central dispatcher who could then route an inspector to the scene.<sup>199</sup> For example, in Chicago, Illinois, air pollution control inspectors patrol the city by day in radio-equipped vehicles, citing violations of the pollution ordinances.<sup>200</sup> To encourage voluntary adherence, a New York City law authorizes local officials to summarily seal noncomplying refuse burning equipment.<sup>201</sup>

Authorized by a local ordinance or state statute, municipal enforcement of pollution laws therefore has a distinct advantage—less administrative procedures to wade through to achieve ultimate compliance. Also, lack of funding need not be a determinative obstacle where imaginative use is made of an existing police force. However, while municipalities may be a bastion of untapped legal muscle in the battle to save the environment, how are the courts receiving these current local efforts?

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197. NIMLO REPORT, *supra* note 159, at 14-15.

198. For a case upholding and explaining the use of Ringelmann Charts see *City of Miami v. City of Coral Gables*, 233 So. 2d 7, 11 (Fla. Dist. Ct. App. 1970).

199. NIMLO REPORT at 15-16.

200. *Id.* at 14.

201. *Oriental Boulevard Co. v. Heller*, 58 Misc. 2d 920, 297 N.Y.S.2d 431 (Sup. Ct. 1969), *modified and aff'd mem.*, 32 App. Div. 2d 811, 311 N.Y.S.2d 635 (2d Dep't), *aff'd*, 27 N.Y.2d 212, 265 N.E.2d 72, 316 N.Y.S.2d 226 (1970), *appeal dismissed*, 401 U.S. 986 (1971).

VI. AN ENLIGHTENED CONCEPTION OF THE MUNICIPALITY'S ROLE

Pursuant to chapter 41 of the New York City Administrative Code, incinerators in multiple dwellings were required to be upgraded to improve the combusting of refuse through the installation of a water scrubbing device that would eliminate soot, fly ash and dirt from emissions.<sup>202</sup> A subsequent amendment to the law in 1968 mandated the procurement of an operating certificate as a prerequisite for incineration; and various deadlines were promulgated for compliance.<sup>203</sup> The local law provided that the commissioner could summarily seal nonconforming equipment.<sup>204</sup> In response to the law, various property owners and the Real Estate Board of New York brought suit in New York State Supreme Court, Kings County, to have the law declared unconstitutional and to enjoin defendants from entering plaintiffs' buildings and sealing their refuse burning equipment.<sup>205</sup> In granting the Commissioner of Sanitation's cross motion for summary judgment declaring the law constitutional, the court held that there was no probative merit to the argument that privately owned multiple dwellings are responsible for less than one percent of the total emissions from all sources; the rationale being, an amelioration of a condition adversely affecting the public health, however minimal in effect, satisfies the constitutional requirement that the law be reasonably related to some manifest evil.<sup>206</sup> The court went on to dismiss the objections that: the law provides a mere piecemeal approach to the air pollution problem;<sup>207</sup> compliance with the law imposed a heavy economic burden;<sup>208</sup> and summary sealing of incinerators is a violation of due

202. *Oriental Boulevard Co. v. Heller*, 58 Misc. 2d 920-22, 297 N.Y.S.2d 431, 435 (Sup. Ct. 1969).

203. *Id.* at 923, 297 N.Y.S.2d at 436-37.

204. *Id.* at 924, 297 N.Y.S.2d at 437.

205. *Id.* at 921-22, 297 N.Y.S.2d at 435.

206. *Id.* at 926, 297 N.Y.S.2d at 439. See *Barber's Supermarket, Inc. v. Grants*, 80 N.M. 533, 458 P.2d 785 (1969), holding that an incinerator contributes to air pollution, and it is not necessary that it contribute to the extent of becoming a nuisance before a city may prohibit its use.

207. 58 Misc. 2d at 926, 297 N.Y.S.2d at 439-40.

208. *Id.* at 928-29, 297 N.Y.S.2d at 441-42. See *Suttner v. Seattle*, 62 Wash. 2d 834, 384 P.2d 859 (1963), holding that the harsh economic effect of a smoke abatement ordinance cannot invalidate it unless shown to be clearly unreasonable and discriminatory.

process.<sup>209</sup> On appeal to the Appellate Division, Second Department, the court held that the presumption favoring the constitutionality of municipal enactments had not been rebutted by the plaintiffs and no trial on that issue was required.<sup>210</sup> On further appeal to the Court of Appeals, the court unanimously affirmed the decision of the supreme court stating that there was no merit to the argument posed by the appellants that

the city in a panic has adopted measures which will not achieve what is hoped or, if so, at a greater cost than is necessary. . . . [T]he rebuttal is that such arguments, however cogent they may appear to be, do not affect the constitutionality of the ordinance. Efforts at solution of serious problems will not wait on perfect knowledge or the application of optimal methods of alleviation to the exclusion of trial and error experimentation. Unfortunately, the extent of the pollution problem, its life-threatening acceleration, and the high economic and social costs of control are exceeded in gravity by only one or two domestic or even international issues.<sup>211</sup>

Significantly, the court went on to hold that the according of a hearing to aggrieved persons *after* summary sealing of equipment complied with due process.<sup>212</sup>

The court's discussion in the above case captures the very essence of the role of municipal police power in a system in which the upper levels of the governmental bureaucratic hierarchy have become too rigid and nearsighted to effectively solve the ever increasing environmental problems of a multiplicity of local units. Implicitly, the court recognizes the necessity for municipal action and its ability to act in situations not conducive to the compromise that attends higher levels of government decision making. The opinion exemplifies the principle of flexibility that is, and should be, accorded to localities to eradicate their particular ecological difficulties. In doing so, the court impliedly takes the view that the present environmental concern is a policy choice better made, in some cases, to conform to local requirements and de-

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209. 58 Misc. 2d at 930, 297 N.Y.S.2d at 442-43. See *Fox River Grove v. Aluminum Coil Anodizing Corp.*, 114 Ill. App. 2d 226, 252 N.E.2d 225 (Ct. App. 2d Dist. 1969), holding, *inter alia*, that it is not necessary that a water pollution ordinance provide for notice and an opportunity to correct violations before prosecution.

210. 34 App. Div. 2d at 812, 311 N.Y.S.2d at 637.

211. 27 N.Y.2d at 219, 265 N.E.2d at 75, 316 N.Y.S.2d at 230.

212. *Id.* at 221-22, 265 N.E.2d at 76, 316 N.Y.S.2d at 232. See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.08 (1958, Supp. 1970).

sires. Conceiving this decision as one adding further impetus and enabling power to municipalities, it is apparent that, at least in New York State, greater involvement by local government in contemporary ecological problems can be expected.

## VII. CONCLUSION

Endowed with a pervasive power to rectify social problems, the response of Congress to the public sense of national priorities with respect to pollution has been subordinated to short-run interests, resulting in a series of incremental adjustments as opposed to the needed wide range policy decisions that must be made if the environment is to be preserved.<sup>213</sup> It has been suggested that to a large measure the problem is the structure of the committee system and its fragmented approach to the environment.<sup>214</sup> A single unified bill must usually be referred to several committees, each determining for themselves what the policy should be. The system, dominated by a few powerful committee chairmen, favors economic interests while ignoring the public outcry for reform. Congress also lacks the technological expertise to make a studied decision without the predominate counsel of the very same interests they are obliged to regulate.<sup>215</sup> Consequently, to move Congress to swift action, nothing short of a national ecological disaster will do.

To compensate for this and similar inaction at the state level, municipal police power is not being advocated as a substitute for federal and state legislation and enforcement; but where these higher levels of government demonstrate the inability to act, municipal police power can be an effective alternative until a uniform and coordinated policy is formulated.

If local police power can be upheld as legitimate to combat phosphate pollution where the technological connection between the reasonableness of the prohibition and some valid local objective is not yet fully developed, a fortiori, the exercise must be sustained in the area of air pollution by motor vehicles where the evidence of a detriment to the public is more firmly estab-

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213. See Cooley & Wandesforde-Smith, *Conclusions: Congress and the Environment of the Future*, in CONGRESS AND THE ENVIRONMENT 229-30 (R. Cooley & G. Wandesforde-Smith eds. 1970).

214. *Id.* at 227.

215. *Id.* at 229-30.

lished. Similarly, solid waste problems are more clearly visible and seem to pose less of a causal relationship problem. If municipal police power is to realize its objective of the protection of the health, safety and welfare of local inhabitants, newly arising ecological problems must fall within its circumscription. While waiting for Congress and the state legislatures to act, municipal police power has great pragmatic utility.

WARREN B. ROSENBAUM

NEGATIVE LEASEHOLDS: THE PROPERTY-CONTRACT DISTINCTION  
AND A FAILURE OF JUST COMPENSATION

In recent years, eminent domain has been utilized and expanded to satisfy certain material needs of the public sector.<sup>1</sup> Public authorities clearly possess the power to acquire private property for public purposes.<sup>2</sup> However, the continued existence and ultimate success of programs entailing land acquisition depends on (1) the receptiveness of courts to public takings; (2) legislative authorization and appropriation; and (3) an absence of public indignation over the disruptions to private expectations inherent in public takings of private property.<sup>3</sup> Public indignation can be neutralized best by a system which provides just compensation for takings of private property.<sup>4</sup> This comment will explain and evaluate one instance where there is a failure of just compensation. The situation arises when property encumbered with a leasehold is condemned and taken in a falling real

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1. For an analysis of the historical development of eminent domain, see Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

2. Under the fifth amendment of the United States Constitution, no governmental authority can seize private property without payment of just compensation. By force of the due process clause of the fourteenth amendment, this requirement is extended to the states and their subdivisions. See *Scott v. Toledo*, 36 F. 385 (N.D. Ohio 1888). Notwithstanding, N.Y. CONST. art. 1, § 7(a) provides: "Private property shall not be taken for public use without just compensation." See Sackman, *The Right to Condemn*, 29 ALBANY L. REV. 177, 180-83 (1965).

3. See Baker, *Condemnation: Concepts and Consequences of Public Intervention in the Landlord-Tenant Relationship*, 9 KAN. L. REV. 399, 400 (1961).

4. This is closely aligned to the idea of indemnification for public takings. See Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 535 (1962) [hereinafter cited as Polasky].