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The N.I.M.B.Y. Syndrome Meets the Preemption Doctrine: Federal Preemption of State and Local Restrictions on the Siting of Hazardous Waste Disposal Facilities

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . . By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

James Madison, *The Federalist Papers*¹

I. INTRODUCTION

In comparison to other environmental concerns, the safe disposal of hazardous waste has only been recognized rather recently as a national priority. In 1976, Congress passed the Solid Waste Disposal Act which acknowledged the impact of the Clean Water Act and the Clean Air Act on land disposal of waste.² Renamed the Resource Conservation and Recovery Act (RCRA) in 1980, the Act created "cradle to grave" regulation of the treatment, storage, and disposal of hazardous waste. Congress' stated policy is two-fold: 1) reduce or eliminate the generation of hazardous waste as expeditiously as possible, and 2) treat, store, and dispose of hazardous waste that is generated "so as to minimize the present and future threat to human health and the environment."³ Since the elimination of hazardous waste will probably remain only a dream to our distant descendants, Congress' goal of safe disposal of such waste represents the primary emphasis of regulations promulgated under the Act.

One obstacle that has impeded Congress' policy is the hostility of local communities to the location of hazardous waste disposal facilities in their own particular city, county, or parish. This reaction is called

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1. The Federalist No. 10 (James Madison) in Max Beloff ed., *The Federalist or, The New Constitution* 41, 42 (Basil Blackwell, 1987).

2. 42 U.S.C. § 6901(b)(3) (1988).

3. *Id.* § 6902(b).

the "not in *my* backyard" syndrome, widely known by the acronym NIMBY. The accent in NIMBY is on "my," which illustrates the peculiar nature of this environmental response. The safe disposal of hazardous waste is a goal common to all parties—Congress, EPA, industry, environmentalists, and consumers. Even local communities support the goal as long as the hazardous waste disposal facility is located in someone else's backyard. The NIMBY movement has exploded on the political scene in the last ten to fifteen years,⁴ and the courts and legislatures are struggling to balance the often legitimate NIMBY concerns against the national policy of safe disposal of hazardous waste.

This comment explores the impact of NIMBY on the siting of hazardous waste disposal facilities. In particular, the comment will examine the application of the constitutional doctrine of preemption to attempts by state and local governments to ban or restrict the disposal of hazardous waste. Finally, the comment will discuss whether the current jurisprudence concerning preemption and NIMBY is rational or whether alternative approaches are preferable. The courts' reliance on the preemption doctrine reflects the tension between Congress' statutory scheme for waste disposal and Congress' stated policy behind that scheme. Preemption of state and local laws has been criticized by commentators, yet it represents the only solution presently available to the courts in light of the ambiguities of the system established by Congress. In the interest of focusing on preemption, this comment will not address the closely related issue of the impact of the dormant commerce clause on the NIMBY syndrome.

II. THE NATURE OF NIMBY

NIMBY is a recent phenomenon. The rise of the syndrome parallels the general decline of public trust in both government and business that began in the 1960s. Vietnam and Watergate changed forever the way that citizens relate to their leaders. Love Canal, Times Beach, and Three Mile Island had the same effect on our perceptions of the business community. NIMBY is a well-founded recognition that government and business are either unwilling or unable to protect the public from harm. Indeed, in the environmental field, NIMBY recognizes that government and/or business may actually harm the public.

NIMBY is not confined to the siting of hazardous waste disposal facilities. Communities are also blocking the location of half-way houses for prisoners, half-way houses for the mentally ill, homes for unwed mothers, nuclear plants, sewage treatment plants, recycling plants, power

4. A March 28, 1992 NEXIS search request found 1,398 newspaper and magazine articles that mention the term NIMBY. As of January 1, 1982, NIMBY was found only three times.

transmission lines, animal feed lots, etc.⁵ Collectively, these activities are referred to as "locally unwanted land uses."⁶ Like hazardous waste disposal facilities, the utility of these activities is beyond dispute—as long as they are located in someone else's backyard. While each different "locally unwanted land use" may engender different fears in the community, a common fear behind all NIMBY movements is that property values will fall in the proximity of the "locally unwanted land use." Hazardous waste disposal facilities have the additional spectres of air pollution, ground-water pollution, and aesthetic harm.⁷

When viewed as a breakdown in public trust, the NIMBY syndrome has three basic causes. First, free market responses do not work properly when the issue is the siting of a hazardous waste disposal facility or other "locally unwanted land uses."⁸ Ideally, the NIMBY syndrome would merely drive up the price of land until the compensation is adequate to overcome local fears. However, the continued vitality of NIMBY after fifteen years indicates that the market system is malfunctioning. One reason is that some hazardous waste disposal facilities are public facilities and thus operate on a not-for-profit basis.⁹ Additionally, hazardous waste disposal facilities must be approved by the local government and the local officials are reluctant to campaign as the person who allowed the community to be turned into a dump.¹⁰ Finally, the free market is affected by the strong bureaucratic bias to avoid controversial decisions.¹¹ A second cause of the NIMBY syndrome is the failure of most states to impose siting standards on unwilling local communities.¹² The third cause stems from the failure of traditional tort law to address the damages of people near "locally unwanted land uses" in a fashion that is either timely or financially adequate.¹³

This brief review of the causes of NIMBY is sufficient to show that NIMBY is a rational reaction to a real problem. And even though the NIMBY syndrome generally asserts itself at the grass roots level with

5. Orlando E. Delogu, "NIMBY" Is a National Environmental Problem, 35 S.D. L. Rev. 198, 204 (1990); Denis J. Brion, An Essay on LULU, NIMBY, and the Problem of Distributive Justice, 15 B.C. Envtl. Aff. L. Rev. 437, 438 (1988).

6. Brion, *supra* note 5, at 437.

7. Jonathan P. Meyers, Note, Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal, 79 Geo. L.J. 567 (1991). While this Note concerns solid waste disposal, it is reasonable to conclude that a hazardous waste disposal facility would instill similar fears to an even greater extent.

8. Delogu, *supra* note 5, at 204.

9. *Id.* at 206.

10. See Delogu, *supra* note 5.

11. Brion, *supra* note 5, at 443.

12. Delogu, *supra* note 5, at 202.

13. Brion, *supra* note 5, at 497.

minimal funding, the impact on the hazardous waste disposal facility siting process has been enormous. One study of forty-seven states found that of eighty-one applications for commercial hazardous waste treatment and disposal facilities only fourteen had been approved, and only six facilities were actually operating.¹⁴ Under a Massachusetts siting process specifically designed to defuse the NIMBY syndrome by addressing local concerns, all five hazardous waste disposal facility applications approved by the siting authority ultimately failed as a result of public pressure.¹⁵ More often it is not necessary to defeat a siting proposal because simple delay, or the threat of delay, is sufficient to force the developer to withdraw.¹⁶

If one starts with the premise that the safe disposal of hazardous waste is a positive achievement, one must conclude that successful NIMBY challenges to proposed hazardous waste disposal facilities are harmful to the public, unless the challenge is based on *bona fide* health concerns. The defeat of the proposal does not stop the creation of hazardous waste, and if the waste cannot be disposed of in a licensed, regulated facility, what happens to it? Common sense and economic considerations suggest that the success of NIMBY leads to illegal dumping which leads to health and public safety problems.¹⁷

III. THE NATURE OF PREEMPTION

The preemption doctrine arises from the supremacy clause of the United States Constitution which makes "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . the supreme law of the land; . . . laws of any state to the contrary notwithstanding."¹⁸ In interpreting the supremacy clause, the courts will find that federal law preempts state/local law in three different ways. First, Congress' statutory language may expressly preempt state law.¹⁹ Second, courts will imply preemption from the structure and purpose of the statute. If the statute sets up a regulatory scheme so pervasive that Congress has "occupied the field," state law in the field is preempted by implication.²⁰ Finally, even if Congress has neither expressly nor implicitly preempted other law, state/local laws are preempted to the

14. Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 Colum. J. Envtl. L. 1 (1990).

15. Brion, *supra* note 5, at 448.

16. *Id.* at 453.

17. Delogu, *supra* note 5, at 200.

18. U.S. Const. art. 6, cl 2.

19. *Michigan Canners & Freezers v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469, 104 S. Ct. 2518, 2523 (1984).

20. *Id.*

extent that they conflict with federal law.²¹ Such conflict exists whenever compliance with both state and federal law is impossible and also when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²²

Generally, federal environmental statutes set minimal standards that must be met by the states while permitting the states to enact more stringent regulations.²³ Such floor preemption recognizes that state and local governments may wish to impose stricter standards and that these stricter standards do not interfere with Congress' overall policy.²⁴ RCRA also contains a provision certifying the retention of state authority:

. . . no State or political subdivision may impose any requirement less stringent than those authorized under this subchapter Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.²⁵

This quoted section does not differ substantively from similar sections in the Clean Air Act or the Clean Water Act; yet, the preemption issue has arisen only under RCRA. The explanation for this apparent inconsistency can be found by referring to the purposes of the various programs. The primary goal of the Clean Air Act is to enhance air quality through the prevention of pollution.²⁶ The Clean Water Act seeks to restore and to maintain the chemical, physical, and biological integrity of the nation's waters.²⁷ As stated above, the policy behind RCRA seeks to minimize the threat of hazardous waste disposal to human health and the environment.²⁸

More stringent local standards under the Clean Water Act or the Clean Air Act will further Congress' purpose. But when local governments set overly stringent site selection standards under RCRA, they frustrate Congress' goal by interfering with the safe disposal of hazardous waste. This potential conflict falls under the third prong of the preemption doctrine if the local statute "stands as an obstacle to the

21. *Id.*

22. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)).

23. E.g., Clean Air Act, 42 U.S.C. § 7416 (1988) (stationary sources only); Clean Water Act, 33 U.S.C. § 1370 (1988).

24. For an exception to the general rule, see 42 U.S.C. § 7543 (Clean Air Act) which limits state authority to enact stricter regulation on mobile sources of air pollution. This exception is a recognition of the fact that the automobile industry serves a national market and could not respond to fifty-one different standards.

25. 42 U.S.C. § 6929 (1988).

26. *Id.* § 7401(b).

27. 33 U.S.C. § 1251(a) (1988).

28. 42 U.S.C. § 6902(b) (1988).

accomplishment and execution of the full purposes and objectives of Congress."²⁹ Ironically, RCRA is the only one of the three programs that expressly authorizes "more stringent" regulation by state and local governments. Nevertheless, RCRA is the one program where the courts have resorted to preemption to protect the program from those very same "more stringent" standards.

IV. JUDICIAL INTERPRETATIONS OF PREEMPTION IN THE HAZARDOUS WASTE DISPOSAL FIELD

A. RCRA Preemption

In the landmark dormant commerce clause case of *City of Philadelphia v. New Jersey*, the United States Supreme Court stated that RCRA contained "no 'clear and manifest purpose of Congress' to preempt the entire field of interstate waste management. . . ."³⁰ At that time (1978), the state authority section of RCRA (42 U.S.C. § 6929) contained only the restriction on "less stringent" requirements. The positive statement authorizing "more stringent" requirements was not made part of the law until 1980.³¹ The *City of Philadelphia* Court had no need to explore implied preemption because it held that the dormant commerce clause invalidated the statute which barred the importation of waste. But the Court's dicta on express preemption was clearly correct and that position was bolstered by the 1980 amendment to 42 U.S.C. § 6929.

The Louisiana Supreme Court was the first body to uphold a preemption challenge to a local statute banning hazardous waste disposal in *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*.³² The court found that state law preempted an Iberville Parish ban on the disposal of hazardous waste. But the court went on to cite RCRA and the congressional purpose of establishing uniformity among the states in the field of hazardous waste disposal. This emphasis on Congressional policy presaged the approach of the federal courts to preemption challenges based solely on RCRA. Decided in 1979, *Rollins*

29. *Michigan Canners & Freezers v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469, 104 S. Ct. 2518, 2523 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)).

30. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620, 98 S. Ct. 2531, 2534 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)).

31. *Stone*, supra note 14, at 11.

32. *Rollins Env'tl. Serv. of La., Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979).

preceded the 1980 RCRA amendment which authorized "more stringent" regulations.

The most authoritative³³ statement on RCRA preemption comes from the Eighth Circuit's 1986 decision in *ENSCO, Inc. v. Dumas*.³⁴ The court upheld a permanent injunction against a Union County, Arkansas ordinance prohibiting the storage, treatment, or disposal of "acute hazardous waste" within the county.³⁵ The court recognized the *City of Philadelphia* dicta on express preemption, but went on to find an express declaration of national policy on hazardous waste treatment, storage, and disposal.³⁶ The court concluded that the state's authority to enact more stringent requirements under 42 U.S.C. § 6929 applies only to "good-faith adaptations of federal policy to local conditions."³⁷ Use of such labels as "more stringent requirement" or "site selection" in the ordinance does not, by itself, authorize the local entity to "enact a measure that as a practical matter cannot function other than to subvert federal policies. . . ."³⁸ The court indicated that it will look to the language and history of the ordinance to determine whether it qualifies as a "good-faith adaptation." *ENSCO* does leave the door open for more stringent regulations but suggests that the courts will take a hard look at such ordinances, especially when an ordinance imposes an out-right ban, rather than a restriction, on hazardous waste disposal.

Ogden Environmental Services v. City of San Diego favorably cited the language from *ENSCO* in ruling on an ordinance that was less than an out-right ban.³⁹ The San Diego ordinance established a "conditional use permit" that was mandatory even when EPA approval had been obtained. The ordinance contained no meaningful standards for the evaluation of such permit requests. The plaintiff corporation was denied the conditional use permit for a hazardous waste incineration facility that had already been approved by EPA.⁴⁰ The court recognized that such a discretionary review creates the potential for sham, subterfuge, and a *de facto* ban on the disposal of hazardous waste.⁴¹ The court concluded that RCRA preempted the ordinance. In the analysis of RCRA preemption of state/local hazardous waste disposal facility statutes, the

33. The United States Supreme Court has not addressed the preemption issue since *City of Philadelphia* in 1978.

34. *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986).

35. *Id.* at 744.

36. *Id.*

37. *Id.* at 745 (emphasis added).

38. *Id.*

39. *Ogden Envtl. Serv. v. City of San Diego*, 687 F. Supp. 1436, 1446 (S.D. Cal. 1988).

40. *Id.* at 1437-38.

41. *Id.* at 1446.

Ogden court also looked to jurisprudence under other federal statutes that set standards for the safe disposal of harmful materials, such as the Toxic Substance Control Act.⁴²

The "more stringent requirement" clause of 42 U.S.C. § 6929 is not the only "savings clause" in RCRA. The Act also provides that nothing in the citizen suit provision "shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste"⁴³ In *Sharon Steel Corp. v. City of Fairmont*, the West Virginia Supreme Court upheld a municipal ordinance declaring that the permanent disposal of hazardous waste was a public nuisance.⁴⁴ The court relied on the language of the citizen suit savings clause quoted above. The court's reliance on that section seems misplaced, as the clause is clearly intended to preserve a citizen's right to obtain nuisance relief and not to declare an entire industry a *per se* nuisance.⁴⁵

B. Hazardous Waste Disposal and Preemption Under Louisiana Law

Unlike RCRA's statutory scheme, Louisiana law expressly preempts most facets of hazardous waste control. The Louisiana Hazardous Waste Control Law (LHWCL) states that the Department of Environmental Quality (DEQ) has exclusive jurisdiction over the development, implementation, and enforcement of a comprehensive state hazardous waste control program.⁴⁶ A major exception to this grant of authority is found in the statutes governing local parish authority which restrict police jury authority in the area of the generation, transportation, and disposal of hazardous waste. In the field of hazardous waste, police jury power is limited to the "initial siting of facilities pursuant to general land use planning, zoning, or solid waste disposal ordinances."⁴⁷

Under state preemption law, the supremacy clause of the United States Constitution is obviously irrelevant. State preemption of local law stems from the inherent authority of a superior legislative body to override an inferior one when the two entities are in conflict.⁴⁸ In

42. 15 U.S.C. § 2601 (1988). See William L. Andreen, Defusing the "Not in my Back Yard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities, 63 N.C. L. Rev. 811 (1985).

43. 42 U.S.C. § 6972(f) (1988).

44. *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616 (W.Va. 1985), appeal dismissed, 474 U.S. 1098, 106 S. Ct. 875 (1986).

45. Stone, *supra* note 14, at 12.

46. La. R.S. 30:2174(A) (1989).

47. La. R.S. 33:1236(31) (1989).

48. *Hildebrand v. City of New Orleans*, 549 So. 2d 1218, 1227 (La. 1989), cert. denied, 494 U.S. 1028, 110 S. Ct. 1476 (1990).

Louisiana, local power is not preempted unless the state legislature expressly intends preemption or the "exercise of dual authority is repugnant to a legislative objective"⁴⁹ Absent express preemption, the courts determine legislative intent by examining: 1) the pervasiveness of the state regulatory scheme, 2) the need for state uniformity, and 3) the danger of conflict between the enforcement of the local laws and the administration of the state program.⁵⁰

The LHWCL expressly preempts out-right or constructive bans against hazardous waste disposal. The exemption for the siting of facilities is inapplicable because a ban does not involve the selection of sites or even land use planning.⁵¹ And even if such an ordinance survived an express preemption challenge, it would be implicitly preempted as repugnant to a legislative objective. The LHWCL states that the enforcement of a comprehensive state hazardous control program is its declared purpose.⁵² Additionally, the Act declares that the chemical industry is a "basic and essential activity" for our economy.⁵³ An ordinance banning the disposal of hazardous waste would bear little chance of survival in this environment. The exception for the initial siting of facilities pursuant to general land use planning may amount to no more than a grant of *ENSCO*-like authority to the police juries—the authority to include good-faith adaptations based on local concerns in the siting of hazardous waste disposal facilities. We must also consider that the Louisiana Supreme Court is the only high court in the country that has cited Congress' policy behind RCRA while preempting such an ordinance on state law grounds.⁵⁴

V. THE PARAMETERS OF RCRA PREEMPTION: A CASE STUDY

Current jurisprudence clearly establishes that an out-right ban on the disposal of hazardous waste is preempted under RCRA unless the local entity is making a "good-faith adaptation of federal policy to local conditions."⁵⁵ *Ogden* indicates that the same test will be applied to an ordinance that can serve as a *de facto* ban on such disposal. A harder

49. *Palermo Land Co., Inc. v. Planning Comm'n*, 561 So. 2d 482, 497 (La. 1990).

50. *Id.*

51. See La. Att'y Gen. Op. 91-394 (July 23, 1991). Avoyelles Parish Code § 10-6 bans the disposal "in any way, shape, or form" of all hazardous waste. The AG opinion states that the ordinance is expressly preempted by the LHWCL and that the "initial siting" exception found in La. R.S. 33:1236(31) does not apply to a parish-wide prohibition.

52. La. R.S. 30:2172(B) (1989).

53. La. R.S. 30:2172(A)(1) (1989).

54. *Rollins Envtl. Serv. of La., Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (1979).

55. *ENSCO, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986).

question that has not been clearly answered is: "How far can the local entity go with more stringent requirements before it interferes with the national policy of safe disposal of hazardous waste?"

EPA and the State of North Carolina recently litigated this question in a dispute involving North Carolina's attempt to block the location of a hazardous waste treatment plant in Laurinburg, North Carolina. The dispute differed from prior preemption conflicts because North Carolina operates its own EPA-approved hazardous waste program,⁵⁶ and the State was careful to construct a statute that scuttled the proposed facility without jeopardizing EPA approval of its overall plan.⁵⁷ The dispute was also unique in that it was well documented during the administrative battles between EPA and North Carolina which preceded the litigation in the District of Columbia Circuit Court of Appeal.⁵⁸

Laidlaw Environmental Services proposed to build a facility designed to treat both organic and inorganic waste, a process representing state-of-the-art technology.⁵⁹ The plans called for the discharge of up to 500,000 gallons of waste-water per day into publicly-owned treatment works which would then discharge the treated waste-water into the Lumber River. The drinking water intakes of Lumberton, North Carolina were thirty miles downstream from the proposed location. Local legislators introduced numerous bills into the North Carolina legislature but were faced with warnings from EPA that any moratorium on the issuance of permits could result in the withdrawal of authorization for the state's hazardous waste program.⁶⁰ In its final form, the disputed statute prohibits the issuance of a permit if waste-water is discharged and is not diluted by a factor of at least one thousand by the waters of the receiving river.⁶¹ The statute ignores any dilution through treatment that may occur prior to discharge. It also contains a clause that any provision of the statute that would cause the revocation of EPA authority for the state's hazardous waste program would be void.⁶² That provision set the stage for the proceedings and litigation that followed.

The dilution requirement of the statute reduces the allowed discharges at the Laurinburg site to 72,000 gallons per day, effectively destroying the profitability of the proposed facility. EPA held a hearing on the

56. 42 U.S.C. § 6926 (1988).

57. Douglas J. Snyder, *The EPA-North Carolina Dispute: The Right of States to Pass Stricter Laws Under the Resource Conservation and Recovery Act*, 8 Va. J. Natural Resources L. 171 (1988).

58. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991) (*HWTC*).

59. *Id.* at 1393.

60. *Id.* at 1394.

61. Snyder, *supra* note 57, at 173.

62. *HWTC*, 938 F.2d at 1393.

withdrawal of its authorization based on allegations that the statute's dilution requirement was arbitrary and on the fact that the statute did not further the protection of human health or the environment.⁶³ Because North Carolina had an approved program, the subsequent proceedings did not focus on the preemption doctrine, or the "more stringent requirement" language of retained state authority, but rather on the statute⁶⁴ and regulations⁶⁵ governing EPA approval of state programs. The statute states that EPA may not approve any state program that: 1) is not equivalent to the federal program; 2) is not consistent with the federal program; or 3) does not provide for adequate enforcement.⁶⁶ The relevant⁶⁷ provision in EPA's regulations declares that any state regulation which both *prohibits* the treatment, storage, or disposal of hazardous waste *and* is not based on human health or environmental protection may be deemed inconsistent.⁶⁸

North Carolina argued that the "more stringent requirements" authority of 42 U.S.C. § 6929 nullified the stricter "consistency" requirements of the federal regulations, and at least one commentator agreed.⁶⁹ During the hearing process, 42 U.S.C. § 6929 seemed to be North Carolina's only protection, as EPA claimed that the dilution requirement would render eighty-five percent of the potential sites in North Carolina off-limits.⁷⁰ In a surprising⁷¹ turn of events, the administrative law judge (ALJ) ruled in favor of North Carolina, and EPA adopted the ALJ's determination. The ALJ's finding concentrated on the literal language of the regulation which says in order for EPA to reject a state program on consistency grounds, the program must meet *both* requirements of the regulation. First, it must not be based on human health or environmental protection, and second, it must *prohibit* the treatment, storage, or disposal of hazardous waste.⁷² The ALJ found that, under the statute, Laidlaw could build the facility elsewhere in North Carolina, or build a smaller facility at the original site, and thus the "prohibition" requirement of the regulation was not met.⁷³

63. *Id.* at 1394.

64. 42 U.S.C. § 6926 (1988).

65. 40 C.F.R. § 271.4 (1991).

66. 42 U.S.C. § 6926(b) (1988).

67. The court also rejected Laidlaw's contention that the statute unreasonably restricted interstate commerce under 40 C.F.R. 271.4(a) (1991).

68. 40 C.F.R. 271.4(b) (1991).

69. Snyder, *supra* note 57, at 177.

70. *Id.*

71. *Id.* generally. The commentator treats the dispute as a battle between EPA and North Carolina (the article pre-dates the litigation) and paints a picture of EPA hostility to the statute.

72. Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1394 (D.C. Cir. 1991).

73. *Id.*

Laidlaw petitioned the D.C. Circuit for review of EPA's determination, but EPA's about-face on the statute put the company in the weakened posture of challenging an agency's interpretation of its own regulation. Predictably, the court deferred to EPA's interpretation, finding it reasonable and consistent. The court noted that RCRA mandates consistency, not uniformity, and cited the "more stringent requirement" clause of 42 U.S.C. § 6929.⁷⁴ The court concluded that EPA's interpretation of "consistency" means that "a state law 'acts as a prohibition' on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State, and nothing more."⁷⁵ A broad reading of this case would eviscerate the preemption doctrine as a check on the NIMBY syndrome in that only total bans on different aspects of hazardous waste disposal would be prohibited. Additionally, following the literal interpretation of EPA's own regulation, a total ban would be permissible if it were based on human health or environmental protection. This conclusion is at odds with *ENSCO* and *Ogden* where generalized environmental concerns were held insufficient to ban the disposal of hazardous waste.

The *Hazardous Waste Treatment Council* court upheld a state statute while *ENSCO* and *Ogden* both dealt with local ordinances. While 42 U.S.C. § 6929 grants the "more stringent requirement" authority to states and political subdivisions, the courts may be more receptive to such requirements when imposed by a state. A state with an EPA-approved RCRA program has already assumed the burden of addressing its own NIMBY problems within the state. However, in *National Solid Waste Management Association v. Alabama Department of Environmental Management*,⁷⁶ the Eleventh Circuit struck down certain Alabama waste pretreatment regulations as preempted by federal law. The Alabama standards were more stringent than EPA's standards because Alabama did not recognize pretreatment variances established by EPA under RCRA. While the Alabama case also contained dormant commerce clause considerations, it established that a court will apply the preemption doctrine against a state as well as a political subdivision.

The particular facts and the posture of the parties before the court distinguishes the Laidlaw dispute from earlier cases. First, the facts are not clear as to the extent to which the statute banned such facilities. EPA originally claimed that eighty-five percent of the potential sites for the facility were eliminated. However, the court cites the ALJ's finding that only 152 of the 485 riparian miles (thirty-one percent) in North

74. *Id.* at 1396.

75. *Id.* at 1395.

76. *National Solid Waste Mgmt. Ass'n v. Alabama Dep't of Env'tl. Mgmt.*, 910 F.2d 713 (11th Cir. 1990), modified by 924 F.2d 1001, reh'g denied, 932 F.2d 979 (1991).

Carolina were made unavailable under the Act.⁷⁷ It is not clear whether the remaining areas could handle a facility of the size proposed by Laidlaw. A similar case could hinge on the percentages involved because at some point a restriction must be considered a *de facto* ban. The posture of the parties was another unique feature of the dispute because North Carolina already had an approved plan and thus fell under 42 U.S.C. § 6929. Unlike *ENSCO*, the legal issue presented here was narrow: was EPA's decision not to revoke North Carolina's approval reasonable? In states without approved programs, statutes restricting technology or practices approved by EPA will not reach the court in such a deferential setting.

North Carolina's statute chiefly targeted South Carolina, a potential waste exporter to the Laidlaw site. In the finest NIMBY tradition, South Carolina retaliated with a statute banning the import of waste from states that failed to dispose of their own waste, affecting North Carolina and thirty-one other states. South Carolina officials explained that EPA's decision in Laidlaw "betrayed" South Carolina.⁷⁸

VI. PREEMPTION AS THE SOLUTION TO THE NIMBY SYNDROME

Even assuming that courts will continue to use the preemption doctrine to overturn statutes that ban or severely restrict the siting of hazardous waste disposal facilities, preemption is an unsatisfactory solution to the NIMBY syndrome. Using preemption as a stick with no corresponding carrot does nothing to address underlying conditions. NIMBY is simply a symptom of a basic problem which must be addressed. NIMBY is the logical reflection of the fact that the benefits of hazardous waste disposal facilities are felt nationwide but the costs fall on a small population in the proximity of the facility. Our economic/political system has failed to socialize the costs of these absolutely essential facilities,⁷⁹ and consequently, affected parties respond to every real or perceived risk by using the political system to delay the approval of the facility. The risks associated with these facilities cannot be reduced to zero; there are no perfect sites.⁸⁰ The inevitable NIMBY reaction to all "locally unwanted land uses" floods the system with complaints of varying degrees of validity. These disputes are not decided on the merits; rather, members of cohesive affluent communities generate the political power to delay the "locally unwanted land use," while less cohesive

77. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1394 (D.C. Cir. 1991).

78. Stone, *supra* note 14, at 2-3.

79. Brion, *supra* note 5, at 498.

80. Delogu, *supra* note 5, at 208.

and/or less affluent neighborhoods bear the burden of the "locally unwanted land use."⁸¹

While the solution to this problem is beyond the scope of this paper, a survey of possible solutions is helpful in focusing the issues and determining what policies should be considered when using the preemption "stick." Suggested solutions to the problem center on addressing the fears of the local community so that the answer to hazardous waste disposal facilities changes from "no" to "maybe,"⁸² or even "yes."⁸³

Commentators addressing the problem stress the need for greater communication, usually through public representation on siting boards.⁸⁴ Public participation includes both permanent members plus *ad hoc* members from communities near any proposed hazardous waste disposal facility. While any increase in communication among developers, bureaucrats, and the public is beneficial, the experience of the Massachusetts siting board⁸⁵ teaches that representation alone is no solution. Recall that all five proposals approved by the board were ultimately abandoned despite public representation on the board.

In addition to increased communication, commentators recommend negotiations between developers and the public, emphasizing compensation to the communities. Developers might guarantee local property values and maintain insurance policies to that effect.⁸⁶ Communities could demand that violations of permits will not be contested, with fines going to a community trust fund.⁸⁷ Another anxiety-reducing concession is for the developer to finance the community's employment of an expert who will have some oversight authority for the plant's operations and set up a procedure for the evaluation and implementation of the expert's suggestions.⁸⁸ The community could also demand that the developer ensure an overall reduction in pollution by financing pollution control equipment for other, older facilities in the community.⁸⁹ And certainly, the community should specify routes for access to the facility that ensure against aesthetic degradation. These listed "indirect" payment incentives can be supplemented by "direct" incentives such as increased taxes,

81. Brion, *supra* note 5, at 498.

82. Peter M. Sandman, *Getting To Maybe: Some Communications Aspects of Siting Hazardous Waste Facilities*, 9 *Seton Hall Legis. J.* 437 (1986).

83. Marvin G. Katz, *YIMBYism is Coming But . . .*, 21 *Waste Age* 40 (1990)—a look at market forces from the National Solid Waste Management Association's magazine.

84. Celeste P. Duffy, *State Hazardous Waste Facility Siting: Easing the Process Through Local Cooperation and Preemption*, 11 *B.C. Envtl. Aff. L. Rev.* 755, 800 (1984).

85. Brion, *supra* note 5, at 448.

86. Sandman, *supra* note 82, at 441.

87. *Id.*

88. *Id.*

89. *Id.*

usage fees, and road and fire protection enhancement levies.⁹⁰ Such proposals do not seek to restore public trust in business. Instead, the community is using its valuable land resources to demand a more equal partnership with the developer.⁹¹

The state of Alabama and some commentators have looked to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)⁹² as a counter to provincial NIMBY responses. CERCLA contains a provision that required all states to assure (by October 1989) an adequate capacity for the destruction, treatment, or secure disposal of all hazardous waste to be generated within the next twenty years.⁹³ Alabama enacted legislation that banned the importation of hazardous waste from any state which had not met the CERCLA capacity assurance plan (CAP) requirement. In *National Solid Waste Management Association v. Alabama Department of Environmental Management*,⁹⁴ the Eleventh Circuit struck down the ban as violative of the dormant commerce clause, finding that Alabama's requirement that out-of-state disposers obtain pre-approval was a significant burden on interstate commerce "[h]owever honorable and well intentioned Alabama's leaders might be in coming to grips with environmental problems."⁹⁵ The decision has been criticized by commentators who propose such a plan as a solution to the NIMBY problem.⁹⁶ However, an analysis of the case at a policy level indicates that the use

90. Duffy, *supra* note 84, at 785.

91. These proposals represent what is currently happening in the solid waste disposal marketplace. Charles City County, Virginia recently agreed to host a regional landfill and obtained the following concessions from the developer:

1. guaranteed host fee of \$1.1 million annually (could go as high as \$2.3 million annually) for a county whose total tax revenues before the landfill were only \$1.5 million;
2. fund to monitor the Chickahominy River;
3. fund to close/monitor the landfill should the developer default;
4. free refuse disposal for all residents; and
5. replacement of local shallow wells with deeper wells.

Katz, *supra* note 83, at 41.

92. 42 U.S.C. § 9601 (1988).

93. *Id.* § 9604(c)(9) (1988).

94. *National Solid Waste Mgmt. Ass'n v. Alabama Dep't of Env'tl. Mgmt.*, 910 F.2d 713 (11th Cir. 1990), modified by 924 F.2d 1001, reh'g denied, 932 F.2d 979 (1991).

95. *Id.* at 725. The court also struck down certain pretreatment requirements on preemption grounds because the regulations did not grant the same variances as did EPA under RCRA. In a denial of a rehearing petition, the court noted that some of the EPA variances had expired and thus the corresponding Alabama pretreatment requirements were not preempted. The issue was remanded for a determination of the burden on interstate commerce of those non-preempted restrictions. 924 F.2d at 1004.

96. Meyers, *supra* note 7, at 585; see also David M. Levy, Comment, *Federalism and the Environment: National Solid Waste Management v. Alabama Department of Environmental Management*, 12 *Whittier L. Rev.* 635, 668-73 (1991).

of the CAP as a cudgel is a feasible approach only if the cudgel is in the hands of the right party. Dormant commerce clause considerations aside, state use of CAP based restrictions will invite retaliation and internecine NIMBY warfare among the states.

Using the Superfund as an incentive at the federal level appears to be the preferable approach. Hazardous waste disposal and the NIMBY response present a national problem that should be addressed by the federal government, despite the traditional reluctance to usurp local control of land use regulation. The CERCLA CAP requirements can be an effective starting point for an incentive/punishment system that will encourage states to plan for the disposal of their own waste. Failure to comply with CERCLA's twenty-year planning goal will trigger the loss of Superfund money for non-emergency hazardous waste cleanups.⁹⁷ This incentive carries a different weight in different states, ranging from Mississippi's risk of \$2 million to Florida's possible loss of \$70 million.⁹⁸ The effectiveness of the incentive also depends on the willingness of EPA to apply the sanction for lack of compliance and on the level of scrutiny EPA applies to state CAP proposals. As of October 1991, all fifty states had submitted CAP proposals and forty-seven CAP's had been approved. As of that same date, no states had been denied Superfund remedial funds under the CAP requirements of 42 U.S.C. § 6904(c)(9).⁹⁹

Clearly, the Superfund incentive has not developed into the "potent weapon" envisioned by some commentators.¹⁰⁰ Nevertheless, the use of federal authority to coerce state action is the proper approach. The enhanced communication and compensation schemes discussed above must be implemented locally, but federal action could encourage the states to formulate such programs. Federal action should require that each state develop a plan for hazardous waste disposal facility siting that incorporates a variety of the techniques discussed. The federal plan should also include an *effective* threat of loss of funds for noncompliance and the state plans should be under the approval authority of EPA.¹⁰¹ Congress should also incorporate the CERCLA CAP into the mandatory requirements for EPA approval of state hazardous waste programs under RCRA.

Both the Senate and the House versions of proposed changes to RCRA seek to increase state/local authority over the disposal of hazardous waste while the Bush administration opposes such changes. Both

97. 42 U.S.C. § 9604 (c)(9) (1988).

98. Meyers, *supra* note 7, at 583.

99. Telephone interview with Kristen Fitzgerald, EPA Regulatory Specialist (April 7, 1992).

100. Snyder, *supra* note 57, at 189.

101. Delogu, *supra* note 5, at 212.

Senate and House proposals would permit local governments to refuse out-of-state waste shipments.¹⁰² Facilities currently receiving out-of-state waste would have grandfather rights as long as they comply with all applicable state laws. Additionally, after a forty-two month waiting period, states with approved RCRA programs would be allowed to prohibit out-of-state waste shipments from states without an approved program.¹⁰³ The Bush administration opposes such changes, insisting that current RCRA authority is sufficient and warning that such policies will lead to economic warfare among the states.¹⁰⁴ The administration believes that tough new federal regulations will force smaller landfills to close and thus mandate reliance on larger regional landfills. Barriers to the interstate shipment of waste would interfere with the operation of these new regional disposal facilities.

VII. CONCLUSION

NIMBY was born out of a righteous sense of indignation and has had a positive effect in that developers are no longer free to elect the cheapest mode of hazardous waste disposal without any concern for the effect on human health and the environment.¹⁰⁵ However, due to the inherent political and visceral distaste for the possible siting of a hazardous waste disposal facility in "my" backyard, the pendulum has swung too far, and NIMBY threatens the nation's health and safety by interfering with the safe disposal of hazardous waste. While this comment has reviewed several mechanisms for mollifying local opposition to the rational siting of hazardous waste disposal facilities, those mechanisms are available only to developers and state/local and federal governments. These options are not available to the courts, which are left with preemption and the dormant commerce clause—tools that seem crude in an area where surgical precision is necessary to balance the *bona fide* concerns of parties on both sides of the issue. Given the ambiguity between Congress' stated RCRA policy of "minimiz[ing] the present and future threat to human health and the environment," and Congress' authorization of "more stringent" regulation by states and political subdivisions, the courts have responded rationally by limiting the "more stringent" regulation authority and applying the preemption doctrine to invalidate ordinances that do not meet the courts' narrowed interpretation of state and local power. No other currently available approach would

102. Current Developments, 22 Env't Rep. (BNA) 2660 (Apr. 3, 1992).

103. Id.

104. Current Developments, 22 Env't Rep. (BNA) 2196 (Jan. 24, 1992).

105. See Mariflo Stephens, When Issues Hit Home; LULUs, NIMBYs and Other Angles on Neighborhood Activism, The Washington Post, Nov. 4, 1991, at D5.

enable the courts to force all states and communities to share the burdens of hazardous waste disposal.

Courts should temper the harshness of preemption in accordance with the language in *ENSCO* which permits "good faith adaptations of federal policy to local conditions."¹⁰⁶ To protect the overall federal policy, the courts must be vigilant to limit these good faith adaptations to areas of specific *bona fide* local concerns that are based on public safety, such as unique geologic, hydrologic, geographic, or physical conditions that warrant placing an area off limits for hazardous waste disposal.¹⁰⁷ The generalized risk and fear that we all experience should not, by itself, derail the development of responsible hazardous waste disposal facilities.

The NIMBY problem requires congressional action, not jurisprudential patch-work based on an ambiguous statutory scheme. If Congress truly intends to encourage a safe national disposal program while maintaining state and local authority over land use, Congress must ensure that each state develops a disposal program that adequately addresses that state's disposal needs. Once a state has such a program, it should be allowed to discriminate against states that do not. Once a state has such a program, there will be no reason to use federal preemption of local laws because the states will need some form of state preemption of local laws to maintain their own program.

The current proposals before Congress may achieve this result. The Alabama plan requiring all exporting states to have an approved CERCLA capacity assurance plan (CAP) also deserves consideration in that no disposal program should be granted RCRA approval without an approved CAP. Either of these plans—the Alabama plan or the pending congressional proposal—presupposes that EPA will conduct a stringent review of state proposals and closely monitor the state program after approval. EPA's current record under the CERCLA CAP requirement does not inspire confidence in EPA's ability or willingness to police the states' waste disposal programs and enforce sanctions when necessary. If Congress unleashes state/local "more stringent" regulation authority without an effective review of state programs, NIMBY will lead to economic warfare among the states.

Patrick O'Hara

106. *ENSCO Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986).

107. *Andreen*, *supra* note 42, at 846.