LOCAL TO GLOBAL: CITIZEN'S LEGAL RIGHTS AND REMEDIES RELATING TO TOXIC WASTE DUMPS

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> For fundamental and deeply rooted psychological reasons, as well as more mundane utilitarian concerns, it is characteristic of man to bury that which he fears and wishes to rid himself of . . . . In today's industrialized society, however, the routine practice of burying highly toxic chemical wastes has resulted in serious threats to the environment and to public health. The dangers are especially acute when buried chemical wastes threaten to contaminate the underground aquifers upon which half of the nation relies for its supply of drinking water.[1]

I. INTRODUCTION

A. *Background*

Over the years, the United States has produced and accumulated billions of tons of hazardous wastes,[2] most of which were disposed on land at various sites nationwide. Not only are these wastes are now causing harm; they threaten to continue to cause harm to people and the environment in the future.[3] As of 1986, the Environmental Protection Agency (EPA) had identified 24,000 uncontrolled hazardous waste sites nationwide,[4] at least 250 of which were causing demonstrable damage or were

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1. United States v. Price, 523 F. Supp. 1055, 1057 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

2. A waste is "hazardous" under the Resource Conservation and Recovery Act if because of its quantity, concentration, or physical, chemical or infectious characteristics, it may cause, or significantly contribute to an increase in serious irreversible, or incapacitating reversible, illnesses or pose a substantial hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. 42 U.S.C. § 6903(5) (1988).

3. Barbara White, *Economizing on the Sins of Our Past: Cleaning Up Our Hazardous Wastes*, 25 HOUS. L. REV. 899, 911 (1988).

4. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL PRIORITIES LIST FACT BOOK 1 (1986).

threatening serious damage. Reported incidents of actual damage at these sites included: Twenty-seven sites which caused definite health problems, such as cancer, fetal deformities, or miscarriages; thirty-two sites which had forced the closure of private and public drinking water wells; one hundred thirty sites which caused the contamination of groundwater; and at least seventy-four sites which contaminated the natural habitat and adversely affected indigenous species of plants and wildlife.[5]

In 1980, EPA estimated that ninety percent of the fifty-seven million tons of hazardous industrial and chemical wastes produced in the United States annually are disposed of improperly.[6] The places where these wastes are dumped, or otherwise improperly disposed of, often end up as hazardous waste sites. It has been estimated that the eventual cleanup costs for hazardous waste sites nationwide will exceed 100 billion dollars and that it could take over fifty years to clean just 10,000 of the discovered sites.[7] The estimates of time and cost will increase substantially as more sites are discovered.

Many citizens' and environmental organizations have begun to focus their efforts on problems associated with the disposal of hazardous wastes which cause health and environmental risks. For example, "exposure to hazardous wastes can cause cancer, genetic mutations, birth defects, miscarriages, lung, liver and kidney damage, and death."[8] In addition, environmental contamination caused by improper hazardous waste disposal can bankrupt site owners, lower or destroy land values, drive out residents and industry, depress local economies, and threaten or endanger public health and the environment.[9] Another serious problem is that hazardous wastes do not readily decompose over time into harmless components. Instead, they remain in toxic or dangerous forms which penetrate into and contaminate adjoin-

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5. S. REP. No. 848, 96th Cong., 2d Sess. 4 (1980), *reprinted in* LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, at 311 (1983).

6. *Id.*; Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 32 n.2 (1987).

7. U.S. OFFICE OF TECHNOLOGY, SUPERFUND STRATEGY 3 (1985).

8. George Gramling & William Earl, *Cleaning Up After Federal and State Pollution Programs: Local Government Hazardous Waste Regulation*, 17 STETSON L. REV. 639 n.2 (1988); Note, *Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1462 (1985).

9. Note, *An Assessment of the Role of Local Government in Environmental Regulation*, 5 J. ENVTL. L. 145, 147 (1986).

ing land and water.[10]

Citizens have a right to be concerned about hazardous waste sites.[11] As of February 11, 1991, 1189 sites are reported by EPA as being listed on the National Priority List.[12] EPA also reports that the Superfund, established under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), has cost the public 15.2 billion dollars and only sixty-three sites have been cleaned up nationwide.[13]

B. *Statement of Purpose*

Citizens, when confronted with a proposed hazardous waste disposal facility or a leaking toxic waste dump in their neighborhood, need to know what their legal rights and remedies are and how to exercise them. This article sets forth a guide to citizens' rights and remedies relating to the siting, monitoring, closing, and cleanup of toxic and hazardous waste facilities or dumps.

Citizens' rights are discussed in the context of governmental enactment and enforcement of environmental, health, and safety laws. Citizens have the right to be protected by the governmental agencies and other subdivisions charged with legislative powers and enforcement duties. As a result, a governmental body has a moral obligation to protect the health and welfare of its citizens. This article will discuss governmental actions taken to remedy the problems associated with hazardous waste: these legislative and enforcement actions cannot be taken directly by citizens. Such actions are nevertheless an integral part of protecting citizens from toxic waste dumps. In contrast, citizens' remedies are actions taken directly by citizens to protect themselves. These actions can be as simple as writing a letter to a

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10. 4 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 25A.01[1] (1987).

11. Citizens should also be concerned about EPA's latest solution for hazardous waste disposal/incineration. This concern is warranted once one learns of horror stories such as the North Carolina incinerator that was allowed to operate for a decade with no pollution control devices and is now a candidate for the Superfund National Priority List. *Superfund Turns Ten Amid Controversy*, 5 ENVTL. COMPLIANCE REP. 14-15 (1990).

12. 56 Fed. Reg. 5598-5601 (1991) (to be codified at 40 C.F.R. pt. 300). The "National Priority List" is a hazard ranking system that assesses the relative degree of risk to human health and the environment posed by the hazardous waste facilities and sites being reviewed under CERCLA. 42 U.S.C. § 9605(c)(1).

13. Superfund was established by Congress to aid in paying for the costs involved in hazardous waste site remediation and cleanup and for the costs associated with injury, destruction or loss of natural resources due to damage from hazardous wastes. 42 U.S.C. § 9611.

local government representative or as complex as intervening in a governmental enforcement action.

Citizens' rights and remedies will be explored at four levels: local, state, national, and international.[14] Each level contains different laws and procedures that must be followed to obtain relief. Obviously, with page restraints imposed, few of the subjects touched upon in this article can be covered completely. Therefore, this article merely gives an overview of the types of regulations, statutes, and cases that citizens can use to prevent the location of, or obtain relief from, a hazardous waste facility which has caused, or potentially could cause, damage to citizens, their rights, or their property. It is hoped that this will assist citizens and lawyers alike in grasping the basic laws which regulate hazardous waste. Once the framework is understood, the reader can then select and seek to achieve the remedy that suits his or her particular problem.

II. Rights and Remedies at the Local Level

Historically, legislation enacted to remedy the problem of hazardous waste originated mostly at the state and federal levels. However, most commentators have concluded that neither the federal nor state governments can adequately identify and keep pace with the mushrooming hazardous waste problem facing the United States.[15] Many of these commentators have expressed the belief that the hazardous waste problem should be regulated on a local level, as well as at the state and federal levels.[16] Following this theory, local governments have embarked upon the process of regulating certain aspects of hazardous waste disposal.

A. *Actions To Prevent the Establishment of a Toxic Waste Dump*

Community resistance to new hazardous waste disposal facilities or landfills can greatly influence the decisions of local siting boards, many of which are composed of elected public offi-

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14. It should be noted that the rights and remedies of different levels may overlap. For simplification, each remedy will be discussed only on one level. Reference will then be made to the availability of similar relief at a different level.

15. Gramling & Earl, *supra* note 8, at 641.

16. *Id.*

cials.[17] Because the public generally opposes new hazardous waste facilities, local elected officials who support such siting proposals may risk their political careers.[18] Assuming that the hazardous waste problem is not remedied through waste recycling, treatment, or minimization, these hazardous waste treatment, storage, and disposal (TSD) facilities must locate somewhere. Therefore, it is useful to explore alternate avenues for preventing the establishment of toxic waste dumps in addition to political pressure.

1. Local Government Power

Local governments have extensive powers to regulate activities associated with health, welfare, and safety, including pollution and hazardous wastes. The source of this authority is the inherent, plenary police power expressly reserved to the states by the United States Constitution.[19] Local governments also possess this police power.[20] All local government power derives either from the state constitution or from the state legislature.[21] Therefore, the power to regulate hazardous wastes exists only at the state level unless this power has been delegated to local governments by statutory or state constitutional law.[22] This delegation of the authority necessary to regulate hazardous waste activities must occur before a local government may enact an ordinance.[23]

The extent of power given to a local government to regulate a field such as hazardous waste is limited to the degree of authority delegated to it by the state government. Each state differs in the amount of power delegated to local and municipal governments.[24] Some states authorize local governments to reg-

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17. Joseph C. Gergits, Note, *Enhancing the Community's Role in Landfill Siting in Illinois*, 1987 U. ILL. L. REV. 97 (1987).

18. In recent years, effective public opposition has slowed the development of waste management facilities. Yet, the problem of waste disposal remains. According to one recent study, U.S. industry generates annually the equivalent of 2000 pounds of hazardous waste for each man, woman and child. *See* EPA, Subtitle C, RCRA Draft Final EIS, pt. I, 6-15 (1980).

19. U.S. CONST. amend. X. This police power is defined generally as the power of the states "to proscribe regulations to promote the health, peace, morals, education and good order of the people. . . ." Barbier v. Connolly, 113 U.S. 27, 31 (1885).

20. Barbier v. Connolly, 113 U.S. at 33 (1885).

21. *Id.*

22. A. Dan Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 2 U.C.L.A. J. ENVTL. LAW & POL'Y 1, 2 (1981).

23. *Id.*

24. *Id.*

ulate hazardous wastes under the specific enumerated powers delegated to them by the state.[25] Other states grant a broad base of "home rule" powers and authorize local governments to "exercise any power . . . except as otherwise provided by law."[26] The latter gives local governments the freedom to regulate any use or activity that is not already regulated or preempted by the state.[27]

Where duly authorized by law, local governments have begun to occupy three niches in hazardous waste regulation. First, local governments have begun implementing their own systems for siting hazardous waste disposal facilities and for permitting the generation, handling, transportation, storage, treatment, and disposal of hazardous wastes and other pollutants.[28] Second, local governments have used their inherent police power, a power not available to the federal government, to restrict hazardous waste disposal activities.[29] Local governments have also used this police power to shift much of the burden of hazardous waste site identification and cleanup to the private sector by imposing affirmative duties on property owners and developers.[30] Third, many local governments have established their own trust funds similar to state and federal "superfunds" to clean up hazardous waste sites.[31] These three niches cover the three important stages in hazardous waste disposal: siting of facilities, regulating disposal techniques, and ensuring the proper closure of disposal sites.

2. City, Parish, or County Zoning Ordinances for Siting Hazardous Waste Facilities

A local government can regulate hazardous waste activities through its ability to zone and control land uses.[32] Local zoning controls that provide a local government the power to regulate hazardous wastes include aquifer and floodplain protection

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25. *Id.*
26. *See, e.g.*, FLA. CONST. art. VIII § 2(b).
27. For a discussion of preemption, see *infra* part II.A.3.
28. Gramling & Earl, *supra* note 8, at 664.
29. *Id.*
30. *Id.* at 672.
31. *Id.* at 678.
32. "A hazardous waste management facility is just another use to be allocated by zoning, and there is increasing evidence that communities throughout the country are using their powers to allocate land uses to *exclude* these facilities." Tarlock, *supra* note 22, at 2-3.

zones, well field protection, underground tank regulation, fire protection, industrial safety requirements, water use permitting, and disclosure requirements under a community right-to-know system.[33] At least one court has held that complete local preclusion through zoning ordinances of any hazardous waste activities is unconstitutional.[34] Yet, other courts have upheld ordinances which restrict, but do not totally preclude, hazardous waste activities as being constitutional.[35]

Local governments can restrict the locations of new facilities in various ways. First, they can require that no new facilities be built within a certain distance of municipalities, residences, schools, or recreational areas.[36] Second, they can prohibit the location of any facility in floodplains, wetlands, coastal and other ecologically sensitive areas, or in areas that might jeopardize groundwater or drinking water aquifers.[37]

3. State and Federal Preemption Of Local Authority

a. *State Preemption*

Just as the state legislature may grant authority to local governments, the legislature may also limit, or preempt, local regulation of hazardous wastes.[38] Each state has a different way of dealing with the issue of preemption. In response to local opposition over hazardous waste facilities, some state Resource

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33. Gramling & Earl, *supra* note 8, at 676, 680-86.

34. *See, e.g.*, General Battery v. Zoning Hearing Bd., 371 A.2d 1030 (Pa. Comm. Ct. 1977). *But see* County of Cook v. John Sexton Contractors Co., 389 N.E.2d 553, 560 (Ill. 1979) (granting local government great discretion to ban entry of hazardous waste facilities into their boundaries).

35. *See, e.g.*, Sunny Farms, Ltd. v. North Condorus Township, 474 A.2d 56 (Pa. 1984).

36. *See, e.g.*, JEFFERSON PARISH, LA, COMPREHENSIVE ZONING ORDINANCE, § XVII(K)(1) (amended 1991) (stating that all sites for off-site waste disposal facilities shall be "a minimum of one (1) mile from the property line of any residential or commercial use, school, church, park, playground, historical or archeological site, public building, day care center, hospital, prison, asylum, elderly or retirement home, facility processing or a warehouse storing foods"); ACADIA PARISH, LA, ORDINANCE 532, § 24(D)(1990)(no waste disposal facilities shall be placed within one mile of an inhabited residence, hospital or school).

37. *See, e.g.*, JEFFERSON PARISH, LA, COMPREHENSIVE ZONING ORDINANCE, § XVII(K)(4) (amended 1991) (prohibiting the siting of any off-site waste disposal facility in a flood-prone area); ACADIA PARISH, LA, ORDINANCE 532, § 24(E) (1990) (a controlled industrial waste facility shall not be sited in or over a principal groundwater resource or recharge area).

38. A. DAN TARLOCK, STATE SITING LAWS, LOCAL LAND USE LAWS, AND THEIR INTERPLAY, IN SITING OF HAZARDOUS WASTE FACILITIES — TRANSPORT OF HAZARDOUS SUBSTANCES 4-5 (1984).

Conservation and Recovery Act (RCRA) qualifying legislation either impliedly or expressly preempts local land use controls.[39] For example, the Florida Legislature explicitly preempts and expressly prohibits local governments from regulating the siting of hazardous waste storage facilities.[40] Other states affirm the power of local governments to veto proposed sites.[41] Louisiana is one state that has expressly reserved to local governments the power to site new hazardous waste facilities.[42]

Conflicts between state and local regulation may result in a judicial finding of preemption.[43] Several courts have addressed such conflicts between state and local laws.[44] In *Fondessy Enters v. City of Oregon*, a hazardous waste landfill owner sought to have a municipal ordinance imposing permit fees and record-keeping requirements declared invalid on preemption grounds.[45] Ohio's Supreme Court held that the ordinance was not pre-empted by a state statute forbidding municipalities from altering or limiting the construction or operation of state-licensed hazardous waste facilities. Based on its finding that no conflict existed between the state statute and the local ordinance, the court held that, where state laws and municipal ordinances concerning the monitoring of hazardous waste landfills located within city limits do not conflict, the state and city have concurrent authority under their respective police powers to enforce their respective directives within the city.[46]

Many recent preemption cases have addressed the validity of local ordinances which regulate the siting and operation of hazardous waste disposal facilities. The Connecticut Supreme Court has held that general local zoning authority does not extend to the enactment of zoning regulations that conflict with

39. Tarlock, *supra* note 22, at 3.

40. FLA. STAT. §§ 403.723, 403.7225(11) (1990).

41. *But see* CONN. GEN. STAT. ANN. § 22a-124 (Supp. 1981) (two-thirds vote of the state hazardous waste facility siting board may override a local veto).

42. "[N]o parish or municipality shall engage in any regulation of the generation, transportation, and/or disposal of hazardous wastes *other than the initial siting of facilities* pursuant to general land use planning, zoning, or solid waste disposal ordinances. LA. REV. STAT. ANN. 33:1236(31) (1988) (emphasis added).

43. In determining whether an ordinance is in "conflict" with the general laws of the state, the test is whether the ordinance permits or licenses what a statute forbids or prohibits, and vice versa. Struthers v. Sokol, 140 N.E. 519 (Ohio 1923).

44. *See* Clermont Envtl. Reclamation Co. v. Wiederhold, 442 N.E.2d 1278 (Ohio 1982) (holding that no municipal ordinance may be enacted that conflicts with a state statute).

45. Fondessy Enters. v. City of Oregon, 492 N.E.2d 797, 801 (Ohio 1986).

46. *Id.* at 802.

a permit issued by the state allowing the operation of a solid waste landfill.[47] Therefore, in Connecticut, if a state has permitted the operation of a facility, local governments cannot zone these facilities out of operation.

Another conflict between the requirements of state law and the local populace's aversion to a waste disposal facility occurred in *Stablex Corp. v. Town of Hookset*.[48] The Stablex Corporation challenged a local ordinance which required voter approval before a new facility could be constructed within the township. The court found the ordinance to be preempted by the state's hazardous waste legislation. The court held that the state had "devised a comprehensive and detailed program of statewide regulation, which on its face must be viewed as preempting any local actions having the intent or the effect of frustrating it."[49] Therefore, the court would not permit the local ordinance to contravene the state's comprehensive regulatory scheme.[50]

The principal problem with the jurisprudence of preemption is that no steadfast rules exist. A relatively straightforward preemption analysis is jarred by contradictory rulings which allow local governments to regulate hazardous waste disposal facilities without being preempted. In *Sharon Steel Corp. v. City of Fairmont*, the court upheld a local ordinance which prohibited the permanent disposal of hazardous wastes within the city limits. Under this ordinance, disposal of hazardous wastes was declared to constitute a public nuisance.[51] The court found that since the ordinance was aimed at "abating a public nuisance condition, rather than a regulatory ordinance designed to deal

47. City of Shelton v. Commissioner of Dept. of Envtl. Protection, 479 A.2d 208, 214 (Conn. 1984).

48. 456 A.2d 94 (N.H. 1982).

49. *Id.* at 100. *Accord* Rollins Envtl. Servs. v. Township of Logan, 508 A.2d 271 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 523 A.2d 157 (N.J. 1986)(holding that the State Waste Management Act preempted town ordinance that prohibited the disposal of polychlorinated biphenyls in designated areas within the municipality); Envirosafe Serv. of Idaho, Inc. v. County of Owyhee, 735 P.2d 998, 1001 (Idaho 1987) (holding that a county ordinance regulating the disposal of hazardous wastes was preempted by the state act because it was held to be "a comprehensive statutory scheme of the kind which implicitly evidences legislative intent to preempt the field").

50. 456 A.2d at 100. In a subsequent case, the New Hampshire Supreme Court followed the same reasoning used in the Stablex case. In that case, *Applied Chemical Tech. v. Town of Merrimack*, the court invalidated the town's veto of a hazardous waste treatment facility's construction site plan. 490 A.2d 1348 (N.H. 1985). The court found no merit in the town's argument that the state statute did not preempt local regulation that focused primarily on local economic effects of a proposed facility siting. *Id.* at 1349.

51. 334 S.E.2d 616 (W.Va. 1985).

with the management and control over the disposal of hazardous wastes," it was not preempted by the West Virginia Hazardous Waste Management Act.[52] The court relied upon the public nuisance emphasis of the ordinance and the express savings clause found in the state regulatory statute to distinguish this case from the *Stablex* line of cases.[53]

Because of the unpredictability in the case law, an effort to create a bright line rule for when a local ordinance regulating the disposal or treatment of hazardous wastes will be preempted is problematic. Generally, a local ordinance is preempted by a state statute whenever the state legislature has demonstrated an intent to occupy the entire field of regulation on the matter, or whenever the local ordinance irreconcilably conflicts with the statute.[54] Whether an ordinance conflicts with a statute can only be determined by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives.[55] Since each state has differing laws regulating hazardous waste disposal, each state's law must be scrutinized to determine whether or not preemption of local laws will occur.

Preemption analyses are necessarily less complex when a state legislature expressly indicates its willingness to share regulatory authority with local agencies.[56] As mentioned above, Louisiana expressly reserves to local governments the power to site hazardous waste facilities.[57] In Louisiana, therefore, no preemption should be found of local siting ordinances since the legislature has expressly shared this state power with the local political subdivisions.[58]

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52. *Id.* at 622. The court also held that the ordinance was not preempted by RCRA.

53. *Id.* at 622-23.

54. The Supreme Court of New Jersey has established the following guidelines for deciding whether a state statute preempts a local ordinance: (1) Does the ordinance conflict with state law either because of conflicting policies or operational effect; (2) was state law intended, expressly or implicitly, to be exclusive in the field; (3) does the subject matter reflect the need for uniformity; (4) is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulations; and (5) does the ordinance stand as an obstacle to accomplishment and execution of full purposes and objectives of the legislature. Crow-New Jersey 32 Ltd. v. Township of Clinton, 718 F. Supp. 378, 386 (D.N.J. 1989).

55. *See* City of Shelton v. Comm'r of the Dept. of Envtl. Protection, 479 A.2d 208 (Conn. 1984).

56. *See, e.g.,* People v. Mueller, 8 Cal. App. 3d 949 (1970) (holding that ordinance prohibiting disposal of bait into the city harbor was not preempted by state law).

57. *See generally* Gramling & Earl, *supra* note 8, at 677-86.

58. *See* Palermo Land Co. v. Planning Comm'n of Calcasieu Parish, 561 So. 2d 482,

3b. Federal Preemption

In addition to avoiding conflicts with state law, local ordinances must avoid conflicts with federal law. For example, an Arkansas court held that a local government cannot subvert federal policy and prohibit the storage, treatment, or disposal of hazardous waste which is authorized by federal regulation.[59] Local laws that attempt to regulate hazardous waste in a manner which conflicts with the federal regulatory scheme will be held invalid due to the preemption doctrine.

The federal preemption tests are similar to those used to test for state preemption of local ordinances.[60] Local laws cannot stand if the federal law evidences a legislative intent to occupy the field which the local ordinance proposes to regulate.[61] Additionally, local laws will be found to be preempted if irreconcilable conflicts arise between federal and local law when a local law is implemented or enforced.[62] Of course, just as with state preemption, some federal laws avoid the preemption problem by expressly reserving authority to state or local governments.[63]

B. Actions Available Against an Existing Toxic Waste Dump

1. Regulating Hazardous Waste on a Local Level

Local governments have been innovative in filling the gaps between federal and state legislation by using their police powers in three important ways.[64] First, some local governments have

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498 (La. 1990) (noting that "such an intent [to preempt zoning] cannot be gleaned from the state environmental legislation. None of the regulations, nor the laws which authorize them, purport to displace local authority over land use planning to control siting . . . .")

59. Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986). In *Ensco, Inc. v. Dumas*, a county in Arkansas adopted an ordinance barring the storage, treatment, or disposal of acutely hazardous waste within the county. Under this ordinance, Ensco was effectively prohibited from incinerating wastes at its facility. Both the district court and the court of appeals found that the ordinance was preempted by federal law because it subverted federal policies concerning the safe handling of hazardous wastes. *Id.* at 745.

60. Cranberry Hill Corp. v. Shaffer, 629 F. Supp. 628, 630 (N.D.N.Y. 1986).

61. *Id.* at 630-31.

62. *See also infra* part III.A.1.a..

63. *See, e.g.*, RCRA, 42 U.S.C. § 6929 (1988) (provision authorizing "any state or political subdivision" to impose requirements more stringent than the federal regulations); CERCLA, 42 U.S.C. § 9614 (provision authorizing the imposition of additional liabiilty requirements or more stringent hazardous substance release laws); *see also* North Haven Planning Comm'n v. Upjohn Co., 921 F.2d 27 (2d Cir. 1990) (noting that zoning regulations were not preempted by RCRA).

64. The United States Supreme Court has affirmed the use of the police power by local governments to regulate environmental quality. In *Huron Portland Cement Co. v.*

shifted the burden of identifying hazardous waste sites to the private sector, thus breaking down a tremendous administrative and financial barrier to efficient and speedy site identification and cleanup.[65] Second, where not preempted, many local governments have enacted laws to halt environmental threats, such as groundwater pollution.[66] Third, local governments have responded to these threats far more rapidly than the federal or state governments.[67] On a practical level, local governments can provide better and more rapid "on-the-scene" regulatory authority than can the state or federal government because of their proximity to such sites.[68] Thus, local governments fill a vital supplemental role in both identifying hazardous waste sites and in responding quickly to hazardous waste contamination under ordinances which address the myriad of sources of pollution.[69]

Local governments can also use a variety of local tools as leverage to remediate hazardous waste contamination, including revoking occupational licenses, refusing building permits, and rezoning through the enactment of ordinances.[70] Local ordinances may not be able to prohibit outright the disposal of hazardous waste within that jurisdiction, but ordinances can be enacted which increase the costs and administrative burdens of operation. Since pollution follows the path of least resistance, a hazardous waste facility may decide to locate in a different locale with less restrictions. As an illustration, local ordinances could require a hazardous waste facility operator to maintain complete and accurate records showing the type, amount, and volume of all hazardous waste disposed of or treated within the facility.[71] Ordinances could also regulate traffic, roads, landscaping, buildings, sewage disposal, signs, aesthetics, hours of operation, waste

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City of Detroit, the court upheld the enforcement of Detroit's Smoke Abatement Code, finding that it "was enacted for the manifest purpose of promoting health and welfare of the city's inhabitants." 362 U.S. 440, 442 (1960). Such local pollution control legislation was said to fall clearly "within the exercise of even the most traditional concept of what is compendiously known as the police power." *Id.* This ruling holds true whenever local regulation is not preempted by state or federal law.

65. *Id.*

66. *Id.*

67. *Id.*

68. To illustrate a comparison, authors have stated that "[i]n the race to discover and combat hazardous waste contamination, local government is a sprinter while the state and federal governments are distance runners." Gramling and Earl, *supra* note 8, at 679.

69. *Id.* at 678.

70. *Id.* at 679.

71. *See* Fondessy Enters. v. Oregon, 492 N.E.2d 797, 798 (Ohio 1986).

capacity, and site selection of the facility.[72]

In addition, local governments have imposed the requirements of buffer zones surrounding hazardous waste facilities,[73] and of facility monitoring to protect against unknown leakage. California courts have upheld both of these exercises in local government legislation.

In 1986, the California Legislature enacted a law allowing counties to prepare hazardous waste management plans regulating the expansion and location of hazardous waste facilities within their jurisdictions.[74] The court in *IT Corp. v. Solano County Board of Supervisors* interpreted this law.[75] The court found that a county requirement of buffer zones for hazardous waste facilities fell under the category of land use restrictions that local governments are expressly authorized to enforce under a statutory grant of authority.[76] The court additionally found that, like the setback restrictions commonly included in conditional use permits, the buffer zone serves a reasonable purpose by making the permitted facility more compatible with other surrounding uses.[77]

In another California case, *Casmalia Resources Ltd. v. County of Santa Barbara*, the court upheld a county ordinance requiring the operator of a hazardous waste facility to conduct a monitoring program to detect off-site leakages of toxic substances.[78] The court concluded that "the Legislature did not intend to preempt reasonable local regulation which does not prohibit the disposal and treatment of toxic waste."[79]

The requirements of buffer zones and facility monitoring were upheld as valid local hazardous waste regulations. These

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72. *See* Local Hazardous Waste Regulation, 67 A.L.R. 4th 829.

73. JEFFERSON PARISH, LA, COMPREHENSIVE ZONING ORDINANCE, § XVII(K)(5) (amended 1991) (requires off-site waste disposal facilities to contain a minimum of 500 feet of front, side, and rear yard green area measured from the property line and containing a minimum of one tree for every 35 feet of lot perimeter).

74. CAL. HEALTH & SAFETY CODE § 25149 (Deering 1988); IT Corp. v. Solano County Bd. of Supervisors, 222 Cal. App. 3d 1629, 1634 (1990), *reh'g granted*, 799 P.2d 1282 (1990). Section 25149(a) makes it clear that local governments retain the right to enforce land use regulations affecting hazardous waste sites: "Nothing in this section authorizes an operator of that facility to violate any term or condition of a land use permit or any other provision of law not in conflict with this section."

75. *IT Corp.*, 222 Cal. App. 3d at 1635.

76. *Id.*

77. *Id.* at 1636.

78. Casmalia Resources Ltd. v. County of Santa Barbara, 195 Cal. App. 3d 827 (1987).

79. *Id.* at 836.

types of regulations are important in filling legislative gaps left in the federal and state regulatory schemes.

2. Regulating Transportation of Hazardous Wastes

A 1983 EPA study concluded that ninety percent of off-site transportation of hazardous waste is by truck, and that an average of one drum of hazardous waste is lost for every three truckloads being transported.[80] For the most part, these lost drums end up on roadsides and on property within the jurisdictions of local governments. As of 1981, at least fifty-five localities and states had attempted to regulate the transportation of hazardous wastes to control the problems associated with accidental losses and spills during transport.[81] Many other regional governments have considered enacting similar regulations.[82]

To protect residents, counties or municipalities could enact ordinances which require transporters of hazardous waste to obtain approval from, or at least inform, the local government of all routes to be used through that jurisdiction. Transportation routes through or near residential and sensitive ecological areas should be avoided to the maximum extent possible.[83] The transporter should bear the burden of showing that transport through these protected areas is necessary and cannot be avoided.[84]

In drafting regulations for the control of hazardous wastes, local governments must realize that limitations on the transportation and disposal of hazardous waste which originates outside the boundaries of the local jurisdiction are likely to encounter either Commerce Clause challenges,[85] or challenges under the Hazardous Materials Transportation Act (HMTA).[86] The HMTA does not expressly prohibit state or local laws affecting hazardous waste transportation. As long as the local laws are

80. *Truck Transport of Waste as Risky as Treatment, Disposal, Consultant Says*, 14 ENV'T REP. (BNA) 733 (Sept. 2, 1983).

81. Bradley M. Marten, *Regulation of the Transportation of Hazardous Materials: A Critique and a Proposal*, 5 HARV. ENVTL. L. REV. 345, 354-56 (1981).

82. *Highway Safety Act of 1983: Transportation of Hazardous Materials: Hearings on S.1108 Before the Senate Comm. on Commerce, Science and Transportation*, 98th Cong., 1st Sess. 205 (1983).

83. JEFFERSON PARISH, LA, COMPREHENSIVE ZONING ORDINANCE, § XVII(K)(22) (amended 1991).

84. *Id.*

85. *See, e.g.*, Browning-Ferris, Inc. v. Anne Arundel County, 438 A.2d 269 (Md. App. 1981). These challenges may be avoided if the regulations apply even-handedly to in-state and out-of-state transporters.

86. 49 U.S.C. § 1811(a) (1988).

not inconsistent with the HMTA or other pertinent federal laws, they are permitted.[87] Since the HMTA does not address liability, a state or local law imposing strict liability on transporters for hazardous waste spills or accidents would be consistent with this federal law. Assuming such a law would not conflict with the provisions of other applicable federal or state laws or discriminate against interstate commerce, this law would provide the benefit of protecting local governments from having to pay for spills and accidents.[88]

3. Analysis of Common Law Rights and Remedies

In addition to challenging a toxic waste dump under local ordinances or state laws, citizens can bring a toxic tort claim to redress injuries or interferences with property rights caused by that dump site. Four theories of tort are available to victims of toxic or hazardous waste exposure: nuisance, trespass, negligence, and strict liability.[89]

a. Nuisance

Two types of nuisance actions exist: private nuisance and public nuisance. An action for a private nuisance would lie where the defendant's unreasonable use of his property interferes with the reasonable use of the plaintiff's property.[90] Potential nuisance remedies include injunctions against the continuance of the nuisance, or monetary damages for injuries, loss of use and

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87. *Id.*

88. Marten, *supra* note 81, at 374-75.

89. Each of these tort theories require proof of causation. Plaintiffs can fail to prove the requisite causal link to their harm when dealing with toxic substances for three reasons: (1) latency periods of fifteen to forty years before illness or cancer may result, (2) difficulties in attributing adverse health effects to a specific pollutant or source, and (3) no generally accepted minimum threshold levels below which would cause no adverse health effects.

For these reasons, some authors have suggested replacing the traditional tort remedies with an administrative compensation scheme. Proponents of such a scheme visualize it as providing a reasonable level of compensation for the exposure victim, without the need for a jury, in less time, with lower costs, and with more scientific and medical accuracy. Ora F. Harris, *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 SW. L.J. 909, 950 (1986). A critic of this system states that "although attractive from the standpoint of avoiding the potential for large verdicts produced (in the view of the defense bar) by public hysteria, [it] will in all probability *not* result in shorter, less complex 'trials'." Donald W. Stever, *Remedies for Hazardous or Toxic Substance-Related Injuries: A Discussion of the Usefulness of Regulatory Standards*, 25 HOUS. L. REV. 801, 812 (1988).

90. Ronald Rychak, *Common Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L.J. 657, 660 (1989).

enjoyment of property, costs of abatement, and emotional distress caused by the nuisance.[91] An individual may also seek a tort action for public nuisance if the unreasonable use violated a criminal statute, interfered with the general public, or caused the plaintiff some special injury.[92] Local authorities can also enforce hazardous waste regulations through the common-law principle of nuisance.[93] Therefore, both types of nuisance actions theoretically could be used to challenge the actions of individuals and industries which improperly store or dispose of hazardous waste,[94] even if those activities were permitted under a local government ordinance.[95]

Perhaps the most celebrated recent case involving nuisance is the Tennessee case of *Sterling v. Vetsicol Chemical Corp.*.[96] This case was a class action brought by residents within a three-mile radius of a chemical waste burial site. Vetsicol operated the site from 1964 until it was closed as a hazardous waste site in 1973. The plaintiffs alleged that chemical contamination from the waste site had leached into the groundwater and contaminated their wells. Many of the neighboring residents suffered health problems, and they sought compensatory and punitive damages from Vetsicol. The cases of five representative members of the class were tried, and the court awarded compensatory damages ranging from 350,000 to 2,300,000 dollars, and punitive

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91. *Id.* at 686-93.

92. Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10292 (1986).

93. In *Village of Wilsonville v. SCA Servs., Inc.*, the village sued under a public nuisance theory to require the removal of a hazardous waste landfill. The Illinois Supreme Court affirmed the trial court's grant of an injunction, and the requirements that defendant exhume all material from the site and reclaim the surrounding area. 426 N.E.2d 824, 841 (Ill. 1981).

94. Under conventional nuisance law, it is difficult to enjoin any facility in advance of its operation because of the doctrine of imminent irreparable harm. DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 3.05, at 3-20 (1989). Thus, a nuisance action is not useful in preventing the original siting of a hazardous waste TSD facility.

95. Martin V. Melosi, *Hazardous Waste and Environmental Liability: An Historical Perspective*, 25 HOUS. L. REV. 741, 763 (1988).

Courts generally agree that, by authorizing certain land uses in an area, a zoning ordinance does not preclude a nuisance claim against a business operating under that ordinance. *See* Armory Park Neighborhood Ass'n v. Episcopal Comm. Serv., 712 P.2d 914, 921 (Ariz. 1985); State *ex rel.* Gardner v. Sailboat Key, Inc., 295 So.2d 658, 662 (Fla. App. 1974). *But see* Green v. Castle Concrete Co., 509 P.2d 588 (Colo. 1973) (en banc) (holding that activities of defendant concrete company on its own property did not constitute a public nuisance where permitted by local zoning regulations).

96. 647 F. Supp. 303 (W.D. Tenn. 1986), *modified*, 855 F.2d 1188 (6th Cir. 1988).

damages of 7,500,000 dollars to the class. The court also awarded damages for anxiety and discomfort which were incidental to the property damage caused by the nuisance.[97]

In discussing the nuisance theory offered by the plaintiffs, the court said,

> Occasionally, a nuisance proceeds from a malicious desire to do harm, but usually a nuisance is intentional in the sense that the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiffs is substantially bound to follow therefrom. A nuisance may also result from conduct which is merely negligence, to wit: a failure to take precautions against a risk apparent to a reasonable man. Finally, a nuisance may occur when a defendant carries on in an inappropriate place an abnormally dangerous or hazardous activity. The court finds that Vetsicol chemical dump meets all of the above requirements.[98]

The *Vetsicol* case is a typical example of the modern use of the nuisance theory. This theory is most often utilized in cases involving hazardous wastes and/or groundwater contamination.[99]

General common-law nuisance principles allow a court to hold a landowner liable for the consequences of a nuisance condition that the landowner did not create.[100] Therefore, the primary limitation on the usefulness of nuisance law for cleaning up toxic waste dumps is not distinguishing between persons who caused the nuisance and passive inheritors of the dumpsite. Instead, the scope of the nuisance concept itself limits its useful-

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97. On appeal, the Sixth Circuit reversed the finding of nuisance liability as to three of the named plaintiffs. As these plaintiffs were not actually residents of the affected area, they could receive no award for impaired quality of life. 855 F.2d 1188, 1211 (6th Cir. 1988). Johnson and Ware opine that if the plaintiffs had alleged public, as well as private, nuisance, the court probably would have upheld the award to the nonresident plaintiffs. JOHN M. JOHNSON & GEORGE W. WARE, PESTICIDE LITIGATION MANUAL 3-30 (1990).

98. 647 F. Supp. at 320.

99. JOHNSON & WARE, *supra* note 97, 3-30; *see also* Chappell v. SCA Servs. Inc., 540 F. Supp. 1087 (C.D. Ill. 1982).

100. RESTATEMENT (SECOND) OF TORTS § 837 cmt. f (1977). Yet, also under the Restatement (Second), a current landowner is not liable for failure to abate a nuisance if the nuisance condition was not created by the current landowner and the condition is not abatable. *Id. See also* Philadelphia Chewing Gum Corp. v. Pennsylvania, 387 A.2d 142, 149 (Pa. Commw. Ct. 1978) (holding that state police power could not be used to require landowner to abate a public nuisance on his land where his ownership was not related to the forces or conditions resulting in such nuisance); Pennsylvania v. Wyeth Laboratories, 315 A.2d 648, 655 (Pa. Commw. Ct. 1974) (holding an innocent landowner who had not engaged in any affirmative acts to create the pollution was not required to abate the nuisance unless it were feasible to do so).

ness. The problem with a nuisance cause of action is that, in determining whether a condition constitutes a nuisance, courts traditionally balance a great number of factors including the utility of the activity and the gravity of the harm.[101] "In some cases, balancing of the various factors will yield a conclusion that the condition is not a nuisance; while in other cases, the need to make such a showing will itself deter litigation."[102]

b. *Trespass*

Most courts are willing to find new ways to provide a theory of recovery for plaintiffs who have suffered a chemically related injury, and trespass can be a viable theory of liability in many cases.[103] To recover in trespass, a plaintiff must show: (1) An invasion affecting an interest in the exclusive possession of the property, (2) an intentional doing of the act which results in the invasion, (3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest, and (4) substantial damage to the *res*, or property.[104] If, as a result of the defendant's operations, a polluting substance is deposited on the plaintiff's property which interferes with the plaintiff's exclusive possessory interest by causing substantial damage, then the plaintiff may seek a damages remedy under the law of trespass, even though an alternative remedy of nuisance may also exist.[105] Therefore, if a neighboring hazardous waste site leaks onto adjacent property or contaminates groundwater, the adjacent landowner may bring an action in trespass.[106]

A plaintiff in a trespass action can recover for personal as well as property damage.[107] A mere invasion alone without damage can give rise to a claim for nominal damages.[108] And, finally, because a trespass action requires a showing of intent, plaintiffs may seek to recover punitive damages from the defendant responsible for the invasion.[109]

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101. WILLIAM H. ROGERS, JR., ENVIRONMENTAL LAW 100 (1977).

102. Hingerty, *supra* note 6, at 39.

103. JOHNSON & WARE, *supra* note 97, at 3-31, 3-32.

104. Borland v. Sanders Lead Co., 369 So. 2d 523, 523-24 (Ala. 1979).

105. *Id.* at 527.

106. While the intruding material in a trespass action need not be detectable by human senses, it must at least be measurable by experts. *See, e.g.*, Padilla v. Lawrence, 685 P.2d 964, 971 (N.M. App. 1984).

107. *See*, William Keeton, *Trespass, Nuisance and Strict Liability*, 59 COLUM. L. REV. 457, 470-73 (1959).

108. *Id.*

109. *See, e.g.*, Maryland Heights Leasing v. Mallinckrodt, Inc., 706 S.W.2d 218, 221-

c. Negligence

The elements of a negligence cause of action are as follows: (1) A duty or obligation recognized by law, which requires a person to conform to a certain standard of conduct for the protection of others; (2) a failure to conform to the standard required (*i.e.* a breach of the duty), (3) a reasonably close causal connection between the conduct and the resulting injury, and (4) actual loss or damage to the interests of another.[110] Even though negligence is a useful cause of action, many lawyers choose to use the less burdensome proof requirements found in strict liability actions.

Negligence remedies include damages for personal and property injuries.[111] A plaintiff may also recover punitive damages if the defendant's conduct is "wanton and willful," reckless, or malicious.[112] In all negligence cases, the plaintiff has the duty to mitigate, or attempt to lessen, any damage caused. In other words, plaintiff's recovery will be decreased for any injuries that could have been avoided by the plaintiff.[113]

d. Strict Liability

A person who engages in "ultrahazardous activities" is liable for damage caused to persons or property even though that person is very careful and tries to prevent the harm.[114] An "ultrahazardous activity" is defined as an activity that necessarily involves a risk of serious harm, which cannot be eliminated by the exercise of the utmost care, and that is not a matter of common usage.[115] The improper storage and disposal of hazardous waste should qualify as an ultrahazardous activity under the Restatement (First) of Torts[116] definition since these activities involve a serious risk of harm to health and the environment.

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24 (Mo. App. 1985) (upholding a prayer for $10,000,000 in compensatory damages and $5,000,000 in punitive damages); Hickox v. Vester Morgan, Inc., 439 So. 2d 95, 101-02 (Ala. 1983) (granting punitive damages for radioactive emmissions trespass and oil spill trespass because wantonness was shown by defendant's knowledge of the invasion of plaintiff's rights).

110. WILLIAM L. PROSSER, CASES AND MATERIALS ON TORTS 144 (7th Ed. 1982).

111. *Id.* at 536-37.

112. *Id.* at 206.

113. Zimmerman v. Ausland, 513 P.2d 1167, 1169-70 (Or. 1973).

114. *See* RESTATEMENT (FIRST) OF TORTS § 520 (1938).

115. *Id.*; Joel A. Mintz, *Abandoned Hazardous Waste Sites and the RCRA Imminent Hazardous Provision: Some Suggestions For a Sound Judicial Construction*, 11 HARV. ENVTL. L. REV. 247, 295 (1987).

116. RESTATEMENT (FIRST) OF TORTS § 520 (1938).

And, although advances have been made in hazardous waste disposal techniques, it is unlikely that this new technology can eliminate all risk of harm.[117]

Improper disposal of hazardous wastes may also fall under the "abnormally dangerous" activity doctrine of the Restatement (Second) of Torts. This doctrine is defined by balancing six factors: (1) existence of a high degree of risk of some harm to the person or property of others, (2) likelihood that the harm that results will be great, (3) inability to eliminate the risk by the exercise of reasonable care, (4) extent to which the activity is not a matter of common usage, (5) inappropriateness of the activity to take place where it is carried on, and (6) extent to which its value to the community is outweighed by its dangerous attributes.[118] This standard is more difficult for plaintiffs to meet because of the balancing involved.

Under the doctrine espoused in *Rylands v. Fletcher*, "the person who for his own purposes brings on his land and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."[119] Applying this case to a hazardous waste dump, it would follow that the storage of hazardous materials could subject the owner to strict liability for any releases or leakage. However, the "non-natural use" requirement may suggest a balancing of social utilities which might weigh in favor of a polluting industry which is "natural" in that particular area or location.[120]

Strict liability actions are probably the easiest for plaintiffs to bring since liability is assumed and courts are more likely to be sympathetic to an innocent plaintiff's injuries.[121] Courts tend to construe the facts in favor of the injured plaintiff especially

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117. Colin Scott Cole Fulton, *Hazardous Wastes: Third-Party Compensation for Contingencies Arising from Inactive and Abandoned Hazardous Waste Disposal Sites*, 33 S.C. L. Rev. 543, 563 (1982). Yet, at least one court has held that disposal of hazardous waste is not necessarily ultrahazardous since safe disposal methods exist. Fox v. McCoy, 21 Env't Rep. Cas. (BNA) 1945, 1947 (D. Pa. 1984).

118. Restatement (Second) of Torts, § 520 (1977).

119. 1 L.R.-Ex. 265, 279 (1866). The House of Lords narrowed this holding somewhat to apply strict liability only if the usage of the land was a "non-natural use." L.R. 3 H.L. 330, 339 (1868).

120. *See* Fritz v. DuPont, 75 A.2d 256, 261 (Del. 1950) (holding that the mere use of chlorine gas at plant was not unusual and not "dangerous per se in the light of recognized industrial use").

121. Damage remedies are similar to those available in a negligence action.

when that party was involuntarily exposed to a high degree of risk, as in the case of hazardous waste exposure, as opposed to a person who voluntarily uses a manufacturer's product.[122]

C. *Actions to Ensure Proper Cleanup of a Closed Toxic Waste Dump*

Some commentators believe that a state cannot carry out an effective program, which will assure that the capacity of the state's hazardous waste facilities is adequate to handle the supply of hazardous waste that needs to be disposed of, without centrally controlling both the manner and extent of closure of existing sites.[123] Following this theory, many states explicitly preempt local governments from controlling the cleanup of hazardous waste sites.

Where not preempted, local governments have the ability to protect the health and safety of their citizens, as well as to insure the economic integrity of the area, as an exercise of their police powers. A West Virginia ordinance that declared the permanent disposal of hazardous waste to be a public nuisance and gave the city the power to abate public nuisances, was judicially upheld as a reasonable approach to risks presented by hazardous waste facilities that are potentially hazardous to human health and the environment.[124]

Local governments should use their police powers to shift the burden of hazardous waste identification, remediation, and cleanup to the private sector. One way local governments can do this is by requiring the posting of a substantial cash bond, issued by a corporate surety, as a means of ensuring that the owner/operator of the hazardous waste facility will comply with the terms of the permit and of any applicable ordinances. This bond should also hold the local government harmless from any expense or liability incurred as a result of the operation of the facility.[125] In addition, local governments should require that

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122. JOHNSON & WARE, *supra* note 97, at 3-28 nn.209-10.

123. IT Corp. v. Solano County Bd. of Supervisors, 222 Cal. App. 3d 1629, 1639 (1990) *reh'g granted*, 799 P.2d 1282 (1990). The court found that site closure directly affects statewide capacity of hazardous waste facilities, and that site closure not only subtracts from the state's capacity for hazardous waste disposal, but also impacts the capacity of other hazardous waste facilities when contaminated material removed from closed sites is disposed of at these facilities. *Id.*

124. Sharon Steel Corp. v. Fairmont, 334 S.E.2d 616 (W.Va. 1985).

125. *See* JEFFERSON PARISH, LA, COMPREHENSIVE ZONING ORDINANCE, § XVII(K)(15) (amended 1991).

facilities maintain sufficient liability insurance for claims arising out of injury to persons or property due to the operation of the facility.[126]

The use of superlien ordinances and pre-sale property compliance reports to identify potential hazardous waste sites and to compel hazardous waste cleanups should also be encouraged.[127] A "superlien" grants the state or local government a lien on certain property to ensure repayment of funds utilized by the governmental entity for environmental cleanup. In many cases, the lien can extend to all property of the person or entity liened in the state, not just the contaminated property. Some laws provide the superlien with priority over other debts incurred, or liens granted prior to the time the government obtained its superlien.[128]

III. Rights And Remedies At The State Level

A. *Actions To Prevent the Establishment of a Toxic Waste Dump*

1. State Permitting and Siting of Hazardous Waste Dumps

The siting of TSD facilities is becoming increasingly regulated by states. Mississippi, for example, has added "buffer zone" siting provisions to its TSD regulations.[129] Wisconsin restricts hazardous waste facility siting in floodplains, wetlands, and endangered species habitat.[130] Other states, through statutes and regulations, provide specific procedures and criteria for siting decisions.[131]

One feature of some state environmental permitting of new hazardous waste TSD facilities is its division into two stages: the "permit to construct" stage, and the "permit to operate" stage.[132] Under the bifurcated system, the responsible state

126. *Id.* § XVII(K)(16). These requirements shall be in addition to any state or federal financial responsibility requirements. *Id.* (K)(17). Such requirements help to guarantee that an injured resident or the local government will not be faced with an insolvent owner or operator.

127. Gramling & Earl, *supra* note 8, at 686. Local governments should also impose nonrefundable fees to finance oversight and enforcement of permitted facilities.

128. *Id.*

129. MISS. HAZARDOUS WASTE MANAGEMENT REGULATIONS § 264.18(c) (1986).

130. WIS. ADMIN. CODE § 181.42(2) (1989).

131. *See, e.g.*, IOWA ADMIN. CODE, div. 567, tit. XI, ch. 151 (1988).

132. KAN. STAT. ANN. § 65-3433(b) (1990); OHIO REV. CODE ANN. § 3734.05 (A)(1)-(2) (1989); S.C. CODE ANN. §§ 48-1-100, 110 (1988); VA. CODE ANN. §§ 62.1-44.18:2, 62.1-44.19 (1988); MISS. REGULATIONS § 270.20(f) (1986).

agency reviews the proposed construction plans and ordinarily approves the construction permit with such conditions and limitations deemed necessary for environmental protection. After the facility is constructed, the agency determines whether or not this facility will operate as planned and with only the anticipated environmental side-effects.[133] After this determination is made, the operation permit is granted.

Since the review at the construction permit stage is normally more extensive, citizens should focus their involvement at this stage.[134] Once a facility is constructed, it is much more difficult, for monetary and political reasons, to convince an agency that the facility should not receive its permit.

2. Preemption Revisited

State lawmakers who enact laws that conflict with federal laws risk preemption. Under the Supremacy Clause of the United States Constitution, federal law governs over conflicting state law.[135] State law can be preempted in one of three ways: by express conflict, by implication, or by operation of the Commerce Clause.

a. Express Preemption

Federal statutes may expressly preempt a state or local ordinance. For example, the Hazardous Materials Transportation Act expressly preempts state or local regulations which are inconsistent with the federal regulatory scheme.[136] When a federal statute unambiguously precludes certain types of state legislation, a court need not go further than the statutory language to determine whether a state statute is preempted.[137]

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133. SELMI & MANASTER, *supra* note 94, § 8.03[2][a].

134. RCRA § 7004 demands that public participation be "provided for, encouraged and assisted" in the implementation of all parts of RCRA by EPA and *by the states*. 42 U.S.C. § 6974 (emphasis added). Therefore, states should adopt provisions that maximize the public's involvement in siting decisions. Gergits, *supra* note 17, at 111 n.88.

135. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

136. Hazardous Material Transportation Act, 49 U.S.C. § 1801.

137. Exxon Corp. v. Hunt, 475 U.S. 355 (1986) (holding that CERCLA's § 114(c) preempted two of the six purposes for which New Jersey's Spill Compensation and Control Act could be used. The four other purposes were beyond the scope of CERCLA and not covered by § 114(c)).

When an express preemption claim is not clear from the face of the statute, courts must often perform a careful analysis of statutory construction, congressional purpose, and legislative history to come to a conclusion. The court's function is to determine whether preemption of state laws on the same subject matter was the legislative intent of the federal statute.[138]

In the realm of federal hazardous waste regulation, RCRA and CERCLA contain express provisions governing preemption of state laws. Section 6929 of RCRA states,

> Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by these regulations . . . . Nothing in this subchapter 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. Nothing in this chapter (or in any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within the State or transported to a treatment, storage or disposal facility within that State.[139]

From a plain reading of this statute, it is clear that state laws which are more stringent than federal law will not be preempted. Only those laws which require less than the federal statute would be expressly preempted.

CERCLA has a section addressing the issue of preemption which states that "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing additional liability or requirements with respect to the release of hazardous substances within such State."[140] CERCLA's preemption clause does not speak in terms of state laws which are more or less stringent. Instead, it speaks of state laws which are more comprehensive. CERCLA specifically allows states to enact laws which impose additional liability or release-response requirements.[141]

Since preemption has been addressed in both CERCLA and

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138. Cranberry Hill Corp. v. Schaffer, 629 F. Supp. 628, 632 (N.D.N.Y. 1986).

139. 42 U.S.C. § 6929.

140. *Id.* § 9614(a).

141. *Id.* § 9658.

RCRA, a judicial inquiry into the preemption of state law is made substantially easier.[142] In a preemption challenge under RCRA, preemption will only be found if a state law is in conflict with the substance of the federal statutes because it is less stringent than the federal law or regulations.[143] States whose statutes are more stringent than RCRA will not be found to be preempted.[144]

b. *Preemption by Implication*

In *Ray v. Atlantic Richfield Co.*, the United States Supreme Court set forth a two-part test to determine whether a state or local law has been impliedly preempted by federal law.[145] Preemption by implication occurs if compliance with both federal and state or local law is impossible,[146] or if the local or state law would impede Congress' objectives.[147] Under both approaches, judges must determine the congressional objective and decide whether the state law impedes accomplishing this objective. Determination of whether or not a state law interferes with federal policy objectives must be done on a case-by-case basis, and therefore no generalized rules concerning implied preemption are feasible.[148]

c. *Preemption by the Commerce Clause*

The Commerce Clause has been held to invalidate any state law that encumbers free commerce between states unless the state interest is sufficiently justified.[149] This holds true even in the absence of otherwise preemptive federal legislation.[150]

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142. Audrey J. Anderson, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131, 140 (1989).

143. 42 U.S.C. § 6929.

144. *Id.*

145. 435 U.S. 151 (1978).

146. *Id.* at 158; Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

147. 435 U.S. at 158 (*citing* Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

148. Many other federal laws have been the subject of preemption claims. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (NFMA); Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 499 (9th Cir. 1984) (Coast Guard regulations); Man Hing Ivory Imports v. Deukmejian, 702 F.2d 760, 764 (9th Cir. 1983) (Endangered Species Act). The jurisprudence of these cases can be utilized in situations concerning hazardous waste regulations since the same preemption jurisprudence applies for all federal laws.

149. U.S. CONST. art. I § 8, cl. 3; *see* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).

150. "When legislating in areas of legitimate concern, such as environmental

The Commerce Clause works to prevent "[s]tates from erecting barriers to the free flow of interstate commerce."[151] Courts must "weigh the state regulatory concerns against the burden imposed on the course of interstate commerce."[152] Three general approaches have been identified for determining whether a state law is valid under the Commerce Clause. The following state laws are likely to be preempted by the Commerce Clause: (1) State actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance, (2) state legislation not containing a peculiarly strong state interest in the interference with interstate commerce, and (3) state laws where the incidental burden on interstate commerce is clearly excessive in relation to the local benefits.[153]

Commerce Clause challenges most often present themselves in cases challenging state laws which attempt to ban or limit the import of out-of-state wastes. In *City of Philadelphia v. New Jersey*, the court held that while a New Jersey statute prohibiting the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the state" was not preempted by federal legislation, it violated the Commerce Clause.[154] The court found that New Jersey's law blocked the importation of wastes solely as a means of slowing the flow of refuse into that state's remaining landfill sites and that this legislative effort was clearly impermissable under the Commerce Clause.[155]

This judicial animosity toward protectionist legislation has been maintained through the years. In *Brown-Ferris, Inc. v. Anne Arundel County, Maryland*, a county ordinance was invalidated as being in violation of the Commerce Clause.[156] The court held that the ordinance, which absolutely prohibited disposal in the county of hazardous wastes not originating in that county as well as prohibiting transportation of any such waste

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protection and resource conservation, States are nonetheless limited by the Commerce Clause." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981).

151. *Raymond Motor Transp.*, 434 U.S. at 440.

152. Direct Automobile Imports Ass'n v. Townsley, 804 F.2d 1408, 1416 (5th Cir. 1986).

153. *See* SELMI & MANASTER, *supra* note 94, § 5.04[5] (citing Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 399 (3d Cir. 1987)).

154. 437 U.S. 617, 621 (1978).

155. *Id.* at 629.

156. 438 A.2d 269, 272 (Md. 1981).

through the county, was void as discriminating against articles of interstate commerce.

Other cases involving the transport of wastes have explored the validity of reciprocity requirements,[157] quarantines,[158] even-handed prohibitions,[159] and other means of restricting the flow of out-of-state wastes.[160] Most cases derive the answer to the question of whether a state law is invalidated under the Commerce Clause by use of a balancing test. In the balancing test, the state's legitimate interest in passing the legislation is balanced against the burden that would be placed on interstate commerce by this state law. If the burden on interstate commerce is "relatively minor," the state law may be judicially upheld.[161]

B. Actions Available Against an Existing Toxic Waste Dump

1. State Regulation

The Resource Conservation and Recovery Act forces states to choose between the enactment of a qualified state program to administer federal standards, or federal preemption of hazardous waste management.[162] Most states have elected to adopt state regulatory programs which track RCRA very closely.[163] State hazardous waste regulations are often referred to as "state RCRA regulations." In many states, the federal RCRA regulations are expressly incorporated by reference as components of

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157. *See* Hardage v. Atkins, 582 F.2d 1264 (10th Cir 1978), *aff'd on reh'g* 619 F.2d 871 (10th Cir. 1980) (mandatory reciprocity requirement was a form of protectionism invalid under the Commerce Clause).

158. *See* Louisiana v. GSX Land Treatment, Inc., No. 38001, 18th J.D.C. (Nov. 13, 1989) (allowing a successful blockade of the importation of sewage sludge by the state of Louisiana on the grounds that it posed an immediate threat of harm to the public).

159. *See* Al-Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 287 (2d Cir. 1982) (holding that town's interest in limiting the acreage of landfills was substantial enough to justify the incidental burdens placed on interstate commerce).

160. For an excellent study on the ramifications of the Commerce Clause on state hazardous waste importation laws, see OLIVER A. HOUCK & ROBERT R. KUEHN, A REPORT ON LEGAL OPTIONS TO ADDRESS THE IMPORTATION OF SOLID WASTES INTO LOUISIANA 106 (1990).

161. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472-74 (1981).

162. 42 U.S.C. § 6947 (sets forth requirements for federal approval of state plans).

163. This close tracking of federal law requirements is necessary for a state to receive RCRA permitting authority. SELMI & MANASTER, *supra* note 94, § 8.02[3][c], at 8-18. Prior to RCRA, only California, Illinois, Minnesota, New York, and Oregon had comprehensive strategies for regulating hazardous waste. Gergits, *supra* note 17, at 110 n.78.

the state's own program. For example, Mississippi's Hazardous Waste Management Regulations almost exactly duplicate the federal regulations.[164] Other states, such as Oklahoma and Oregon, adopted the federal regulations but reserved the power to include additional, more stringent standards and procedures.[165]

2. Tort Remedies

Many federal environmental laws, including RCRA, expressly declare an intention not to preempt common law tort actions. The following provision of RCRA evidences such an intent:

> Nothing in this section 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, or to seek any other relief (including relief against the Administrator or a State Agency).[166]

The same tort remedies available on the local level are available on the state level unless restricted by statute. In negligence, noncompliance with regulatory standards has been found to constitute "negligence per se" in the realm of air and water pollution.[167] Therefore, if a citizen can determine that an adjacent or nearby property contains a hazardous waste facility that has been operating in violation of state law, the citizen may be able to prove negligence per se.[168]

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164. MISS. HAZARDOUS WASTE MANAGEMENT REGULATIONS, §§ 124, 260-70.

165. *See, e.g.*, OKLA. RULES AND REGULATIONS FOR INDUSTRIAL WASTE MANAGEMENT, ch. 2, § 240; SELMI & MANASTER, *supra* note 94, § 8.02[3][C]. Under RCRA, states cannot enact statutes less stringent than federal law, but they may enact laws which are more stringent. 42 U.S.C. § 6929.

166. 42 U.S.C. § 6972(f); *see also* EDF v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983) (rejecting preemption contention); Neal v. Darby, 318 S.E.2d 18 (S.C. App. 1984) (defendant chemical company conceded RCRA does not preempt an action based on state nuisance law).

167. Stachniewicz v. Mar-Cam Corp., 488 P.2d 436 (Or. 1971). A violation of a statute or regulation constitutes negligence as a matter of law when a violation results in injury to a member of the class of persons intended to be protected by the law and when the harm is of the kind which the statute was enacted to prevent. *Id.* at 438. Each violation must be analyzed to see whether it falls under the definition of negligence per se.

168. The designation as negligence "per se" establishes a proof of duty and breach. The plaintiff must still prove causation and damages. PROSSER, *supra* note 110, at 220-47.

C. *Actions to Ensure Proper Cleanup of a Closed Toxic Waste Dump*

1. State Cleanup and Superfund Statutes

By 1986, thirty-nine states had enacted legislation which supplemented the federal effort to clean up hazardous waste sites under CERCLA.[169] States relied heavily upon CERCLA, and its National Contingency Plan, when formulating their hazardous waste site cleanup regulations.[170] Generally, these laws obligate private parties to undertake site cleanup efforts, if they are responsible for past waste disposal activities and effects. If such parties cannot be determined or do not act, then the state can act to effectuate the cleanup. To pay for the costs of cleanup, the state may use money made available either under specific legislative appropriations, through a state "superfund," or by calling in a "superlien."[171] Although private cost recovery actions are generally not allowed under state "superfund" laws, some states do have such provisions.[172]

Some states' cleanup legislation encourages private enforcement through citizen suit provisions which authorize enforcement litigation by private citizens.[173] Citizens can utilize these provisions to ensure proper closure and cleanup of a local toxic waste dump.

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169. Mary T. Koelbel, *The Impact of State "Superlien" Statutes on Real Estate Transactions*, 5 VA. J. NAT. RESOURCES L. 297 n.1 (1986).

170. CERCLA provides that "nothing in this Chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a).

171. Eleven states have enacted superlien statutes. These states include: Connecticut (CONN. GEN. STAT. § 22a-452a (1987)); Maine (ME. REV. STAT. ANN., tit. 38, § 13712 (1990)); Maryland (MD. CODE ANN. EN § 7-266(b)(5)(1) (1988)); Massachusetts (MASS. GEN. LAWS ANN. ch. 21E, §§ 1-13 (1990)); New Hampshire (N.H. REV. STAT. ANN. §§ 147-B:10-b (1990)); New Jersey (N.J. REV. STAT. § 58.10 23.11F(f) (1990)); Ohio (OHIO REV. CODE ANN. § 3734.22 (1990)); Oregon (OR. REV. STAT. § 466.205 (1989)); Rhode Island (R.I. GEN. LAWS § 23-19.1-17.1 (1989)); Tennessee (TENN. CODE ANN. § 68-46-209 (1983)); and Texas (TEX. ANN. CODE, tit.5, § 361.194 (1986)). Marcy S. Cohen, *Hazardous Waste: A Threat to the Lender's Environment*, 19 UCC L.J. 99, 115 (1986).

172. *See* MASS. GEN. LAWS ANN. ch. 21E, § 4; TEX. ANN. CIV. STAT. art. 4477-7, § 11(b).

173. *See, e.g.*, IDAHO STAT. ANN. § 260.430 (1986); W.VA CODE ANN. § 20-5E-18 (1966); LA. REV. STAT. ANN. 30:2026 (1991); MASS. GEN. LAWS ANN., ch. 21E, § 4.

2. The Availability of Citizen Actions Against Toxic Polluters

As enforcement joins legislation as a tool for improving environmental quality, new sources of funds, vigilance, and initiative are critically needed.[174] Bringing individual citizens and citizen groups into the enforcement arena will help to provide some missing factors in the existing enforcement schemes. Four ways exist to provide incentives for citizen action to enforce statutes: Intervention provisions, citizen suit provisions, informer rewards, and *qui tam* laws.[175]

a. Intervention into State Actions

Many states have intervention or citizen suit provisions which allow citizens to participate in the enforcement of state hazardous waste laws.[176] Pennsylvania's Solid Waste Management Act contains both provisions.[177] Citizens concerned with the adequacy of state enforcement actions can intervene to ensure that the concerns of the local citizens are judicially recognized. By intervening, citizens can have an effect on the judicial decisionmaking process.

b. Citizen Suits

Since the first legislative provision for citizen suits was

174. Phillip M. Hocker, *Who is Qui Tam?/Privatizing Environmental Enforcement in* PROCEEDINGS OF THE FIRST INTERNATIONAL SYMPOSIUM ON OIL AND GAS EXPLORATION AND PRODUCTION WASTE MANAGEMENT PRACTICES 1081 (1990). Funding of government agencies at all levels is inadequate to properly enforce environmental statutes, including those that regulate hazardous wastes. In addition, a significant risk exists that government regulatory personnel will be "captured" by the regulated industries. The accepted pattern of dependence upon state agencies, rather than federal, for primary enforcement under many laws increases the vulnerability of the process and decreases citizen faith in the enforcement capabilities of the state. An appropriate addition to the regulatory enforcement scheme would be to incorporate or broaden citizen lawsuit provisions. These additions would help to offset, though not eliminate, the problems of serious underfunding and understaffing of the state agencies that regulate hazardous waste activities. *Id.*

175. *Id.* at 1083.

176. *See e.g.*, MICH. COMP. LAWS § 600.2425 (1990); 35 PA. CONS. STAT. § 6018.615 (1988).

177. The intervention provision reads as follows: "Any citizen of this Commonwealth having an interest which is or may be adversely affected shall have the right on his own behalf, without posting bond, to intervene in any action brought pursuant to [this] section . . . ." 53 PA. CONS. STAT. § 4000.1710. The citizen suit provision allows for citizen enforcement against alleged violators in front of the Environmental Hearing Board, and awards citizens the costs of litigation plus attorneys fees whenever the Board deems such award appropriate. 53 PA. CONS. STAT. § 4000.1711.

included in section 304 of the Clean Air Act in 1970,[178] many environmental statutes have included citizen suit provisions which allow individuals or citizens groups to litigate.[179] However, due to the cost and time involved, the ability to file citizen suits alone is not adequate inducement for significant private party effort in environmental enforcement. The ability to merely recover costs and/or attorneys' fees from a successful action is insufficient to encourage significant numbers of citizen suits, yet, this is the only financial incentive offered under most citizen suit provisions.[180] Therefore, it is no surprise that the great majority of citizen suits have been brought, not by private citizens, but by nonprofit organizations, which are funded by grants and donations and not dependant on the suits for income.[181]

In addition to the prohibitive costs, citizens' access to the courts has recently been reduced by the United States Supreme Court in *Gwaltney of Smithfield v. Cheasapeake Bay Foundation*.[182] The Court held that the cessation of the statutory violation by the defendant during the sixty-day notice period, which is required to be given by the citizen to the prospective defendant and the appropriate agency before commencing a civil action, prevented suit since the "interest of the citizen-plaintiff is primarily forward-looking."[183] Thus, a citizen-enforcer faces the risk of investing time and money to investigate a violation and prepare to file suit, only to be foreclosed from recovering the costs of litigation by a timely shutdown by the offending facility. This is hardly an incentive system for private environmental enforcement.[184]

It has been argued that a violating company which remedies the violation within the sixty-day warning period should be protected from receiving a penalty as a matter of equity.[185] Yet,

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178. 42 U.S.C. § 7604.

179. *See, e.g.*, 16 U.S.C. § 1540 (1988); 30 U.S.C. § 1270 (1988); 42 U.S.C. § 300 (1988).

180. Hocker, *supra* note 174, at 1084.

181. *Id.*; Bruce J. Terris, *Environmentalists' Citizen Suits*, Envtl. L. Rep. (Envtl. L. Inst.) 10254 (July 1987).

182. 484 U.S. 49 (1987).

183. *Id.* at 9.

184. Hocker, *supra* note 174, at 1085.

185. Hocker notes that while there may have been justice in this theory at an earlier time, environmental violations today are often the result of a conscious evasion of regulation by the violator until caught. Hocker analogizes that "someone who is pulled over for speeding would hardly argue that he was exempt from ticketing because, at the moment the officer was checking his registration, his car had stopped." *Id.*

beyond the questions of equity and fairness, the value of the sixty-day notice provision needs to be judged as it affects an entire regulatory system. If judicially maintained, the *Gwaltney* view will chill, or at least discourage, the use of citizen enforcement mechanisms, and further narrow the already inadequate citizen enforcement path.[186]

c. *Informer Rewards*

Many states, as well as the federal government, have incorporated informer rewards into their statutes.[187] New Jersey has a system which rewards people whose reports of illegal polluting activities result in civil or criminal penalties against the polluters.[188] Tipsters who report violations of state environmental statutes receive the greater of ten percent of the civil penalty collected or two hundred fifty dollars. Information leading to a criminal conviction results in a reward of one-half of any fine collected.[189]

Citizen informer rewards provide a monetary impetus for citizens to get involved in environmental enforcement. Informer reward statutes also aid the state in the following three ways: (1) By rewarding its citizens for turning in violators of environmental statutes, (2) by discouraging people from being lax with or from violating environmental regulations due to the increased number of eyes potentially watching them, and (3) by aiding in the protection of citizens, public health, and the environment from the deleterious effects of hazardous waste pollution.[190]

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186. *Id.* To remedy the *Gwaltney* problem, as well as other citizen litigation problems, Hocker suggests that citizens encourage Congress to adopt a Comprehensive Citizen Environmental Enforcement Act which would: 1) provide for citizen enforcement of all environmental statutes; 2) establish a general right to file *qui tam* actions to enforce any environmental statute where citizen suit provisions now exist; 3) eliminate the *Gwaltney* problem of polluters who evade prosecution by ceasing their discharges during the 60-day window of opportunity after a notice of intent to sue is filed by citizens; 4) ensure that "standing" challenges, in which environmentalists must demonstrate that they have been directly injured before suit can be brought, no longer work to prevent judicial scrutiny of environmental offenses; and 5) require that all state programs certified under federal environmental statutes include similar provisions. *Id.* at 1086.

187. The Superfund Amendments and Reauthorization Act of 1986 (SARA) authorizes awards of up to $10,000 to informers whose information leads to arrest and conviction for criminal violators of CERCLA. 42 U.S.C. § 9609(d). *See also* Rivers and Harbors Act, 33 U.S.C. § 411 (1988)(one half of the fines recovered go to the informer).

188. N.J. STAT. ANN. 13:1E-9.2 (1989).

189. *Id.*

190. While informer rewards can be used as one avenue of environmental enforcement, they depend on the prosecutorial resources of government to be effective.

d. *Qui Tam Actions*

The Latin phrase *qui tam* refers to legal actions brought by private parties under a statute which establishes penalties for the commission or omission of certain acts, and which provides for sharing of recovered penalties between the private action initiator and the government.[191] The citizen-plaintiff in a *qui tam* action "sues *as well* for the state as for himself."[192] "In *qui tam* actions . . . society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation."[193]

Specific statutory authorization is necessary for *qui tam* actions, and such explicit authorization is rare. The First United States Congress enacted a number of *qui tam* statutes, presumably in an effort to enlist citizen action while the executive powers were undeveloped, but these provisions have largely been repealed or supplanted.[194] *Qui tam* actions, such as those authorized by the False Claims Act of 1986,[195] allow for treble damages and a citizen reward of between fifteen and twenty-five percent of the total penalty recovered.[196] A similar provision inserted into environmental statutes might encourage citizen enforcement by individuals, and by both public interest and for-

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EPA and state agencies are already aware of many violations that they choose not to pursue for budgetary or policy reasons. Those issues are part of the problem, and reliance on informer rewards does nothing to address them. Hocker, *supra* note 174, at 1083.

191. BLACK'S LAW DICTIONARY 1126 (5th Ed. 1979). *Qui tam* actions provide a dual enforcement scheme where both private citizens and public officials are permitted to represent the United States in litigation to enforce statutory mandates.

192. *Id.* The term "*qui tam*" is short for "*qui tam pro domino rege quam pro se imposo sequitur*" which means "who brings the action as well for the king as for himself." Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 350 (1989).

193. Priebe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J. dissenting). Interest in the suit comes not from the injury but from the statutory bounty offered for successful prosecution. Caminker, *supra* note 192, at 345.

194. Hocker, *supra* note 174, at 1086. Citizens groups attempted to imply a *qui tam* action into the Rivers and Harbors Act. This attempt was ultimately unsuccessful. Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979), *rev'd*, 451 U.S. 287 (1981) (holding no implied right of action contained in the Act).

195. 31 U.S.C. §§ 3729-3733 (1988).

196. Caminker believes that *qui tam* actions are constitutionally acceptable and should withstand challenges under Articles II and III of the Constitution even though no "injury in fact" may have occurred to the *qui tam* plaintiff. Caminker, *supra* note 192, at 348. He cites Supreme Court cases that have entertained suits alleging injuries that were both public and intangible. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (interest in endangered species preservation); Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (personal conservation and aesthetic interests).

profit law firms.[197]

IV. Rights And Remedies At The National Level

A. *Actions To Prevent the Establishment of a Toxic Waste Dump*

1. Permitting Hazardous Waste Facilities under RCRA

RCRA requires any person who owns or operates, or proposes to own or operate, a hazardous waste TSD facility to obtain an operating permit.[198] Permits are required for all treatment, storage, or disposal of hazardous wastes.[199] Recognizing the mammoth nature of the task of reviewing all existing and proposed treatment, storage and disposal facilities, Congress authorized a two-part approach to the permitting of these facilities.[200] Because of the time and labor required by EPA to check all facilities, Congress provided for "interim status" (Part A) approval to continue operation pending final disposition of their RCRA permit application.[201]

Before issuing a final (Part B) permit to any owner or operator of a TSD facility, EPA must hold a public hearing and receive written comments if the Administrator receives written notice of opposition to the issuance of the permit.[202] The Administrator must then decide whether or not to issue the permit.

Citizens may participate in the permitting process by specifically writing to oppose the issuance of a particular permit, or by

197. Debate has raged in federal district and circuit courts over whether § 413 of the Rivers and Harbors Act has an implied *qui tam* action. A few courts have held that citizen *qui tam* actions are available if not used to enforce criminal penalties of the Act. Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979); River v. Richmond Metro Auth., 359 F. Supp. 611 (E.D. Va. 1973). *But see* National Sea Clammers v. City of New York, 616 F.2d 1222, 1232 (3d Cir. 1980); Anderson v. Norfolk & Western Ry., 349 F. Supp. 121, 122 (W.D. Va. 1972) (holding that the Act precludes criminal *qui tam* actions).

198. 42 U.S.C. § 6925.

199. *Id.*

200. Section 3004 of RCRA requires EPA to establish performance standards for owner/operators of TSD facilities, with appropriate regulatory distinctions made between new and existing facilities. 42 U.S.C. § 6924(a). The regulations are to address a variety of matters including recordkeeping, reporting, monitoring, compliance with manifest system, operating methods, facility design, contingency planning, operator training, and financial responsibility. 42 U.S.C. § 6924(a)(1) - (6); 40 C.F.R. § 264 (1990). Section 3005 requires all new and existing TSD facilities to obtain EPA permits on the basis of compliance with § 3004 standards. 42 U.S.C. § 6925.

201. 42 U.S.C. § 6925(e).

202. *Id.* § 6974(b)(2).

submitting general written comments. These comments become part of the record which is relied upon by the Administrator in the permit decisionmaking process. The submission of comments by citizens preserves the arguments opposing the issuance of a RCRA permit. These arguments can then be used to challenge the Administrator's issuance of a RCRA permit despite the letters of opposition.[203]

Citizens may also participate by attending public hearings or meetings which relate to the issuance or modification of a RCRA permit.[204] Citizens should get involved early to ensure that their views are heard on the record prior to the time when decisions on siting are made and finalized.[205] This may be the only opportunity for citizens to participate since RCRA limits citizen suits to enjoin the issuance of permits.[206] However, as stated above, citizens may challenge a permit once it has been issued.

2. Citizen Participation Under Other Statutes

a. *National Environmental Policy Act*

The National Environmental Policy Act (NEPA) requires all agencies of the Federal Government to include in every recommendation or report on major federal actions significantly affecting the quality of the human environment, a detailed environmental impact statement (EIS).[207] The EIS must include the environmental impacts, unavoidable adverse environmental effects, and alternatives of the proposed action.

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203. *See, e.g.*, State of Alabama *ex rel.* Siegelman v. EPA, 911 F.2d 499 (11th Cir. 1990) (discussing four citizens' organizations' appeal of an EPA decision to issue a hazardous waste management facility permit under RCRA).

204. 40 C.F.R. § 25.2.

205. *Id.* § 25.3(c).

206. "No action may be commenced, under RCRA's imminent and substantial endangerment section, by any person with regard to the siting of a hazardous waste facility nor to restrain or enjoin the issuance of a permit for such a facility." 42 U.S.C. § 6972(b)(2)(D). However, this language potentially permits review under other RCRA sections besides the "imminent and substantial endangerment" provision.

207. *Id.* § 4332(2)(C)(i) - (v). Issuing a federal permit for a new TSD facility may qualify as a major federal action which would trigger the application of NEPA. NEPA must be complied with because RCRA contains no express provision that would be deemed to be a "functional equivalent" of NEPA. Other federal environmental laws contain such provisions. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1371(c). However, there may be an implied EIS equivalent in the RCRA Part B permitting process which is functionally similar to the EIS. State of Alabama *ex rel*, Siegelman v. EPA, 911 F.2d 499 (11th Cir. 1990) (noting that EPA is not required to prepare EIS in compliance with NEPA before issuing permit under RCRA).

When NEPA applies, federal agencies must make diligent efforts to involve the public in preparing and implementing their NEPA procedures.[208] Agencies must also provide public notice of NEPA-related hearings, and make available relevant environmental documents so as to inform those persons who may be interested or affected.[209] Additionally, agencies must also make available for public inspection, all EISs, any comments received, and underlying documentation.[210] Citizens can and should submit comments on draft and final EISs which discuss hazardous waste TSD facilities which plan to locate locally.

b. Other Federal Laws

Other federal statutes may be triggered when a hazardous waste TSD facility is proposed. For example, the Clean Water Act requires the issuance of a water permit for any discharge of pollutants,[211] and for discharge of dredge and fill material into the navigable waters at specified disposal sites.[212] Before the EPA Administrator may issue either type of permit, there must be an opportunity for a public hearing.[213] Citizens can attend these hearings and submit written comments concerning permit issuance or denial.

Similarly, the Clean Air Act requires permits for the construction and operation of new or modified stationary air pollution sources.[214] Citizens can comment to EPA, or to a state with authorized permitting power,[215] before an air permit is issued. Additionally, citizens can bring a civil action against any person who proposes to construct, or constructs, any new or modified major pollution emitting facility without a permit or who is in violation of any condition of such permit.[216]

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208. 40 C.F.R. § 1506.6(a).

209. *Id.* § 1506.6(b) and (c).

210. *Id.* § 1506.6(f).

211. 33 U.S.C. § 1342(a)(1).

212. *Id.* § 1344(a). These types of permits would be required for any facility proposed to be located in a wetland area.

213. *Id.* §§ 1342(a)(1) and 1344(a).

214. 42 U.S.C. § 7502(b)(6).

215. *See, e.g.*, Louisiana Environmental Quality Regulations, LA. ADMIN. CODE 33:505(I)(2) (1988).

216. 42 U.S.C. § 7604(a)(3).

B. *Actions Available Against an Existing Toxic Waste Dump*

1. Regulating Hazardous Waste Facilities under RCRA

a. *Federal Enforcement*

RCRA is intended to control hazardous waste from "cradle to grave."[217] RCRA's primary focus is on active waste facilities rather than hidden environmental contamination, yet RCRA can be used to require corrective action at facilities that are leaking.[218] Additionally, RCRA can be used to require corrective action at waste management units that have been long abandoned under a broad interpretation of the term "facility."[219]

RCRA provides the enforcement mechanism for federal and state equivalent programs.[220] Violation of a federal law or regulation will subject the offender to enforcement measures by EPA, or the state agency which administers a federally-approved state program. Enforcement measures include compliance orders, civil penalties, injunctions, fines and imprisonment. As discussed below, citizen suits and imminent hazard authority constitute the other two sources of enforcement under RCRA.[221]

b. *RCRA's Imminent Hazard Provision*

RCRA's imminent hazard provision authorizes the EPA Administrator to bring suit to redress the handling, storage, treatment, transportation, and disposal of any solid or hazardous waste which may "present an imminent and substantial endangerment" to health or the environment.[222] RCRA does not expressly define "imminent and substantial endangerment," but the legislative history gives some indication as to its intended meaning. The House Energy and Commerce Committee stated that, "Section 7003 has always provided the authority to require

217. JOHN QUARLES, FEDERAL REGULATION OF HAZARDOUS WASTES — A GUIDE TO RCRA 5 (1982).

218. 42 U.S.C. §§ 6924(u), 6928(h).

219. *See* 40 C.F.R. § 260.10; and 50 Fed. Reg. 28702, 28712 (1985) (amending 40 C.F.R. § 260 (1984)).

220. 42 U.S.C. § 6928.

221. Stephen I. Friedland, *The New Hazardous Waste Management System: Regulation of Wastes or Waste Regulation?*, 5 HARV. ENVTL. L. REV. 89 (1981).

222. 42 U.S.C. § 6973(a) (Supp. II 1984). As of 1981, 59 of the 61 RCRA actions brought by the federal government contained allegations of imminent and substantial endangerment under § 7003. Barry J. Trilling, *"Potential For Harm" As the Enforcement Standard for § 7003 of the Resource Conservation and Recovery Act*, 2 UCLA J. ENVTL. L. & POL'Y 43 (1981). These numbers have decreased because these actions are now being brought under §§ 106 and 107 of CERCLA.

the abatement of present conditions of endangerment resulting from past disposal practices, whether intentional or unintentional. These endangerments may be immediate or long-term problems."[223]

Proof of actual harm is not necessary to establish an imminent and substantial endangerment.[224] Such imminence may be proven by the setting in motion of a chain of events which could ultimately cause serious injury.[225] Further, an imminent and substantial endangerment could be demonstrated by proof that improperly disposed and carcinogenic wastes are entering groundwater and that, unless preventive measures are taken, those contaminants will leach and migrate into an urban drinking water supply.[226]

Section 7003 of RCRA "focuses on the abatement of conditions threatening health and the environment and not particularly human activity. Therefore, it has always reached those persons who have contributed in the past or are presently contributing to the endangerment . . . "[227] Many courts have taken the view that section 7003 should apply broadly to require the cleanup of abandoned sites and not just to the handling and disposal of toxic wastes. In *United States v. Price*, the court held the past owner of a waste dump site responsible for abatement measures at a leaking but no longer used landfill.[228] The court found that the owners' "continued failure to rectify the hazardous condition they created has been and is contributing to the leaking that is now occurring."[229] The court further opined that society's interests in deterring the improper disposal of hazardous wastes and in alleviating serious hazards as quickly as possible mandate that those responsible for the disposal of such

223. H.R. REP. NO. 198, 98th Cong., 2d Sess. 48, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5607. In fact, "a hazard may be imminent even if its impact will not be apparent for many years." EDF v. Ruckleshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

224. United States v. Vertac Chemical Corp., 489 F. Supp. 870, 880-84 (E.D. Ark. 1980).

225. *See, e.g.*, United States v. Hardage, 750 F. Supp. 1460, 1480-89 (W.D. Okla. 1980); *cf.* RANDY M. MOTT, *Liability for Clean-up of Inactive Hazardous Waste Sites*, *in* HAZARDOUS WASTE LITIGATION 15-18 (Randy M. Mott ed., 1981); Richard Skaff, *The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 HARV. ENVTL. L. REV. 298, 312-15 (1979).

226. United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1110 (D. Minn. 1982).

227. H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 119 (1984).

228. 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

229. *Id.* at 1072.

wastes will not be able to shirk such responsibilities by simply selling the property on which the wastes are stored.[230] The *Price* court concluded that Congress had realized that past acts could presently be contributing to an endangerment and had intended those acts to be governed by RCRA.[231]

RCRA section 7003 has additional significance as a potential source of public information. EPA's Administrator, under the mandate of section 7003(c), is required to provide "immediate notice" to "the appropriate local government agencies" where the Administrator has received information "that there is hazardous waste at any site which has presented an imminent and substantial endangerment to human health or the environment."[232] The Administrator must also "promptly post" notice of this endangerment at the hazardous waste site.[233] The notice and posting provisions of section 7003 may provide vital notification to private citizens who reside or work near an abandoned hazardous waste site.[234]

c. *Citizen Participation in Settlements*

Whenever the United States or the EPA Administrator proposes to restrain from filing suit, or to settle any claim arising under RCRA, the Administrator shall give notice and an opportunity for a public meeting *in the affected area*.[235] The Administrator must also provide a reasonable opportunity for the public to comment on the proposed settlement prior to its final entry.[236]

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230. *Id.* at 1072-73.

231. 523 F. Supp. at 1073. The *Price* opinion was cited favorably in *Jones v. Inmont Corp.*, where the court declined to dismiss a § 7003 suit against a past off-site generator. 584 F. Supp. 1425 (S.D. Ohio 1984). In that case, the court noted that the word "disposal" was defined in RCRA as "the discharge, deposit, injection, dumping, spilling, *leaking*, or placing of any solid waste or hazardous waste into or on any land or water so that . . . [it] may enter the environment." *Id.* at 1435-36 (emphasis added). The court took the view that this language authorizes restraint of continuing leakage of hazardous waste from a landfill, even if that leakage does not result from any ongoing action by a defendant in a § 7003 lawsuit. *Id.*

232. 42 U.S.C. § 6973(c) (Supp. II 1984).

233. Mintz, *supra* note 115, at 252-53.

234. *Id.* at 253. If the site is abandoned, then EPA will probably respond under the provisions of CERCLA instead of this provision of RCRA. RCRA § 7003 suits and remedies were used frequently before the enactment of CERCLA, but use of this section has been limited since EPA is now more likely to use the provisions of CERCLA, specifically §§ 106 and 107.

235. 42 U.S.C. § 6973(d).

236. *Id.*

By submitting comments, citizens may have a voice in how enforcement actions are ultimately resolved.

d. Citizen Enforcement

RCRA allows citizens to bring actions as private attorneys general to redress endangerments from abandoned hazardous waste dumps.[237] Under certain conditions, RCRA section 7002 empowers "any person" to commence a civil action against parties whose past or present hazardous waste activities contribute to an imminent hazard, under a standard similar to section 7003.[238] This right is limited, however, because it can be exercised only if the EPA Administrator, following advance notice by a citizen of intended litigation, fails to file an action under section 7003.[239] Even so, this citizen suit provision "provides a potentially important complement to any governmental program to seek judicially mandated cleanups of abandoned hazardous waste dumps."[240]

2. Other Applicable Federal Statutes

a. Environmental Statutes

Besides the environmental statutes specifically geared to the regulation of hazardous wastes, other federal statutes may be used to urge regulatory compliance. Any citizen who has an interest or may be adversely affected by discharges of pollution into water or air can bring a civil action to enforce the Clean

237. Mintz, *supra* note 115, at 249.

238. *See* 42 U.S.C. § 6972(a)(1)(B) (Supp. II 1984). It has been said that Congress provided this supplemental enforcement mechanism because it recognized that state and local nuisance and trespass laws are inadequate to prevent health risks caused by human exposure to toxic substances at hazardous waste sites. A. Dan Tarlock & Robert L. Glicksman, *Superfund Amendments: Increasing Local Control of Hazardous Wastes Sites Through Litigation, Enforcement and Participation Rights*, *in* 1988 ZONING AND PLANNING LAW HANDBOOK 430 (N. Gordon ed. 1988).

239. Mintz, *supra* note 115, at 252 n.16.

240. *Id.* at 252. Unfortunately, citizen enforcement of RCRA has been sparse. The Environmental Law Institute found that citizen-enforcers filed 27 notices and suits under RCRA from 1978 to April, 1984. When calculated this comes out to an average of fewer than five suits per year. *See also* CITIZEN SUITS; AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES (Envtl. L. Inst.) III-10 (1984). The number of suits may be increasing though. In 1983, ten suits were filed under RCRA. Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23 (1985); *see also When Government Fails to Act: Citizen Suits to Enforce Groundwater Monitoring*, IN BRIEF (Sierra Club Legal Defense Fund, Denver, CO.) Aug. 1984, at 3. In addition, more and more suits are being filed under CERCLA, instead of RCRA.

Water Act or Clean Air Act, respectively.[241]

Other statutes that might not obviously apply may also be available for use by citizens on local toxic dumps. The Endangered Species Act makes it unlawful to harm, wound, or kill any endangered species.[242] If a toxic dump presents a real threat to any endangered species or its habitat, citizens can commence a civil suit to enjoin the actions of any person who is alleged to be in violation of any provision of this Act.[243]

Citizen civil actions may also be brought under the Emergency Planning and Community Right-to-Know Act to require hazardous waste facilities to comply with the Act's requirements.[244] This Act requires that facilities formulate emergency plans and notify officials immediately of spills or releases.[245] Citizens may also intervene in actions brought under this section.[246]

b. Civil Rights Actions

i) Federal Statutes

Studies have revealed that many of the "uncontrolled" toxic waste sites are located in African-American, Hispanic and other minority communities, and that the largest commercial hazardous waste sites tend to be constructed in the rural communities of the southern "Blackbelt."[247] The United States General Accounting Office (GAO) found that three of the four hazardous waste sites in EPA's Region IV were located in areas where African-Americans compose the majority of the population.[248]

Hazardous wastes also threaten the health and safety of Native Americans.[249] An EPA commissioned study by the Council of Energy Resource Tribes discovered that as many as 1,200 hazardous waste generators or other hazardous waste sites

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241. 33 U.S.C. § 1365; *see id.* § 1321 (identifying the requirements of the Clean Water Act that may be judicially enforced). Similar provisions exist under the Clean Air Act. 42 U.S.C. §§ 7412-7671.

242. 16 U.S.C. § 1538(a)(1)(B).

243. *Id.* § 1540(g)(1)(A).

244. 42 U.S.C. § 11046(a)(1).

245. *Id.* § 11004-11050.

246. *Id.* § 11046(h)(2).

247. U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 2 (1983).

248. *Id.* at 1.

249. *See generally* Steven M. Christenson, *Regulatory Jurisdiction over Non-Indian Hazardous Waste in Indian Country*, 72 IOWA L. REV. 1091 (1987); Congressional report authorized by CERCLA, 42 U.S.C. § 9626.

were located on or near the twenty-five Indian reservations selected for the survey.[250]

Minority communities containing a toxic waste dump may be able to enjoin its operation pursuant to a civil rights action brought under 42 U.S.C. § 1982, which states that "[a]ll citizens of the United States shall have the same right, in every state and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[251] Section 1982 applies to cases where private or state decisions have adversely impacted the property values of minority residents when their white counterparts were not suffering the same impacts.

The possibility also exists that local citizens can bring an action under 42 U.S.C. § 1983 to prevent a site from being located or a facility from continuing operation in their community.[252] Section 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To recover in a section 1983 action, some state action is required. Therefore, a private person, acting alone, cannot be liable under this statute. State action may be found in a state law or regulation that applies to permitting hazardous waste sites or to regulating hazardous waste treatment, storage or disposal facilities. If this law works to deprive a person of their constitutional or legal rights, that person can allege a civil rights violation under section 1983.

An additional statute that might provide relief is 42 U.S.C. § 1985(3).[253] Under this statute, as opposed to section 1983,

250. Richard A. Du Bey et al. *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 459 (1988).

251. A § 1982 action may also work to enjoin the siting of a hazardous waste TSD facility in a minority neighborhood.

252. *See* Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986) (plaintiffs contended that the decision of where to site a solid waste facility was partially motivated by racial discrimination in violation of 42 U.S.C. § 1983).

253. This section states in pertinent part:

there is no requirement of state action, and a private party may be held liable.[254] Instead, this statute requires that the claimant prove the existence of a conspiracy,[255] and is limited to denials of equal protection and to cases where claimant alleges "some racial or perhaps otherwise class-based invidiously discriminatory animus."[256]

Although section 1985(3) is frequently cited by landowners as a basis for recovery in land use cases, the inability to plead, much less prove, the existence of a conspiracy which is class-based and invidiously discriminatory limits this statute's usefulness.[257]

ii. Constitutional Claims

An aggrieved plaintiff could additionally bring an action alleging violations under the Due Process and Equal Protection Clauses of the United States Constitution. The issue in these challenges would be whether the regulatory enactment or enforcement under challenge represents a rational exercise of governmental authority.[258]

In *Twitty v. State*, plaintiffs brought a nuisance suit against

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> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal protection or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engage therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

254. Griffin v. Breckenridge, 403 U.S. 88 (1971); *see generally* K.B. Bley, Use of Civil Rights Act to Recover Damages for Undue Interference with the Use of Land (unpublished manuscript, on file with the *Tulane Environmental Law Journal*).

255. Smith v. Butler, 507 F. Supp. 952, 953 (E.D. Pa. 1981). (a conspiracy may result even though all actors are members of the same governmental body); Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984); *contra* Gregory v. Chehi, 843 F.2d 111, 118 n.4 (3d Cir. 1988); Tate v. Alexander, 527 F. Supp. 798, 807 n.12 (M.D. Tenn. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

256. *Griffin*, 403 U.S. at 102.

257. *See, e.g.*, Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981).

258. Courts tend to be very deferential to governmental action. Only when fundamental rights are threatened or a suspect classification can be shown is a court likely to uphold a substantive due process or equal protection attack. SELMI & MANASTER, *supra* note 94 § 5.04[6].

the state's continued operation of a polychlorinated biphenyls (PCB) disposal facility in Warren County, North Carolina.[259] The court also addressed plaintiffs' due process claims against the state. The plaintiffs contended that the state's placement of the facility in close proximity to their land constituted a "governmental taking for which they were entitled to just compensation under the Fourteenth Amendment of the United States Constitution."[260] The court denied relief on the grounds that a "reduction in market value, standing alone, does not constitute an 'actual interference with or disturbance of plaintiffs' use and enjoyment of their property,' which requires an actual interference (the cause) substantial enough to reduce the market value of plaintiffs' property (the effect)."[261] The court held that plaintiffs managed only to prove the effect, but not the cause of the diminution in their property value. This cause of action would clearly be more useful in cases where the cause and effect relationship is clear.

A series of Eleventh Circuit cases have held that municipalities have violated the Equal Protection Clause when these cities denied African-Americans the provision of services that they rendered to the white communities.[262] These cases could be analogized to cases where minority communities are disproportionately burdened with the effects of hazardous waste facilities. It should be deemed a violation of the Equal Protection Clause if states or municipalities burden minority communities with the siting of hazardous waste facilities while allowing the white or affluent communities to live free of adjacent hazardous waste facilities.

3. Federal Common Law of Torts

At one point, common-law remedies were available on a federal level to citizens harmed by pollution. However, the United States Supreme Court has held that where Congress has "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative

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259. 354 S.E.2d 296 (N.C. App. 1987).

260. *Id.* at 302.

261. *Id.* at 304 (quoting Long v. City of Charlotte, 293 S.E. 2d 101, 199 (N.C. App. 1982)).

262. *See, e.g.*, Ammons v. Dade City, 783 F.2d 982, 987-88 (11th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181, 1185-86 (11th Cir. 1983); Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986).

agency," resort to the federal common law of nuisance is unavailable.[263] One author maintains that "[t]he broad regulatory framework of RCRA, and the diminished role of the federal common law of nuisance in the environmental field as a result of *Milwaukee II*, make it inappropriate and unhelpful for courts to resort to the federal common law of nuisance."[264] Therefore, the federal common law of torts provides little or no relief or avenues of redress for citizens.

C. *Actions to Ensure Proper Cleanup of a Closed Toxic Waste Dump*

1 Citizen's Rights and Remedies Related to Superfund Legislation/CERCLA

a. *Federal Enforcement*

RCRA was passed by Congress in 1975 due to the apparent need to regulate hazardous waste at the federal level. While RCRA comprehensively regulates all aspects of hazardous waste management from generation to final disposal, it does not encompass the equally significant problems of cleaning up abandoned waste dumps and toxic spills. In an attempt to cover the areas not covered by RCRA, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980. CERCLA is designed primarily to remedy environmental damages caused by past improper disposal practices.[265] CERCLA is also designed to respond to emergencies caused by the release of hazardous substances into the environment. Through the use of monies accumulated in the "Superfund," the federal government can pay for the cleanup of hazardous waste sites.[266]

Under CERCLA, the federal government has the power to clean up hazardous substance releases,[267] recover cleanup costs

263. Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)(*Milwaukee II*).

264. Mintz, *supra* note 115, at 311-12. The possibility does exist that other federal environmental legislation might call for a different result with regard to preemption of state nuisance claims. *See generally* SELMI & MANASTER, *supra* note 94. Yet, in *United States v. Price*, the court expressly determined that federal hazardous waste laws preempt the federal common law of nuisance. 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

265. Jeffrey Kehne, *Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes*, 96 YALE L.J. 403, 413 (1980).

266. Gramling & Earl, *supra* note 8, at 643.

267. 42 U.S.C. § 9604(a)(1).

from responsible parties,[268] and order abatement actions in the event of an "imminent and substantial endangerment to the public health or welfare or the environment."[269] To prevent insolvency on the part of responsible parties from undermining CERCLA liability, the Act imposes financial responsibility requirements on cargo ships carrying hazardous wastes and establishes a billion dollar trust fund for cleanup of toxic waste dumps.[270]

Under CERCLA, the private sector is compelled to clean up contaminated soil and ground or surface water, even in areas beyond the property lines of the site of release, on a strict liability basis.[271] Under section 107 of CERCLA, a generator, owner/operator, or even a transporter of hazardous substances can be held liable for remedial costs at a hazardous waste site if: (1) In the past, substances originating from the generator were shipped to the facility, (2) substances like those shipped by the generator are present at the facility, and (3) there has been a release of some hazardous waste at the facility.[272] Remedial costs include all costs of removing the hazardous materials, any necessary costs incurred by any other person, damages to natural resources, and costs of any health assessment or health effects study, plus interest.[273]

CERCLA additionally includes the equivalent of a "superlien." Section 107(l) of CERCLA provides that "all costs and damages for which a person is liable to the United States . . . shall constitute a lien in favor of the United States upon all real property and rights to such property . . . ."[274]

2. Citizen Involvement

Under CERCLA, any person may commence a civil action on their own behalf against any person, the United States, or governmental instrumentality or agency, who is in violation of

268. *Id.* § 9607(a).
269. *Id.* § 9606(a).
270. *Id.* §§ 9608(a) - (b).
271. *Id.* §§ 9601-75.
272. *Id.* § 9607(a); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 991-92 (D.S.C. 1986).
273. 42 U.S.C. § 9607(a). CERCLA provides that defendants in cleanup cost recovery actions can raise only certain defenses: (1) that the release of the hazardous substance requiring cleanup was caused by an act of God, (2) by an act of war, or (3) by an act or omission of a third party. *Id.* § 9607(b).
274. *Id.* § 9607(b)(1).

the statute. A citizen can sue an executive agency or official that fails to perform any nondiscretionary act under CERCLA.[275] A citizen may also sue under sections 106 or 107 of CERCLA to enforce cleanup orders or recover response costs.[276]

CERCLA provides for citizen intervention. In any action commenced under CERCLA, a person may intervene as a matter of right when that person claims an interest relating to the subject matter of the action, and is so situated that the disposition of the action may impair or impede the person's ability to protect that interest.[277]

Under CERCLA, technical assistance grants may be made to citizens that are affected by a release or threatened release at any facility listed on the National Priority List.[278] The amount of the grant is limited to 50,000 dollars and the grant recipient must put up twenty percent of the costs of technical assistance, unless these requirements are waived.[279] These grants to pay for technical assistance are important for citizens who wish to participate in the settlement negotiations for site cleanup, yet lack the necessary expertise.[280]

CERCLA additionally provides for citizen input in the form of public hearings and comments on proposed site cleanup plans or on proposed findings.[281] Citizens may also comment on any proposed cleanup agreements.[282] The submission of written comments or oral testimony at a hearing are easy, inexpensive ways for concerned citizens to get involved and make a difference. These comments are crucial, as they are under RCRA in the pre-permit stage, to preserve a coherent and complete record for appeal of a cleanup plan.

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275. *Id.* § 9659.

276. *Id.* § 9659.

277. *Id.* § 9613(i). This is true unless the President shows that the person's interest is adequately represented by the existing parties to the suit. *Id.*

278. *Id.* § 9617(e)(1). Such grants may be used to obtain technical assistance in interpreting information concerning, *inter alia*, the nature of the hazard, remedial investigation and feasibility study, and selection and construction of the remedial action. *Id.*

279. *Id.* § 9617(e)(2).

280. Citizens may file written comments relating to a proposed settlement. *Id.* § 9622(i)(2). EPA may withhold or withdraw consent on a settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate. *Id.* at § 9622(i)(3).

281. *Id.* § 9617(a). The final cleanup plan shall include an explanation of any significant changes made after the public hearing, and responses to comments submitted. *Id.*

282. *Id.* § 9622(d)(2)(B).

Unfortunately, CERCLA does not provide relief for individual victims of exposure from hazardous waste sites. Consequently, individuals must pursue compensatory relief under common law theories, since CERCLA contains no general victim compensation provision for individuals.[283]

V. RIGHTS AND REMEDIES AT THE INTERNATIONAL LEVEL

A. Multinational Treaties

Since pollution does not stop at national borders, the international community has begun to respond to this problem with international accords concerning hazardous wastes.[284] Numerous treaties have been established to address the problems of transboundary pollution.[285]

Most notably, the United Nations adopted the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal in 1989.[286] This international accord contends with hazardous wastes that are increasingly being shipped across national boundaries, from the generating country to another country for disposal.[287]

Although the Basel Convention represents an important step toward controlling the international traffic in hazardous wastes, it does not expressly recognize that all persons have a right not to be exposed to hazardous wastes. Most regrettably, this convention also fails to include remedies for private citizens against other persons, corporations or governments that expose

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283. Harris, *supra* note 89, at 921. *See supra* part II.B.3. *supra* for discussion of common law actions and remedies.

284. Dr. Ganter Hager, *Waste Control under German Law: Liability and Preventative Measures*, 25 HOUS. L. REV. 963, 965 (1988).

285. *See, e.g.*, Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187; Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, T.S. No. 548; Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. 10541, U.N. Doc. ECE/HLM II.R. 1, *reprinted in* 18 I.L.M. 1442 (1979).

286. 28 I.L.M. 649 (1989). The treaty, taking effect upon the signatures of twenty state representatives, has currently been signed by 35 representatives, "almost all of them from the developed world." Stephen B. Staske, II, *The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: A Comparison with the European Community Directives and a Recommendation for a Liability Protocol*, 3 GEO. INT'L ENVTL. L. REV. 183, 185 n.15 (1990).

287. Karen Parker & Susan Bates, HUMAN RIGHTS AND THE ENVIRONMENT 5 (1990) (available from Sierra Club Legal Defense Fund, San Francisco).

them to hazardous wastes without their consent.[288] Consequently, this convention provides no remedy for personal injuries caused by toxic wastes.[289]

The United States became a signatory to this treaty on March 21, 1990, when President Bush signed the convention. Critics of this treaty say that the earlier drafts of the Convention contained stronger mechanisms to discourage and, in some cases, ban international waste dumping.[290] Critics further contend that the United States was responsible for stripping the Convention's final version of the following protective devices: Bans on the international trade of hazardous wastes, control of radioactive waste transport, advance notice to states of transportation of hazardous wastes through their territorial waters, and prohibitions on states with stricter environmental standards from shipping hazardous wastes to states with less developed regulations.[291] As a result of the weakening of the treaty, many developing countries have refused to sign the Convention because it does not offer them any real protection from unwanted waste imports.[292] By not signing the treaty, these nations may receive greater protection because the treaty forbids shipments of hazardous or other wastes to any nonparty to the convention.[293]

More recently, the Bamako Convention on Hazardous Waste was passed by a coalition of African States to control the import of hazardous wastes into the continent. At the 1991 United Nations (U.N.) Commission on Human Rights, a resolution was introduced which would require all nations to respect the African Convention.[294] But, because Western nations are the primary exporters of hazardous waste to the African continent, the majority of the Western nations abstained from voting

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288. *Id.* at 5-6.

289. The Convention identifies three routes for dispute resolution between nation states: negotiation, submission to the International Court of Justice, and submission to arbitration. Basel Convention, 28 I.L.M. at 675, art. 20, ¶¶ 1-2. The convention makes no provision for disputes between individuals and nation states either importing or exporting hazardous wastes.

290. Mary Deery Uva, *Where in the World Shall We Send Our Hazardous Waste Today?*, 9 J. PESTICIDE REFORM 11 (1989).

291. *Id.*

292. *Id.* at 12.

293. Basel Convention, 28 I.L.M. at 662, art. 4, ¶ 5.

294. U.N. Doc. E/CN.4/1991/L.70 (1991).

on this resolution.[295] By abstaining, these nations can claim that they owe no duty to the citizens of Africa to protect them from the risks of imported hazardous wastes.

Although the current conventions provide little relief to individuals who suffer injury from toxic waste exposure, it is conceivable that more conventions will be passed that could address this concern. It is also conceivable that a private right of action could be implied under these conventions which would afford citizens of all nations with a remedy for their injuries.

B. Alleging a Human Rights Violation

International forums could potentially offer a remedy to individuals whose environmental or human rights have been violated by toxic wastes.[296] Although strongly advocated by various authors, there currently exists no United Nations forum where an individual may allege a violation of a human right to environment.[297]

Progress is being made toward creating a human right to a clean, safe, and healthy environment. At the forty-first session of the Subcommission on the Prevention of Discrimination and the Protection of Minorities (Subcommission), the Subcommission appointed one member to take on a study of the relation between environmental problems, such as toxic waste dumps, and human rights.[298] Since then, the U.N. Commission on Human Rights has ratified this appointment and put the establishment of an international human right to environment on a fast track.[299] This accelerated pace should enhance the possibility that citizens can bring complaints about hazardous wastes

295. The abstaining nations were Australia, Austria, Belgium, Canada, France, Germany, Hungary, Italy, Japan, Portugal, Sweden, and the United States.

296. Article 8 of the Universal Declaration of Human Rights guarantees the right to an effective remedy in a competent tribunal. Universal Declaration of Human Rights, art. 8, G.A. Res. 217A, U.N. Doc. A/810 (1948).

297. *See* E/CN.4/Sub.2/1990/12 (explaining scope of what this right should include); E/CN.4/Sub.2/1990/L.33 (draft resolution on human rights and the environment); Melissa Thorme, *Establishing Environment As a Human Right*, 31 DEN. J. INT'L L. & POL'Y 301 (1991); W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85 (1990); Ernest F. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, *in* LAW AND THE ENVIRONMENT 134, 148 n.39 (Baldwin & Page eds., 1970); Dr. Hen-Jari Uibopuu, *The Internationally Guaranteed Right of an Individual to a Clean Environment*, 1 COMP. L. Y.B. 101, 106 (1977).

298. U.N. Doc. E/CN.4/Sub.2/L.23 (1989).

299. The process was accelerated to make sure that the results of the study are

before an international human rights forum within the next few years.

Forums currently exist which allow an individual to allege gross violations of other human rights, such as the right to life or the right to health.[300] Even if a human right to a clean environment is established and can be heard by these forums, some question the effectiveness of the relief received, namely a U.N. resolution. However, at the very least, public announcement of these violations may compel the violating governments to justify their acts to the outside world. Resolutions may encourage violating governments to introduce reforms in their toxic waste policies in order to save face internationally.[301]

Even though opportunities for international remedies exist or are being established, their applicability to citizens of the United States seems limited because most international forums require the prior exhaustion of domestic remedies.[302]

American citizens are fortunate to have a pervasive domestic regulatory scheme which provides remedies to its citizens at the local, state, and national levels. Therefore, citizens of the United States would be wise to avail themselves of domestic remedies relating to toxic waste dumps before attempting to seek the aid of an international tribunal.

VI. CONCLUSION

Under the laws reviewed and proposed in this article, citi-

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prepared in time for the U.N. Conference on Environment and Development scheduled to take place in Brazil in 1992.

300. Regional human rights forums, however, may provide the only current international opportunities for relief related to toxic waste dumps. United States citizens can seek relief in the form of a resolution at the Organization of American States (OAS) under the American Convention of Human Rights. Article 12 of the Draft Protocol Additional to this convention grants everyone the right to a pollution-free environment. Victims of hazardous waste exposure can utilize the OAS as a forum to redress injuries or damages caused by toxic wastes. Parker & Bates, *supra* note 288, at 16. Citizens of other countries can utilize other conventions and forums to seek redress. The Nordic Environmental Protection Convention, (art. 3) is one such convention. The Organization of African Unity, the Council of Europe, and other regional human rights bodies are alternate forums. *Id.*

301. Even Luard, *Foreward* to THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, IN HUMAN RIGHTS: 30 YEARS AFTER THE UNIVERSAL DECLARATION xiii (B. Ramcharan ed., 1979).

302. This requirement can be waived in some circumstances where no domestic remedies are available or where domestic remedies will not redress the injuries alleged. Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, BRIT.Y.B.I.L. 83 (1959).

zens clearly have many remedies available to deal with the problems associated with toxic waste dumps. These remedies are available at each level of government. The number and types of remedies vary from the local to the international level.

Citizens should begin by working at the state and local level to try to control hazardous waste before it becomes a problem. By working for stringent waste recycling, minimization, and treatment laws, and by requiring new TSD facilities to be sited away from residential or ecologically sensitive areas, many of the problems being experienced today with old toxic waste dumps can be avoided. When trying to control an existing facility, or when trying to ensure the proper cleanup of an inactive or abandoned toxic dumpsite, citizens should participate in governmental enforcement or cleanup actions. By intervening into a government action, bringing a citizen suit, or submitting comments, citizens can make a difference in the ultimate resolution of the particular hazardous waste situation.

Recommendations as to the exact course of action that citizens should follow are difficult as each case involves different factors and different goals. Therefore, citizens should choose the remedies which conform to their specific needs and requirements. Hopefully this article provides most of the options available to citizens for siting and controlling toxic waste dumps, local to global.[303]

303. I dedicate this article to the memory of Mr. Frederic Sutherland, former executive director of the Sierra Club Legal Defense Fund. His leadership, inspiration, and kindness will be missed by those who were fortunate enough to know him.