An Assessment of the Role of Local Government in Environmental Regulation

I.
INTRODUCTION

Environmental legislation during the decade of the 1970's significantly expanded the role of the federal government in the promulgation and enforcement of regulations and standards.[1] The veritable tide of regulatory activity often sparked heated controversy over the appropriate degree of federal involvement in dictating environmental policies to the states.[2] However, as the tidewaters of the 1970's recede, significant cutbacks in federal environmental funding are shifting responsibility for these programs to both state and local governments.[3] During the next decade there will be an ongoing battle to define the boundaries within which local,[4] state and national government will assume authority to issue environmental mandates. It is essential that local governments, which have characteristically been granted a relatively insignificant role in controlling environmental issues, step forward to assume a greater leadership role in this field.

Current trends suggest that local government will become in-

1. "When the Senate finally passed NEPA, late on a Saturday afternoon in December 1969, it set in motion an entire series of new statutes inserting the federal government into nearly every ecological niche: clean air (1970, 1977), clean water (1970, 1972), occupational safety (1970), resource recovery (1970, 1976), Alaskan lands (1971), pesticides (1972), endangered species (1973), drinking water (1974), energy supplies (1974), federal land management (1976), toxics (1976), and mining (1977)." Detwiler, *Environmental Analysis After a Decade: "If Prophecy is Impossible, Then Go For Understanding,"* PUB. ADMIN. REV. Jan./Feb. 1981, at 93.

2. For a discussion of this issue, see Strohbehn, *The Basis for Federal/State Relationships in Environmental Law*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15074 (1982).

3. "States will be encouraged to assume more responsibility for administering federal environmental laws through a combination of increased leeway to conduct environmental programs and offers of grant assistance, according to a policy statement signed by Environmental Protection Agency Administrator William D. Ruckelshaus April 4." *EPA Policy Encourages Greater State Role; Funding Viewed as Key By Bipartisan Caucus*, ENV'T REP. (BNA) at 2203 (April 6, 1984).

4. Throughout this paper, the term "local government" is used broadly to include various types of municipalities, including cities, towns, villages, boroughs, parishes, etc., created by or pursuant to state law, as well as county level governments.

creasingly active in environmental programs. The implementation of a diverse and extensive environmental regulatory framework has awakened public interest in the nature and extent of environmental problems. This increased awareness, impassioned by each new environmental disaster, has sparked local interest in programs which affect the quality of the local environment.[5] These local regulatory programs have been the subject of an increasing number of preemptive challenges as local governments experience the growing pains that accompany additional authority. Preemptive challenges, which are often wasteful and unnecessary, can be avoided as local governments come to understand the boundaries within which they can regulate environmental matters. It is the thesis of this article that increased participation by local government in the formation and enforcement of certain types of environmental regulations will further goals of environmental protection and safety. There is significant untapped potential in these local governments both to fill gaps in existing regulatory schemes and to define and structure regulations that operate concurrently with state and federal law while more precisely catering to unique local needs and concerns. These programs can complement each other, and any protectionism and shortsighted regulation by local government will be precluded by the safeguards built into the existing laws.

In support of appropriate local regulation, this article examines the existing regulatory frameworks in several environmental areas, including solid waste and hazardous waste. By detailing the respective roles allocated to local and state government, it is then possible to define and predict the type of regulatory activities which will be acceptable manifestations of local authority within the existing system. To predict trends in the interpretation of statutes which define state and local roles, judicial decisions are discussed wherever appropriate. In addition, methods of structuring local regulation that may be less likely to meet with preemptive challenges are evaluated.

The advantages of increased local involvement in environmental

5. This groundswell has perhaps been most clearly seen in the right-to-know movement. A number of communities have enacted right-to-know ordinances which require varying levels of disclosure from handlers of hazardous waste. As of May of 1984, approximately 18 states and 31 localities had adopted right-to-know laws. These states include Alaska, California, Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, West Virginia and Wisconsin. *Hazard Communication Report*, ENV'T REP. (BNA) at 1899 (March 2, 1984); *Complying With OSHA's Hazard Communication Standard*, 8 CHEMICAL REG. REP. (BNA) No. 6, at 189 (May 11, 1984).

affairs stem from the benefits of local autonomy,[6] and from the superior ability of local government to respond to matters of local concern. Both the California Legislature and the state supreme court have recognized the importance of local concerns in environmental regulation as well as the effectiveness with which local government can define and regulate specific and unique local problems.[7] The potential role of local government is in no way limited to filling the regulatory gaps in state and federal laws. A well-defined, integrated local approach to the control of hazardous and nonhazardous wastes benefits both industry and local citizens. Environmental disasters lower land values, drive out both residents and industry, and create depressed local economies. Finally, local officials have a greater degree of accountability to local residents than do state or federal officials, and are often more sensitive and responsive to local concerns.[8]

The perceived disadvantages of local control over environmental concerns are largely illusory. The most significant and oft-repeated fear concerns local protectionism. While it is probable that some local governments would prefer to respond to environmental pressures by excluding industry, hazardous waste disposal sites and landfills, the structure of the environmental regulations currently in force precludes such protectionism.[9] Local governments are required to design environmental policies that are reasonable and which do not prohibit industrial activity.

The second perceived disadvantage of local control over environmental policy centers around vulnerability to political pressure.[10] However, given the accountability of local officials to their constituencies, it is unlikely that local special interests will have a greater effect upon local decision making than the statewide special interests typically exerted in the state legislature.[11] In addition most

6. For a more complete discussion of this issue, see Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447, 453 (1981).

7. People v. County of Mendocino, 36 Cal. 3d 476, 486, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984).

8. For a contradictory view, see Lefcoe, *supra* note 6, at 454.

9. *See* notes 54, 67-102 *infra* and accompanying text.

10. "History demonstrates that local municipal leaders could not resist the political pressure exerted by commercial interests and that ultimately state intervention was necessary to maintain environmental quality." McCaffery, *Hazardous Waste Regulation: An Evaluation From An Historical Perspective*, 7 COLUM. J. ENVTL. L. 251, 284 (1982).

11. One commentator arguing against this conclusion points out that "[l]ocal planning, zoning and sewer boards or authorities usually have members who are appointed by elected officials or are themselves elected officials serving both legislative and administrative functions. Board staff, if any, are under control of politicians or their appoin-

state and federal regulatory schemes are structured so as to establish certain minimum standards with which local governments must comply. Even if local officials were to bow to special interests, there are confining standards from which they do not have the discretion to deviate.[12]

A recent trend developing in the courts may also play a role in encouraging local governments to assume a more aggressive stance in environmental regulation. Several decisions have imposed an affirmative duty on local government to preserve environmental quality through the consideration of regional concerns in their planning strategies and to exclude uses which adversely impact the regional environment.[13] Other court decisions have held local government liable for damages arising from negligent failure to preserve environmental quality. Thus, negligent operation of a town landfill led to a $5.6 million damage award against a New Jersey town.[14] Government entities have been held liable in nuisance and inverse condemnation for damages arising from the malodorous operation of a sewage treatment plant[15] and the noise from a government owned airport.[16] As local authorities recognize that they may be liable for environmental degradation even in the face of compliance with existing state and/or federal regulations, promulgation of additional local standards may become viewed as the most expedient check against liability.

This article examines the specific regulatory and judicial framework for solid waste, hazardous waste and economic poisons. The

---

tees, and are usually without the benefit of union protection. Thus, politically expedient results are not difficult to achieve. . . . Even if municipal agencies make the environmentally "correct" decision, local economic, legal and technical resources are usually inadequate to defend sound environmental policy in the courts. In the end, the result is the same as if an unsound decision was [sic] originally made." *Id.* at 269 n.44, 46.

12. For example, RCRA, 42 U.S.C.A. §§ 6901-6987 (West 1977 and Supp. 1985) provides for the establishment by EPA of minimum standards of hazardous waste emissions which must be incorporated into any state hazardous waste management plan. Similarly, in the field of solid waste management, states typically promulgate minimum standards with which counties must comply. *See, e.g.*, CAL. ADMIN. CODE tit. 14 § 17200.

13. Save A Valuable Environment v. City of Bothell, 89 Wash. 2d 862, 870, 576 P.2d 401, 405 (1978), where the approval of a plan for a regional shopping center was held to be "arbitrary and capricious" in that it failed to serve the welfare of the community as a whole.

14. Ayers v. Jackson Township, 202 N.J. Super. 106, 493 A.2d 1314 (1985).

15. Varjabedian v. City of Madera, 20 Cal. 3d 285, 572 P.2d 43, 142 Cal. Rptr. 429 (1977).

16. *See, e.g.*, Griggs v. Alleghany County, 369 U.S. 84, 82 S. Ct. 531, 7 L.Ed. 2d 585 (1982), *reh'g denied*, 369 U.S. 857 (1962); Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981).

majority of the discussion focuses on California law. By distinguishing between local regulations which maximize flexibility and effectiveness and local regulation which is likely to meet preemptive challenges from higher governmental levels, it is possible to define the optimal role for local government in the field of environmental regulation.

II.
PREEMPTION

The division of regulatory power between state and local governments determines the permissible extent of local participation in environmental regulation. The issue of state preemption of local regulation differs significantly from the more widely discussed issue of federal preemption of state regulation.[17] While states are essentially free to regulate any area not explicitly reserved to the federal government,[18] local governmental power is traditionally derived exclusively from either the state legislature or the state constitution.[19] This view of local government as creature of the state legislature, known as "Dillon's Rule,"[20] makes local government totally submissive to the state except in those matters which are purely local.[21] These local governments are referred to as general law or non-home rule governments. In many states, however, municipalities have been provided with an alternative power framework known as home rule. Home rule governments derive power specifically from their

17. *See, e.g.*, Strohbehn, *supra* note 2; McLeod, *The Doctrine of Preemption*, 8 U.S.F.L. REV. 728 (1974).

18. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 377 (1st reprint 1978).

19. "The devolution of authority to local units has traditionally been a function of the state legislature under the strongly prevailing doctrine of legislative supremacy over local government." Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 221 (1983).

20. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation-not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." J. DILLON, MUNICIPAL CORPORATIONS, § 237 at 448-50 (5th ed. 1911).

21. "Local governmental units are creatures of the state legislature, dependent upon the latter for their existence and power, in the absence of any state constitutional provision to the contrary. Local entities do not have protection under the federal constitution against the state." Sato, *Local Government in California: Structure, Power, Immunity and Financing*, in PROCEEDINGS: A CONFERENCE ON THE RESPECTIVE ROLES OF STATE AND LOCAL GOVERNMENTS IN LAND POLICY AND TAXATION 1 (Lincoln Institute of Land Policy Monograph No. 80-7, G. Lefcoe ed., 1980).

state constitutions which authorize the assumption of exclusive authority over municipal affairs by local government.[22]

The role of the state in preempting local regulatory authority differs significantly between home rule and non-home rule units. However, with respect to both general law and home rule governments, state constitutions implicitly recognize the superior authority of the state to regulate certain matters.[23] In these matters, the state may always preempt local regulation.

A. Non-Home Rule Government

The California Constitution, Article XI Section 7 specifies: "A county or city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general law." The California Supreme Court recently defined and characterized municipal police power in flexible terms that reflect the tendency of the court to support local assertions of regulatory authority:

> It has long been settled that [municipal police] power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and "is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life."[24]

While the California courts have expressed a general willingness to allow local governments to regulate most areas not reached by state law, it is essential to bear in mind that the potential preemption of general law governments by the state is a political reality.

There are generally three contexts in which the issue of preemption arises with regard to non-home rule municipalities. In the first situation, the state specifically occupies the given regulatory field and makes explicit its intent that localities be excluded from the area. The second possibility is that the state explicitly acknowl-

22. Williams, *supra* note 19, at 222.

23. Advantages accruing from state control have been found to include uniform application of laws throughout the state; *see, e.g.*, Tolman v. Underhill, 39 Cal. 2d 708, 713, 249 P.2d 280, 283 (1952); Abbott v. City of Los Angeles, 53 Cal. 2d 674, 688, 349 P.2d 974, 3 Cal. Rptr. 158 (1960)), and the prevention of "the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground." Chavez v. Sargent, 52 Cal. 2d 162, 176, 339 P.2d 801, 809 (1959) (quoting Pipoly v. Benson, 20 Cal. 2d 366, 371, 125 P.2d 482 (1942)).

24. Fisher v. Berkeley, 37 Cal. 3d 644, 676, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), (quoting Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 160, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976)).

edges and authorizes the role of local government in a given area. The final situation calls for judicial interpretation of legislation to determine if the state legislature implicitly intended to preempt local regulation in a given area. In the first two situations, where local participation in the regulatory process is either explicitly prohibited or permitted, the role of the courts is relatively straightforward.[25] However, the issue of preemption by implication is considerably more complex and controversial.

In *Fisher v. Berkeley*, the court indicated in general terms the types of situations in which implied preemption might be found: "A potentially preemptive 'field' of state regulation is 'an area of legislation which includes the subject of the local legislation and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject.' "[26] The test utilized to determine whether local law-making in a given regulatory area has been implicitly preempted was established in *In re Hubbard*.[27] When a regulatory field has been fully occupied by state legislation, both supplementary and complementary local regulations are prohibited even if the subject were otherwise properly characterized as a "municipal affair":

> In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme. There are three tests: "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality."[28]

---

25. "Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations." People v. County of Mendocino, 36 Cal. 3d 476, 485 (1984).

26. 37 Cal. 3d 644, 707-708 (1984), (quoting Galvan v. Superior Court, 70 Cal. 2d 851, 862, 452 P.2d 930, 76 Cal. Rptr. 642 (1969)).

27. 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964). (The holding of *Hubbard* was subsequently overruled by Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969) but the test that the California Supreme Court set forth in *Hubbard* has been frequently cited since that time).

28. *County of Mendocino*, 36 Cal. 3d at 485, (quoting *In re Hubbard*, 62 Cal. 2d at 128).

This rather amorphous test gives the judiciary significant leeway in deciding whether preemption by implication has occurred. California courts have been reluctant to find such preemption and, in recent decisions, have generally been liberal in finding that municipal ordinances and regulations were valid exercises of local power.[29] In addition, the California Supreme Court has suggested that, particularly with respect to ordinances relating to environmental concerns, local government may have an affirmative duty to regulate where issues of public health are raised. Addressing a local ban on herbicide spraying, the court recently discussed the issue of implicit preemption:

> The legislature has not only recognized the rights of counties to regulate to preserve and protect public health, but has imposed a duty to regulate. Health and Safety Code § 450 provides: "The board of supervisors of each county shall take such measures as may be necessary to preserve and protect the public health . . . including, if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws, . . ."
>
> It is clear that the initiative is a proper local regulation for health purposes authorized by the constitution unless it conflicts with general laws, and in view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.[30]

In summary, general law cities and counties are essentially at the mercy of state legislatures in promulgating local regulations. A statement by the state legislature that they intend to regulate a given area to the exclusion of local law is sufficient to totally exclude local government. Despite this, the California courts have been reluctant to find that local regulations are implicitly preempted by a state regulatory scheme absent a showing of legislative intent to exclude local regulation.

B. Home Rule Governments

Many state constitutions provide local governments with the opportunity to take a more active and definitive role in their own governance by becoming home rule cities or counties. Home rule cities have constitutionally-granted authority to legislate over "municipal

29. *See, e.g.*, Fisher v. Berkeley, 37 Cal. 3d 644 (1984) (application of the *Hubbard* factors to the field of rent withholding led court to conclude that local regulation of the field was not implicitly preempted); *County of Mendocino*, 36 Cal. 3d 476 (local regulation of economic poisons is not implicitly preempted, based on *Hubbard* test).

30. *County of Mendocino*, 36 Cal. 3d at 484.

affairs," to the exclusion of state legislation. In California, Article XI, ¶ 5(a) of the Constitution authorizes local government to assume home rule status:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

In determining whether a home rule city or county has power to regulate in a given field, an inquiry is made into whether the issue in question is primarily a "municipal affair" or is of "statewide concern." While home rule governments can effectively "preempt" state law in the governing of municipal affairs, in matters of statewide concern "home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation. . . ."[31] While the state is free to legislate on local matters and localities are free to legislate on matters that are not local in nature, each level of government has ultimate authority over those issues most relevant to its own affairs.[32]

No precise test has been formulated by the courts to define what constitutes a local matter. The general approach has been to evaluate the contested regulations on a case-by-case basis.[33] The courts have given great weight to the legislature's purpose in enacting a general law and have questioned whether the purpose indicates an intent to preempt the field.[34] The intent to occupy is determined by an analysis of the subject matter in question, the statute, the subject matter to which the statute was intended to apply and the entire legislative scheme dealing with the subject matter.[35] An intent to

31. Bishop v. City of San Jose, 1 Cal. 3d 56, 61-62, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

32. *Id.* at 62.

33. " 'No exact definition of the term "municipal affairs" can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case. The comprehensive nature of the power is, however, conceded in all the decisions.' " *Id.* at 62-63 (quoting Butterworth v. Boyd, 12 Cal. 2d 140, 147, 82 P.2d 434 (1938)).

34. Abbott v. City of Los Angeles, 53 Cal. 2d 674, 683, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).

35. Tolman v. Underhill, 39 Cal. 2d 708, 712, 249 P.2d 280 (1952).

preempt is likely to be found in three situations: "(i) [W]hen the ordinance *duplicates* state law; when the local ordinance *contradicts* a state statute which expressly occupies the field; and (3) when the state occupies the legislative area by *implication*." (emphasis in original).[36] However, it is significant that a finding by a court that the legislature intended to preempt a given field will not, of itself, result in a holding that local government is precluded from regulating an area absent the simultaneous judicial decision that the matter being regulated is truly of statewide, as opposed to local, concern.

Despite these guidelines, courts have shown considerable flexibility in their approach to the municipal affairs question. A California appellate court characterized the decision-making process of the courts in the following terms: "The common thread of the cases is that if there is a significant local interest to be served which differs from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption."[37]

While an inquiry into whether a matter is of "local interest" or "traditionally a local matter," provides a way to approach the municipal affairs issue, it is not a test which provides certainty in predicting when local legislation will be preempted. And it is probable that as the structure of society changes and grows, what may once have been considered a municipal affair may later appear to be of statewide concern.[38] Ultimately, the courts possess the authority to empower local governments to regulate issues which are characterized by the judiciary as municipal affairs even while legislative intent will be a very important factor in determining whether local regulation of a given area is preempted.

C. The Judicial Response To The "Municipal Affairs" Issue

The traditional attitude of the courts in determining questions of preemption of local regulation by state legislation has been one of deference to the superior authority of the state.[39] However, Califor-

36. McLeod, *supra* note 17, at 732.

37. Gluck v. County of Los Angeles, 93 Cal. App. 3d 121, 131, 155 Cal. Rptr. 435, 440 (1979).

38. "[T]he 'constitutional concept of municipal affairs. . .changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state.' " *Bishop*, 1 Cal. 3d at 63 (quoting Pacific Tel. & Tel. Co. v. City & County of San Francisco, 51 Cal. 2d 766, 771, 775-76, 336 P.2d 514 (1959)).

39. "In 1960, our Supreme Court declared, in *Abbott v. City of Los Angeles, supra*, (sic) that: 'When there is a doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, the doubt must be

nia courts now appear to be willing to give local government the authority to preempt state regulations that directly conflict with local ordinances governing municipal affairs. The following discussion will review the evolution of the judicial attitude on the municipal affairs question.

In *Bishop v. City of San Jose*, the court upheld a city ordinance over a state law which enforced certain sections of the Labor Code by requiring the city to pay municipally-employed electricians at a certain wage rate.[40] The court definitively stated that the existence of state legislation will not automatically characterize a given field as a statewide concern and that the courts will be the final arbitrators in this determination. The court noted that where state and local laws directly conflict, or state legislation discloses an express intent to preempt local regulation, the courts will determine which regulation will be given effect.[41]

The court thereby seems to abandon the prior judicial attitude that the state could preempt local regulation of any field merely by adopting a general scheme purportedly necessary for a professed statewide concern. A charter city regulating a truly local matter may now authorize and engage in conduct prohibited by the state, or conversely, may prohibit conduct which the state has authorized, even where the legislature has expressed a clear intent that given legislation be applicable to charter cities.[42] Any subsequent battle will then be shifted to the courts.

Subsequent to the *Bishop* decision, the California Supreme Court has reiterated that some ordinances relating to "municipal affairs" will not necessarily be struck down merely on the basis either of direct conflict with general state laws or because of prior coverage of the regulated subject by state laws.[43] One commentator has concluded that "these cases appear to be indicative of a trend that courts will deem predominantly local matters 'municipal affairs,' despite the fact that they are also of some 'statewide concern' where

---

resolved in favor of the legislative authority of the state.' (53 Cal. 2d at p. 681.)" Gluck v. L.A., 93 Cal. App. 3d at 132.

40. 1 Cal. 3d at 61-62.

41. *"[I]n the event of conflict* between the regulations of the state and of local governments, *or if the state legislation discloses an intent to preempt* the field to the exclusion of local regulation, the question becomes one of predominance or superiority between general state laws on the one hand and the local regulations on the other (emphasis added)." *Id.* at 62.

42. *Id.* at 67.

43. *See, e.g.*, Baron v. City of Los Angeles, 2 Cal. 3d 535, 469 P.2d 353, 86 Cal. Rptr. 673 (1970); Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849, *cert. denied*, 415 U.S. 935 (1973).

charter cities have undertaken regulation."[44] Charter cities will be entitled to enact and enforce local police regulations in direct or implied conflict with state regulations or the state general scheme, "provided the city's regulations have a highly local character and a peculiar impact on the charter city's affairs."[45]

In the 1979 California Supreme Court decision of *Sonoma County Organization of Public Employees v. County of Sonoma* the court reaffirmed its tendency to support home rule ordinances over state regulation in affairs of municipal concern, and extended its defense of local government regulation to noncharter municipalities.[46] *Sonoma County* was a Proposition 13-related case, whereby the state prohibited many cost-of-living and wage increases by local governments to their employees. Receipt of state surplus funds was conditioned upon compliance with the state regulation. It was anticipated that the decision in *Sonoma County* would be of particular importance because of its impact upon the delegation of authority between state and local government in the regulation of land-use development and environmental policy, coming as it did at a time when Proposition 13 was potentially shifting significant amounts of fiscal power from local to state government.[47] Allocation of state surplus funds to municipalities based on compliance with state-enacted regulation would potentially result in a significant power shift in favor of the state. Those favoring local control were therefore pleased with the strong home rule sentiments expressed by the *Sonoma County* court.

The court examined the conflicting claims that the wage increase issue was alternatively of statewide concern, or was a municipal affair, and found in favor of the municipality. In so finding, the court held that a statutory statement by the legislature that its actions were a matter of statewide concern was not binding on the court. Then, in an unprecedented extension of its holding, the court extended the right of charter cities to control employee salary levels to noncharter municipalities. While local laws of noncharter cities and counties normally yield to state laws in cases of conflict, the court concluded that the legislature could not have intended to treat charter and noncharter entities differently in this matter. The state

44. McLeod, *supra* note 17, at 741-42.

45. *Id.* at 740.

46. 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

47. Dimento, et al., *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A. L. REV. 859, 1018-19 (1980).

law was therefore struck for both charter and noncharter governments, in what one commentator referred to as "a smashing assertion of localism over statism."[48]

Thus, the current status of the state/local preemption doctrine in California reflects a strengthening in the position of local government over state government. While charter localities are clearly in a stronger position than noncharter municipalities, courts have been generally reluctant to strike down regulation by general law cities and counties unless a clear intent to preempt has been expressed by the legislature. In the case of charter governments, courts have been liberal in defining some areas of regulation as "municipal affairs" and have firmly upheld the role of the judiciary as the final arbitrator of what is of statewide, as opposed to local, concern.

III.

LOCAL GOVERNMENT PARTICIPATION IN THE REGULATION OF NONHAZARDOUS WASTE

While solid waste management has traditionally been a function of local government, a perceived increase in problems associated with solid waste disposal has led to the promulgation of a significant state and federal regulatory framework covering this field. Solid waste regulation serves as an illustrative starting point for a consideration of the delegation of environmentally-related regulatory duties for three reasons. First, the awareness of the need for greater state and federal control is relatively recent. Secondly, solid waste disposal activities are less influenced by the emotionally-charged arguments which characterize the regulation of toxic and hazardous wastes. Thirdly, solid waste regulation is perhaps the most heavily litigated environmental field, thereby providing excellent documentation of developing trends and attitudes.

The following discussion reviews the traditional approach to solid waste management, and the extent to which this role has changed as a result of the state and federal regulatory framework developed over the past few decades. The response of the judiciary to local attempts to control solid waste regulation is then reviewed and assessed in terms of nationwide trends. Because of the plenitude of opinions in this area, the discussion approaches the review of judicial precedent on a state-by-state basis or, where appropriate, on a regional basis, and focuses on the implications of a particular case for state or local control, rather than on the facts of each case.

48. *Id.* at 1019.

A. The Traditional Approach

Control over the collection and disposal of solid waste has been consistently viewed as the responsibility of local government.[49] The duty to so regulate stems from the local government's role in administering law and furnishing public services.[50] Solid waste regulation is typically accomplished through zoning ordinances, which divide a municipality into districts based on functional utilization and prohibit given activities within districts. In the absence of state preemption, municipalities are free to locate or exclude waste disposal facilities in any district.[51]

Under the "essential government function" and "public health" doctrines,[52] local governments have been accorded substantial deference by courts evaluating challenges of a municipal authority to regulate or exclude disposal facilities. Localities have been authorized to completely exclude waste disposal facilities found to constitute a public menace.[53] In addition, significant restrictions on location, quantity of waste accepted and operation of disposal facilities have been upheld.[54] However, courts have consistently de-

49. *See*, Gardner v. Michigan, 199 U.S. 325 (1905); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905); Silver v. Los Angeles, 217 Cal. App. 2d 134, 31 Cal. Rptr. 545 (1963); Strub v. Deerfield, 19 Ill. 2d 401, 167 N.E.2d 178 (1960); Building Comm'r v. C & H Co., 319 Mass. 273, 65 N.E.2d 537 (1946); Board of Health v. Vink, 184 Mich. 688, 151 N.W. 672 (1915); Nehbras v. Village of Lloyd Harbor, 2 N.W.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1914); Meyers v. Cornwall, 24 Misc. 2d 286, 192 N.W.S.2d 734 (1959); V & H Equip. Rental Corp. v. Garfield Heights, 161 N.E.2d 646 (1959); Lutz v. Armour, 395 Pa. 576, 151 A.2d 108 (1959); 42 U.S.C. § 6901(a)(4) (Supp. III 1979); *cited in* Comment, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem*, 10 FORDHAM URB. L.J. 215, 216 n.5 (1982).

50. National League of Cities v. Usery, 426 U.S. 833, 851 (1976). The Court cited as traditional or essential government functions fire protection, sanitation, public health and parks and recreation.

51. For a more complete discussion of the regulatory methods available to local government, see Comment, *supra* note 49, at 221.

52. *See, e.g.*, Huron Cement Co. v. Detroit, 362 U.S. 440, 446 (1960); City of Glendale v. Trondsen, 48 Cal. 2d 93, 101, 308 P.2d 1 (1957); Laurel Hill Cemetery v. City and County of San Francisco, 152 Cal. 464, 470, 93 P. 70 (1907). *See also* CAL. HEALTH & SAFETY CODE § 450 (West 1979).

53. Township of Vanport v. Brobeck, 22 Pa. Commw. 523, 349 A.2d 523 (1975) (where an open garbage dump could be excluded based on the city's duty to protect public health, safety and welfare).

54. In County of Cook v. Triem Steel and Processing, Inc., 19 Ill. App. 2d 126, 153 N.E.2d 277 (1958), a zoning ordinance prohibiting the disposal of refuse within one mile of the municipality was upheld. In a number of cases, municipalities have been authorized to limit the quantity of waste to be disposed of within their boundaries. *See, e.g.*, Ex Parte Lyons, 27 Cal. App. 2d 182, 80 P.2d 745 (1938); Yaworski v. Town of Canterbury, 21 Conn. Supp. 347, 154 A.2d 758 (Super. Ct. 1959); Boone Landfill, Inc. v. Boone County, 51 Ill. 2d 538, 283 N.E.2d 890 (1972); Southern Ocean Landfill, Inc.

feated attempts by local government to totally prevent disposal of waste, either through permit refusal or by zoning out sanitary landfills, absent clear showing that the landfill would present a public nuisance, would be a threat to the public health, or had failed to comply with established regulations.[55]

B. The Regulatory Framework

Since 1976, solid waste disposal has been regulated on the federal level by the Resource Conservation and Recovery Act ("RCRA").[56] RCRA was enacted to promote the protection of both public health and the environment, and to conserve valuable materials and energy resources. It sets forth comprehensive federal planning guidelines to be utilized by local and state governments in the development of individual state or regional solid waste programs.[57] However, it is the express intent of RCRA to leave primary responsibility for solid waste management with state and local governments.[58]

The legislatures of all fifty states have enacted laws which govern the collection, disposal and management of solid waste by establishing guidelines and state permitting requirements for collection and disposal facilities.[59] In order for states to qualify for federal assistance, they must submit a state waste management plan and designate a state agency to oversee the implementation of the plan. States are authorized to designate as the responsible agency the state health department or a state environmental agency, such as a state department of environmental protection, or to establish a separate entity solely for the control of solid waste.[60]

---

v. Mayor of Ocean, 64 N.J. 190, 314 A.2d 65 (1974); Public Health Council v. Franklin Township Bd. of Health, 108 N.J. Super. 239, 260 A.2d 859 (Super. Ct. App. Div. 1970); Ench v. Mayor and Council of Pequannock Township, 47 N.J. 535, 222 A.2d 1 (1966); Shaw v. Township of Byram, 86 N.J. Super. 598, 207 A.2d 570 (1965); Wiggins v. Town of Somers, 4 N.Y.2d 215, 149 N.E.2d 869, 173 N.Y.S.2d 579 (1958); Case v. Knauf, 32 Misc. 2d 137, 224 N.Y.S.2d 228 (Sup. Ct. 1961); Lutz v. Armour, 395 Pa. 576, 151 A.2d 198 (1959).

55. *See, e.g.*, In re Town of Shelburne Zoning Appeal, 128 Vt. 89, 258 A.2d 836 (1969); Carlson v. Village of Worth, 62 Ill. 2d 406, 343 N.E.2d 493 (1975); O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

56. 42 U.S.C. §§ 6900-6987 (1982 and Supp. I 1983).

57. 42 U.S.C. §§ 6941-42 (1982 and Supp. I 1983).

58. "[T]he collection and disposal of solid waste should continue to be primarily the function of State, regional, and local agencies. . ." 42 U.S.C. § 6901(a)(4) (1982).

59. Comment, *supra* note 49, at 227.

60. For a detailed listing of choices made by the various states with respect to type of agency chosen to manage solid waste disposal programs, see Comment, *supra* note 49, at 227-29 nn.91-98.

In California, a separate regulatory agency, the California Solid Waste Management Board, administers the state solid waste program, popularly known as the Waste Management Act.[61] The explicit policy of the Waste Management Act is to leave primary responsibility for solid waste management and planning with local government, subject to the condition that all activities conform with the state Solid Waste Management Plan. Local government is free to adopt and enforce any additional regulations imposing conditions, restrictions or limitations on the local handling or disposal of solid waste, providing that no conflict with state regulations occurs.[62] In addition, the Act distinguishes matters "solely of local concern" from those of statewide concern and prohibits the imposition of state regulations in these areas.[63]

The Act also recognizes that a solid waste program is most efficiently administered at the county level. Counties are therefore authorized to adopt their own solid waste management plans.[64] Regulations promulgated pursuant to the California Solid Waste Management Act[65] give the county administrative agency primary responsibility for planning, implementing and enforcing solid waste programs.[66] While counties are free to set standards stricter than those set by the state, if not inconsistent with the state plan,[67] they still must consider regional issues in the promulgation of all regulations. Thus, the regulations inherently foreclose protectionist measures by local and county governments.

In brief, the California structure of regulatory authority is characterized by local and county control, subject only to compliance with minimum standards set by the state, and to preemption in the case of direct conflict. The state is free to promulgate its own waste management policies, subject to ultimate approval by the Federal Environmental Protection Agency and to basic commerce clause restrictions.

---

61. CAL. GOV'T CODE §§ 66700-66796.84 (West 1983).

62. *Id.* at §§ 66730-32.

63. Examples of local concerns include the frequency and means of collection and transportation, the level of service, charges and fees, the designation of territory served through franchises, employee contracts and purely aesthetic considerations. CAL. GOV'T CODE § 66771. *See also* §§ 66755-57.

64. *Id.* at §§ 66780.7.

65. CAL. ADMIN. CODE tit. 14, R. 17020 *et seq.* (1984).

66. *Id.* at § 17127.

67. *Id.* at § 17129.

C. The Judicial Response

(a) California

While the right of state and local governments to control non-hazardous waste disposal is one of the most heavily litigated areas of environmental law, there is very little case law addressing this issue in California. This is perhaps attributable to the lower population densities that characterize California, as compared to some Northeastern states and to the availability of open space in the West. As metropolitan areas grow, however, the problem of waste disposal siting becomes a central concern to planners. Thus, this may be an area of greater legal activity in the near future.

The only California case to squarely address the issue of a municipality's rights with respect to waste disposal was the appellate court decision of *Ex Parte Lyons*.[68] There, a county ordinance banning the importation of refuse produced outside the county was struck down as an arbitrary and improper exercise of the town's police power. The court noted that an ordinance could limit the amount of waste accepted to the extent that an increase in the quantity of solid waste could endanger public health, but could not discriminate on the basis of waste origin.[69] As will be seen throughout the following cases, the *Lyons* holding is a fairly succinct statement of subsequent and current law.

(b) New Jersey

New Jersey has experienced a crisis in waste management due to the large quantities of waste generated in and around the state and the relatively limited disposal space within the state. In response, judicial interpretation of the New Jersey Solid Waste Management Act of 1970[70] has significantly curtailed the authority of local government to regulate solid waste disposal.

Initially, the law in New Jersey vacillated. In the 1971 case of *Ringlieb v. Township of Parsippany-Troy Hills*,[71] the court found that the Solid Waste Management Act totally preempted local government from regulating in the field of solid waste management. Apparently in response to this decision, the legislature promulgated a supplement to the Act in 1971, clearly stating that nothing in the

68. 27 Cal. App. 2d 182, 80 P.2d 745 (1938).
69. *Id.* at 188-89, 80 P.2d at 749.
70. N.J. STAT. ANN. § 13:1E-1-135 (West 1979 and Supp. 1985).
71. 59 N.J. 348, 283 A.2d 97 (1971).

Solid Waste Management Act precludes the right of local government "to adopt health or environmental protection ordinances or regulations promulgated pursuant thereto."[72]

Emphasis shifted to state control again when pertinent sections of the 1971 supplement were repealed in 1975. Immediately prior to the legislative shift, the Supreme Court of New Jersey interpreted the 1971 Waste Management Act supplement to mean that a locality had authority only to regulate "immediate health and environmental matters [such] as fencing, cover, dust control and the like."[73] The court based its holding on what it perceived as a legislative intent to regionalize solid waste management, although it acknowledged that no statewide plan for waste management had ever been developed.[74] Thus, the role of local government in the regulation of local solid waste disposal sites in New Jersey is now almost completely subordinated to state control.

The controlling law on solid waste disposal regulation is set out in *City of Philadelphia v. New Jersey*.[75] That decision directly addressed the issue of federal preemption of state bans on waste disposal, but the findings are eminently applicable to the issue of state preemption of local ordinances. The Court's conclusion that geographic origin is an impermissible basis for discriminating against solid waste is perhaps the most fundamental principle governing the environmental law in this field.

City of Philadelphia involved a New Jersey statute that banned in-state disposal of solid waste originating outside of the state. The statute was struck down as discriminatory and therefore violative of the Commerce Clause.[76] The Court examined and found impermissible the various reasons given by the state to justify the waste ban. The arguments presented by the state were of the type offered by municipal governments to justify limitations on the flow of waste into their landfills and presumably would be equally invalid when offered by a local government. Preservation of existing landfill space and extension of the life of existing landfills were deemed to be impermissible state objectives when accomplished by discriminating against out-of-state waste.[77] In addition, the Court held that a state may not accord its own residents a preferred right of access

72. N.J. STAT. ANN. § 13:1E-17 *repealed by* L. 1975, c. 326 § 36.

73. Southern Ocean Landfill, Inc., v. Mayor of Ocean, 64 N.J. 190, 195, 314 A.2d 65 (1974).

74. *Id.*

75. 437 U.S. 617 (1978).

76. *Id.* at 628.

77. "But whatever New Jersey's ultimate purpose, it may not be accomplished by

over consumers in other states to natural resources (such as landfill space) located within the state.[78]

The court qualified its opinion in two ways which will be significant for local planners wishing to legally control the flow of waste to the landfills in their municipalities. First, the Court found that New Jersey could legitimately extend the lives of its landfills by slowing the flow of all waste, regardless of origin, into the remaining landfills.[79] Second, the court implied that the state might be entitled to restrict to state residents access to *state-owned* landfills without violating the Commerce Clause. The court, however, declined to definitively decide this issue.[80]

(c) Maryland

The issue of local limitations on solid waste disposal has also been frequently litigated in Maryland. The state has followed the Commerce Clause limitations laid out in *City of Philadelphia*,[81] but has gone on to explore the possibility raised by the Supreme Court that out-of-state waste may be prohibited from publicly-owned landfills. In *County Commissioners of Charles County v. Stevens*,[82] the court upheld a county ordinance banning the importation of out-of-state waste into a county-owned landfill.[83] The court found that since the landfill was publicly-owned, and despite the fact that it was the only landfill in the county, the county fell under the market participant exemption from the dormant Commerce Clause.[84] As a market participant providing a service to county residents, the county was

---

discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-27.

78. *Id.* at 627.

79. *Id.* at 626.

80. *Id.* at 627 n.6.

81. In Shayne Bros., Inc. v. Prince George County, 556 F. Supp. 182, 184-85 (1983), a county ordinance banning the importation of out-of-state waste into county landfills, except with the consent of county council, was found to violate the Commerce Clause, as per *City of Philadelphia*.

82. 299 Md. 203, 473 A.2d 12 (1984).

83. *Id.* at 206.

84. *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) where the Supreme Court granted an exemption from the dormant Commerce Clause restrictions to states acting as market participants rather than market regulators; Reeves, Inc. v. Stake, 447 U.S. 429 (1980) where South Dakota was permitted to give preference to state residents in the allocation of cement manufactured in a state-owned cement plant, based on the finding that the state was a market participant; White v. Massachusetts Council of Const. Employers, 460 U.S. 204 (1983) where a restriction in favor of the employment of city residents in city-funded construction projects was upheld by the court "insofar as the city expended only its own funds in entering into construction contracts for public projects." 460 U.S. at 214-15.

entitled to "limit the benefits of this service to the county taxpayers who pay for it."[85]

Concededly, *Charles County* reaffirms that a county does not have unlimited power to exclude nonresidents from either state-owned facilities or from the county, implying, *inter alia*, that the nonresident waste haulers may have a right to construct their own private landfill. This decision does, however, have potentially far-reaching implications regarding the limited rights of a municipality to restrict the flow of waste into its landfills.

(d) Illinois

The Illinois State Constitution recognizes both home rule and general law government, in provisions similar to those found in the California constitution. There is, however, a critical distinction between California and Illinois. While an Illinois home rule unit can normally exercise powers pertaining to its own government and affairs, the state legislature can preempt any action by the local government by explicit limitations, even when the activity preempted is apparently local in nature.[86]

In 1970 the Illinois Environmental Protection Act[87] ("IEPA") was enacted to provide for a statewide program of environmental regulations specifically designed to address the problems of solid waste treatment and disposal. In the years following the enactment of the IEPA, the Illinois Supreme Court heard several cases involving the issue of whether the Act preempted local environmental regulation. The court articulated three conclusions in these various cases. First, the court followed the fundamental guideline that geographic origin cannot be used as a basis for discriminating against solid waste generated outside a municipality.[88] Second, the court held that non-home rule governments are preempted by the IEPA from regulating the field of waste disposal.[89] The third conclusion is rather less clear. The court seems to be implying either that

85. *Charles County*, 299 Md. at 217.

86. "Even where an ordinance pertains to the home rule unit's government and affairs, the state can limit or totally exclude the exercise of home rule powers over most local authorities. Striking a balance between home rule autonomy and state sovereignty, the constitution's home rule provisions set out a precise system for the limitation and exclusion of home rule powers by the General Assembly." Hilliard, *The Coordination of Environmental Law Enforcement In Illinois*, ILL. B.J., Dec. 1983 at 206, 208.

87. ILL. REV. STAT. Ch. 111½, §§ 1001-1051 (1977).

88. Boone Landfill, Inc. v. Boone County, 51 Ill. 2d 538 (1972), where the court rejected a county claim that banning of outside waste was necessary to limit the quantity of refuse being discarded.

89. In O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972) the

home rule governments can regulate concurrently with the state on environmental issues only if there is no conflict between local and state laws, or, that local home rule units may be totally preempted from regulating areas covered by the IEPA. Because the case history on this issue is contradictory, the approach of Illinois courts to this question is briefly reviewed here.

In *City of Chicago v. Pollution Control Board*[90] a landfill and incinerators operated by the home rule city of Chicago were deemed to be subject to the provisions of the IEPA. The court explicitly allowed for concurrent regulation by the city and the state, provided that the city met minimum standards set by the state: "We conclude therefore that a local governmental unit may legislate concurrently with the general Assembly on environmental control."[91]

Only one year later, in *Carlson v. Village of Worth*[92] the court held that a non-home rule village was preempted by the IEPA from superimposing local environmental regulations on a private landfill operator. The court also cast doubt on the right of home rule governments to so regulate. The court clarified its *City of Chicago* statement acknowledging the validity of concurrent regulation as dictum and explained that the issue of the authority of a home rule municipality to legislate was not before the court.[93] Thus, while the *Carlson* decision implies that both home rule and general law governments are totally preempted from regulating in the field of waste disposal, only the validity of regulation by general law units was actually before the court.[94]

In 1979, the Illinois Supreme Court partially retreated from its prior pro-state position and acknowledged that the policy objectives of the IEPA mandated the recognition of the right of home rule governments to regulate concurrently with the state. In *County of*

---

court found that the legislative policy behind the IEPA preempted a county requirement that a landfill proposed by a city comply with county zoning ordinances.

90. 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

91. *Id.* at 489.

92. 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

93. *Id.* at 409.

94. The next major decision of the court did not clarify this issue. In Metropolitan Sanitary District v. City of Des Plaines, 63 Ill. 2d 256, 347 N.E.2d 716 (1976) a home rule city was held to be preempted from passing an ordinance that prevented the Greater Chicago Metropolitan Sanitary District from building a sewage treatment plant in Des Plaines. However, the holding seems to be based on the fact that the matter involved was beyond the "government and affairs" of the city, and was actually a problem of regional or statewide concern. Thus, the decision probably does not represent a blanket preemption of home rule environmental regulation.

Cook v. John Sexton Contractors Co.,[95] a home rule county was found to have the authority to compel a private owner of a sanitary landfill to comply with county zoning restrictions, as long as local legislation primarily affected matters of municipal, as opposed to regional or statewide concern and conformed with minimum standards established by the IEPA.[96] The court reiterated, however, that the Act preempted non-home rule units from passing municipal environmental legislation.[97]

(e) Miscellaneous Decisions

Courts throughout the country have generally tended to reflect one of the courses taken in the previously described decisions. In Rhode Island, the state supreme court found local regulation of solid waste disposal to be completely preempted by state legislation.[98] In New York,[99] Pennsylvania,[100] and Connecticut,[101] the courts have recognized the authority of local governmental units to regulate waste transportation and disposal but have prevented the banning of waste based on geographic origin.

Thus, there is strong case precedent to support the proposition that exclusionary ordinances restricting waste disposal on the basis of geographical origin are untenable. As violations of the Commerce Clause, these exclusionary ordinances will not survive judicial scrutiny. Although a number of similarly restrictive state and local statutes have not yet been challenged or repealed, it is unlikely

95. 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

96. *Id.* at 509, 514.

97. *Id.* at 515. ILL. REV. STAT. Ch. 111½ §§ 1039.2(a) and (f), enacted subsequent to *Sexton*, seem to have significantly expanded the power of counties and municipalities to regulate the siting of landfills.

98. In Town of Glocester v. Rhode Island Solid Waste Mgt. Corp., 120 R.I. 606, 390 A.2d 348 (1978), a town ordinance banning importation of solid waste from outside the town was found to be preempted by the Rhode Island Solid Waste Management Corp. Act of 1974. R.I. GEN. LAWS §§ 19-1 to 19-29 (1979 and Supp. 1980).

99. In Dutchess Sanitation Service, Inc. v. Town of Plattekill, 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980) a city ordinance prohibiting out-of-town waste disposal within its territorial limits was found to violate Commerce Clause principles enunciated in *City of Philadelphia*. However, in the anomalous decision of Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980) a similar ordinance which prohibited disposal of out-of-town refuse unless authorized by the Town Board was upheld.

100. In Lutz v. Armour, 395 Pa. 576 (1959), a town ordinance banning out-of-town waste was found unconstitutional. In General Battery Corp. v. Zoning Hearing Board of Alsace Township, 29 Pa. Commw. 498, 371 A.2d 1030 (1977) a town zoning ordinance totally excluding disposal facilities from the area was held to be unreasonable in light of approval of a facility by the State Department of Environmental Resources.

101. Yaworski v. Town of Canterbury, 21 Conn. Supp. 347, 154 A.2d 758 (1959).

that they would withstand challenge.[102]

Beyond this absolute limitation to the power of both state and local governments, municipalities in most states possess considerable authority under RCRA and state solid waste plans to regulate the siting and operation of their own waste disposal sites. In addition, the increasing tendency to require local governments to take regional needs into consideration adds a desirable degree of accountability to the regulatory process. Thus, the statutory emphasis on regional needs prevents protectionism and provides a positive framework within which local government can plan, fund and operate disposal facilities. While there are persuasive arguments for the regionalization of control of solid waste disposal operations, there is no apparent conflict between concurrent state, regional and local control.[103] The greater resources of the state or regional agencies can be utilized to conduct studies to locate environmentally safe areas within the state or region for the establishment of sanitary landfills. Simultaneously, local government should incorporate unique local concerns and conditions into the planning and operation of these facilities. There is little doubt that increased urban density is creating unique problems in solid waste disposal, as towns surrounded by urban development experience the depletion of the open space needed to meet their disposal requirements. In these circumstances, regional control and planning are essential. Local government, however, should establish its own unique and constructive role in the process.

IV.
LOCAL PARTICIPATION IN THE REGULATION OF HAZARDOUS WASTE STORAGE AND DISPOSAL FACILITIES

The field of hazardous waste regulation contains a number of

102. For a listing of all states with exclusionary statutes and a categorization of the types of limitations placed on local government pursuant to state policy set forth in these statutes, *see* Comment, *supra* note 49, at 237 n.188.

103. Advocates of regionalized or statewide programs of solid waste disposal can be persuasive: "The persistent belief that solid waste disposal is a municipal problem prevents effective regulation. The problem of refuse disposal transcends territorial limits and affects areas substantially larger than a single municipality. Furthermore, most municipalities are too small to finance, construct or operate modern disposal facilities. The increasing involvement of federal and state governments in solid waste regulation indicates that the problems involving disposal have reached regional and national proportions. While the disposal of refuse continues to be a municipal function, state and regional planning is needed in order to find effective and economical solutions." *Id.* at 225.

unique environmental issues. This is a more emotional issue than solid waste and extensive media coverage has caused the development of an extremely negative attitude among local communities confronted with plans for hazardous waste disposal facility siting. Pragmatically, the issue of siting and regulation of disposal facilities diverges from regulation of non-hazardous waste in a number of ways. Initially, the need for disposal sites is predominately a regional rather than a local need. Few communities require their own hazardous waste disposal site. Conversely, the potential for adverse environmental effects is concentrated almost entirely on the locality and is not proportionally borne by the entire waste-generating region. In addition, the technologies associated with development and monitoring of adequate disposal methods are complex and expensive, and largely beyond the reach of local governments. The role of state and even federal government in this area is therefore more pronounced than in the disposal of non-hazardous waste.

The typical response of local governments faced with the potential siting of hazardous waste disposal facilities within their jurisdictions has been to attempt to prevent the location of facilities through use of the police power.[104] This problem may become more acute if the funding cutbacks currently plaguing regulatory agencies result in more frequent and dramatic environmental disasters.[105] In general, the public opposition to hazardous waste facilities is strong and growing.[106]

---

104. "In many states local communities are free to base decisions on the fear of future public health hazards because they have the power to exclude such facilities through the land-use control process. 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, *Anywhere But Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 2 UCLA J. ENVTL. L. & POL'Y 1, 2-3 (1981).

105. "States are having difficulty carrying out their responsibilities under the other major hazardous waste law, the Resource Conservation and Recovery Act (RCRA), because of a severe personnel shortage. . . ." Freilich, Acconcia & Martin, *Judicial Federalism and State Sovereignty: Trends and Developments in Urban, State and Local Government Law*, 16 URB. LAW. 539, 614-15 (1984).

106. Actions taken by the Reagan Administration EPA to modify the RCRA rules promulgated by the Carter Administration EPA will inevitably have the effect of strengthening local opposition to hazardous-waste-facility sites. As a recent report on siting concludes: "States need a good strong, enforceable, responsible set of federal regulations in place to base state programs on. . . ." *Special Report on Siting of Hazardous Waste Management Facilities: A Major Problem Facing Industry and States*, [12 Current Developments] ENV'T REP. (BNA) 871, 874 (Nov. 13, 1981). The most controversial decision taken to date to undermine public confidence in RCRA was the decision announced on February 25, 1982, to allow some use of "containers holding free liquid" in land fills, 47 Fed. Reg. 8307 (1982), but the decision was reversed in less than a

The issue of local regulatory authority in the field of hazardous waste regulation is, therefore, particularly sensitive. This section will examine and interpret the regulatory framework currently in place in order to assess both the potential role of local government and possible areas of conflict arising between local and state governments. Then, it will be possible to evaluate the relative desirability of local and state control over various facets of hazardous waste management.

A. The Regulatory Framework

The Resource Conservation and Recovery Act[107] gives states the option to enact a qualified state program to administer federal hazardous waste standards. Without the enactment of such a plan, a state is totally preempted by the federal government from the management of hazardous waste. Between 1976 and 1980 most states elected to administer qualifying programs and passed the necessary implementing legislation. Under RCRA, the Environmental Protection Agency ("EPA") identifies those wastes that are hazardous, requires that states have a manifest system to track waste transported from generation sites to off-site management facilities, and requires that existing and new on- and off-site facilities be regulated through a permit program. Thus, RCRA contemplates a dual management system whereby the EPA promulgates minimum standards and requirements while the states are free to incorporate these standards and procedures into a qualified state plan. While it is clear that RCRA requires that the states incorporate minimum standards, it is not clear whether the states possess the power to impose higher standards than those established by the EPA.[108]

In California, the Hazardous Waste Control Act[109] ("the Act"), which became operative on July 1, 1983, sets out the policies and procedures for the administration of a comprehensive hazardous

month after a storm of public opposition surfaced at an EPA hearing. [12 Current Developments] ENV'T REP. (BNA) 1476 (Mar. 19, 1982). "Such actions, even if reversed, can only serve to make it difficult for any regulatory agency or facility operator to argue convincingly that compliance with RCRA regulations is sufficient to protect third parties and the public generally from harm occurring at a site chosen for a facility." Tarlock, *supra* note 104, at 11, n.27.

107. 42 U.S.C.A. §§ 6901-6987 (West 1977 and Supp. 1981).

108. One commentator opposed to the imposition by states of stricter standards noted that "[t]he result could be that neighboring states might try to out-regulate each other in an effort to force hazardous waste management activities into adjoining states." McCaffery, *Hazardous Waste Regulation: An Evaluation From An Historical Perspective*, 7 COLUM. J. ENVTL. L. 251, 285 (1982).

109. CAL. HEALTH & SAFETY CODE §§ 25100-25245 (1985).

waste management plan. The California Hazardous Waste Management Regulations[110] ("the Regulations") establish specific standards, definitions and regulations necessary to implement the Waste Control Act.

The Act seems to contemplate a dual system of regulation by state and local agencies. Essentially, local regulation is permitted to the extent that it is not explicitly preempted by state law.[111] Section 25149 specifically provides for the imposition of local conditions and ordinances "not in conflict with this section."[112] In defining the permissible scope of this concurrent regulatory scheme, the section specifies that local government, whether general law or home rule, may not "prohibit or unreasonably regulate" any hazardous waste facility.

It seems unlikely that a local government could impose stricter standards than those established by the state. The Act specifically provides for a dialogue between local government and the director of the state program in order that "new or additional permit or interim status conditions" desired by the local agency be considered for adoption by the state.[113] Local government probably lacks independent authority to adopt additional requirements without state approval. In addition, the Act provides for the incorporation of unique local or regional considerations into the Regulations, rather than in supplemental local ordinances and regulations.[114] Thus, the

110. CAL. ADMIN. CODE tit. 22, R. 66011-67651.

111. "No provision of this chapter shall limit the authority of any state or local agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce and administer." CAL. HEALTH & SAFETY CODE § 25105 (1985).

112. "Notwithstanding any provision of law to the contrary, except as provided in § 25149.5 or 25181 of this code or § 731 of the Code of Civil Procedure, no city, county, city and county, whether chartered or general law, or district may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit relating to an existing hazardous waste facility so as to prohibit or unreasonably regulate the disposal, treatment, or recovery of resources from hazardous waste or a mix of hazardous and solid wastes at that facility, unless after public notice and hearing the director determines that the operation of the facility may present an imminent and substantial endangerment to health and the environment. However, nothing in this section shall authorize an operator of that facility to violate any term or condition of a local land use permit or any other provision of law not in conflict with this section." *Id.* at § 25149.

113. "A city, county, or city and county in which an existing hazardous waste facility is located may at any time recommend to the director any new or additional permit or interim status conditions as the local agency deems necessary to protect against hazards within its boundaries to the public health, domestic livestock, wildlife, or the environment." *Id.* at § 25149.6.

114. "The department may adopt varying regulations pursuant to § 25150, other than building standards for different areas of the state depending on population density, climate, geology, types and volumes of hazardous waste generated in the area, types of

extent to which local regulation will be preempted by the Act is somewhat ambiguous.[115]

B. Interpretation Of The California Program

Two sources contribute to an understanding of the intended role of local government in hazardous waste regulation. First, the California Attorney General has issued an opinion discussing that office's perception of the role of local government in this field. Second, there is some case law in California that has indirectly touched on the issue.

(a) California Attorney General's Opinion

A 1974 opinion issued by the California Attorney General's office[116] concluded that the Hazardous Waste Control Law preempts existing local ordinances and regulations pertaining to the processing, handling and disposal of hazardous materials.[117] While the opinion acknowledges that the California Constitution (Article XI, § 7) generally authorizes cities and counties to exercise their police powers to regulate this field as long as the regulations do not conflict with "general law", the opinion concludes that the "general law"—namely the Waste Control Act—implicitly preempts local regulation. The Attorney General interprets § 25172 of the Act, which provides in relevant part that "No provision of this chapter shall limit the authority of any state or local agency in the enforcement or administration of any provision of law. . . ." to mean that a local agency can enforce ordinances that are not inconsistent with the Act provided that they do not "deal with the subject matter of the processing, handling and disposal of hazardous and extremely

---

waste treatment technology available in the area, and other factors relevant to hazardous waste handling, processing, storing, recycling, and disposal." *Id.* at § 25151.

115. In areas of hazardous waste management other than disposal siting, the degree of authority granted to local government varies. In the California Hazardous Substances Storage Act (CAL. HEALTH & SAFETY CODE §§ 25280 *et seq.*), covering the regulation of underground storage tanks, local governments had the option of developing their own, independent regulatory program prior to January 1, 1984. *Id.* at § 25299.1. However, those local governments choosing to not develop local qualifying programs prior to 1984 are preempted from subsequently passing ordinances or regulations in conflict with those set out in the Storage Act. The city of Santa Monica is an excellent example of a local government that has taken control of its own underground storage tank program. *See* Santa Monica Municipal Code, Chapter 6, §§ 8600-8614.

116. 57 Op. Att'y Gen. 160 (1974).

117. *Id.* at 160.

hazardous wastes. . ."[118] The opinion justifies this conclusion on the basis that there is a need for a "single, uniform state law"[119] and because the lack of expertise on the local level further necessitates the need for control on a state level.[120]

The Attorney General's opinion seems to be a flawed and inaccurate interpretation of the Hazardous Waste Control Act. First, weaknesses in the argument include the interpretation of the specific regulations. Section 25172 specifically authorizes existing local regulation not in direct conflict with the Act. Furthermore, the opinion fails to address section 25149.[121] That section limits the power of local government to prohibit or unreasonably regulate waste facilities, thereby implicitly acknowledging the authority of local government to regulate "reasonably." In light of these provisions, it is difficult to support the Attorney General's finding of complete preemption.

Secondly, while the argument for statewide control is persuasive, there is no support for a finding that concurrent regulation by state and local agencies would thwart the ability of the state to maintain a uniform system for those activities requiring uniformity. Finally, the finding of implicit preemption would probably meet opposition in the courts, which have shown a general reluctance to find preemption without an explicit showing of legislative intent.[122]

(b) California Judicial Response

No California case has examined the question of whether a local government may regulate a hazardous waste disposal facility. Only one case involved a conflict between a local government entity and an operator of a hazardous waste facility, and neither the operator nor the court questioned the authority of the county to regulate the facility.[123]

---

118. *Id.* at 163. Section 25172 has since been renumbered CAL. HEALTH & SAFETY CODE § 25105 (1985).

119. "The nature of the activities, namely, handling, processing, and the disposal of hazardous and extremely hazardous waste materials, frequently will involve more than one governmental area and, if statewide laws and regulations are not in effect, confusion and conflicts may develop from a proliferation of local laws and ordinances." 57 Op. Att'y Gen. at 161.

120. *Id.* at 162-3.

121. *See* notes 111-12 *supra* and accompanying text.

122. *See* notes 29-30 *supra* and accompanying text.

123. In I.T. Corp. v. County of Imperial, 35 Cal. 3d 63, 672 P.2d 121, 196 Cal. Rptr. 715 (1983), the county sought to enjoin alleged violations of county zoning ordinances by I.T. Corp. in the course of its operation of a hazardous waste disposal facility. On review, the only issue was the proper test to be met for the issuance of a preliminary

C. Judicial Response Throughout the Country

There is a paucity of case law discussing the respective rights of local and state governments in the regulation of hazardous waste operations. Despite this, a general trend is evident in judicial resolution of conflicts between local regulations and state permit programs that seems to endorse dual regulatory schemes.[124] Indeed, only one opinion was found in which a court interpreted RCRA and the state qualifying plan to implicitly preempt local authority to regulate.[125] In that instance, the state legislature quickly responded with legislation to nullify the court's holding.[126]

In the only decision to confront the issue of the authority of a local government to require hazardous waste landfill operators to comply with county ordinances, the court found in favor of the county. In *Neal v. Darby*,[127] an operator of a hazardous waste landfill challenged the constitutionality of a county ordinance pertaining to the handling and storage of hazardous chemicals. The court upheld the trial court findings that the county had the authority to enforce its ordinances. Furthermore, the court acknowledged the right of the county to counterclaim against the landfill operators based on the allegation that the landfill constituted a public nuisance: "[T]he South Carolina Hazardous Waste Management Act and the federal Solid Waste Disposal Act do not preempt South Carolina common law nuisance actions. . ."[128] Thus, a common-law nuisance action to enjoin the construction or operation of a facility may continue to provide alternative ammunition for excluding a facility.

Thus, some states explicitly preempt local governmental units from utilizing land-use controls to regulate hazardous waste facilities, while the majority of states either explicitly recognize the authority of local government or, more typically are ambiguous in

injunction under these circumstances. Other states have treated this issue similarly. In Chem Waste Services, Inc. v. Konigsberg, 636 S.W.2d 430 (Tenn. 1982) the court did not seem to question the right of a county to require compliance with county regulations prior to granting a permit to an operator of a proposed chemical waste treatment plant.

124. This judicial preference is mirrored in holdings in the fields of solid waste disposal, regulation of toxic substances and regulation of air and water pollution.

125. Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury, 371 So. 2d 1127 (La. 1979).

126. Act 748, §§ 1, 2 and 5, 1980 La. Acts (codified at LA. REV. STAT. ANN. §§ 30:1136(C), 30:1144B, 33:1236(31) (West Supp. 1981)).

127. 318 S.E.2d 18 (S.C. App. 1984).

128. *Id.* at 23.

defining the role of local entities.[129] The California Hazardous Waste Disposal Act seems to provide for a considerable degree of local control, provided that the minimum standards set by the state are met, and the local ordinances do not directly conflict with the Act. Although the Attorney General has interpreted the Act to totally preempt concurrent local regulation, that interpretation seems faulty and is unsupported by California courts.[130] If California's case law follows the nationwide trend, the Attorney General's opinion seems destined for rejection.

If the legislative intent is truly to preempt local regulation, it is fully within the legislature's power to express that intent, at least with respect to general law municipalities. Preemption of home rule governments, if it were to occur, would be based on a legislative finding that the regulation of hazardous waste facilities is primarily a statewide concern rather than a municipal affair. Were the California legislature to espouse this opinion, the courts would still possess final authority to decide whether such regulation was indeed primarily of local or statewide concern.

Given the uncertainty of the permissible extent of involvement of local government, it is wise to consider the relative advantages and disadvantages of local authority over hazardous waste facilities. In siting hazardous waste disposal facilities and industrial complexes that generate hazardous wastes, there is a tension between state and local governments. On the one hand, the state is working to reconcile an economic need for industrial growth with its mandate to protect the public health. The state can, to a large degree, achieve a balance between these demands by providing an adequate number of safe disposal sites. On the other hand, the local interest in maintaining a safe environment for those who will be most directly exposed to the risks from the facilities is less influenced by the economic gains realized throughout the rest of the state.

While motives of protectionism clearly cannot be tolerated,[131] it

129. Maryland, Ohio and Utah preempt all local land-use controls. New York and Michigan have preserved local authority in siting decisions, while Connecticut, Florida and New Jersey give local government initial input, but provide for ultimate state review and possible preemption. For a more complete review of the approaches of these and other states, see Tarlock, *supra* note 104, at 32-38; Goldshore, *Role of Local Government in Environmental Protection*, N.J. LAW B.J., Winter, 1983 at 35.

130. People v. County of Mendocino, 36 Cal. 3d 476 (1984).

131. A. Dan Tralock has developed the thesis that unrestrained local autonomy will threaten the goals of the national hazardous waste management policy, and therefore the costs of local veto powers exceed the benefits. He expresses the concern that local government may fail to take interests such as environmental protection into account, or

is important to give local government some autonomy and control over issues immediately impacting residents of the area. It seems that adequate limitations on local protectionism can be and in some states have been written into a comprehensive state hazardous materials plan. Explicit preemption of unreasonable or prohibitory local regulation, as well as the option for preemption in case of irreconcilable conflict between state and local government, are adequate means for protecting both state or regional needs and the needs of local government. Parochialism can be effectively prevented by a state requirement that local government take regional needs into account in formulating environmental ordinances, and be able to justify regulatory policies in light of these needs.[132]

Local government itself has the ability to incorporate uniquely local conditions and needs into a plan for a hazardous waste facility while working in cooperation with the state. By allowing local government input, the fears of local residents can be justifiably assuaged. In addition, an understanding by industry that they will have to work cooperatively with local government, and to some degree be accountable to the local community, may foster an attitude of increased attention to safety.

Ideally, concurrent regulation should incorporate the strengths unique to both state and local government units. Local land use regulations particularly should be supplementary to, rather than antagonistic to, state regulations. As one commentator has noted:

> Courts have increasingly adopted the theory that state permit programs focus more on general facility design and operation procedures than on the analysis of site-specific risks. Local land-use regulations are therefore complementary because they fill a regulatory "gap" and supplement rather than frustrate the goals of state licensing statutes.[133]

Given the uncertain scope of local authority, and the potential conflict in interests at a state and local level, the incidence of judi-

---

may shift unacceptable burdens to the rest of the region or state. For a complete discussion, see Tarlock, *supra* note 104.

132. For a discussion of the application of a regional needs requirement in the area of low-income housing development, see D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN LAND DEVELOPMENT 1070-79 (1980).

In a recent Washington court decision, a community's decision to allow a regional shopping center in a rural but growing area was found to be "arbitrary and capricious in that it failed to serve the welfare of the community as a whole." Save a Valuable Environment v. City of Bothell, 89 Wash. 2d 862, 870, 576 P.2d 401, 405 (1978). The case implies that a community may have an affirmative duty to take regional factors into account in its land-use planning decisions.

133. Tarlock, *supra* note 104, at 15.

cial intervention in the area of hazardous waste siting may increase in the future. There are indications that courts may be willing to resolve uncertain issues in favor of the public where hazardous wastes are involved.[134] The judicial attitude against implied preemption of local governmental authority has created a favorable climate for local entities to design responsible, comprehensive planning and regulation strategies that will enable them to exercise a large degree of self-determination in formulating safe policies for the hazardous waste facilities in their jurisdictions.

V.
LOCAL REGULATION OF ECONOMIC POISONS

A recent battle over the regulation of herbicide spraying in California has highlighted the process whereby state and local government struggle for the authority to control environmental regulation. While herbicide and pesticide spraying is only one discrete aspect of waste regulation, the case history provides an excellent example of the procedural and substantive issues which can arise in a conflict over the delegation of authority to regulate environmental matters.

In February of 1979, the voters of Mendocino County (a general law county) approved an initiative measure prohibiting the aerial application in the county of phenoxy herbicides, including but not limited to 2,4,5-T, 2,4-D, silvex, and any compound containing the chemical dioxin. The Attorney General, then George Deukmejian, issued an opinion in March of 1979,[135] declaring that local control over herbicide spraying was preempted by the state, and filed a lawsuit against the county.

The Attorney General's opinion found that section 14001 *et seq.* of the Food and Agricultural Code exclusively governed the aerial spraying of economic poisons. The opinion acknowledged that, absent a conflict with the general law, the banning of the use of phenoxy herbicides was clearly within the "police powers" of

134. In a recent Illinois Supreme Court decision, Village of Wilsonville v. SCA Services, Inc., 86 Ill. 2d 1, 426 N.E.2d 824 (1981), a village suit to require the removal of a hazardous waste landfill resulted in an injunction against the landfill even though the trial court found that the likelihood of substantial future harm was remote. As one commentator noted: "instead of directly addressing the question of when a court may base an injunction on proof of risk as opposed to relatively certain injury, the court found that the evidence met the conventional standards of 'real and immediate' danger. However, the court's summary of the evidence and the law leaves little doubt that courts now have more discretion to resolve the uncertainty issue in the public's favor when hazardous wastes are involved. . ." Tarlock, *supra* note 104, at 21.

135. 62 Op. Att'y Gen. 90 (1979).

protecting the health, safety and general welfare of the citizens of the county.[136] The Attorney General contended, however, that taken as a whole, the Food and Agricultural Code fully occupied the field to the exclusion of any local regulation.[137] Because the county ordinance prohibited that which was allowed under the state law, namely the granting of a permit and the use of herbicides pursuant to the conditions of the permit, the ban would directly interfere with the authority of the state to issue such permits.

The Attorney General's opinion concluded that the implicit intent of the Food and Agricultural Code was to preempt local regulation. In addition, the Attorney General found that local control was found to be preempted by the Federal Environmental Pesticide Control Act of 1972[138] because the legislative history of that act explicitly indicates an intent to so preempt.[139]

The Superior Court of Mendocino County granted summary judgment in favor of the government, thereby declaring the county ordinance invalid and the judgment of the Superior Court was affirmed by the California Court of Appeal.[140] The court discussed specific provisions of the Food and Agricultural Code and concluded that "the legislature has adopted a 'general and complete

136. *Id.* at 92 n.3.

137. "From the foregoing provisions of the Food and Agricultural Code and of the administrative regulations, it is clear that state law prescribes in detail which 'restricted materials' and 'pesticides' may be used, by whom, and under what conditions. It provides for the issuance of a permit to allow the use of these 'restricted materials' in accordance with law and regulations and any conditions properly annexed thereto.

Clearly, a local ordinance banning the use of phenoxy herbicides, by air or otherwise, would interfere with state law." 62 Op. Att'y Gen. 90, 97-8 (1979).

138. 7 U.S.C. §§ 136-137y (1982 and Supp. I 1983).

139. "With respect to the 1972 federal law, Senate Report No. 92-838 stated in part: . . . 'The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether town, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.' (1972 U.S. Code Congr. & Admin. News at pp. 3993, 4008.)" 62 Op. Att'y Gen. 90, 104-5 (1979).

140. People v. County of Mendocino, 143 Cal. App. 3d 188, 191 Cal. Rptr. 598 (1983), *rev'd*, 36 Cal. 3d 476 (1984).

scheme' for regulating the use of pesticides in 'the state.' "[141] Local regulation was therefore preempted based on an interpretation of the *Hubbard* test.[142]

The court specifically rejected the county's contention that the local ban was a pollution control measure authorized by both the Health and Safety Code[143] and the Water Code.[144] Under the Health and Safety Code, local and regional authorities have primary responsibility for the control of pollution from all nonvehicular sources, and are expressly authorized to establish standards stricter than those set "by law."[145] Similarly, the Water Code preserves for the cities and counties the right "to adopt and enforce additional regulation, not in conflict therewith, imposing further conditions, restrictions or limitations with respect to the disposal of waste or any other activity which might degrade the quality of the waters of the state."[146] Since the correlations between aerial spraying and both air and water pollution are well established, the county asserted their right to regulate spraying under these acts. However, the Appellate Court construed these provisions as subordinate to the limitations on local authority imposed by the Food and Agricultural Code.

On appeal, the California Supreme Court reversed the Appellate Court decision and refused to find implicit preemption of local authority by state regulation.[147] The court was persuaded by the county's public health argument:

> Where, as here, there is no direct conflict between the statutes and the specified statutes require compliance with the law, that harmonization is accomplished by permitting regulations to preserve and protect public health under either the Food and Agricultural Code or under the air and water pollution statutes.[148]

The court also rejected the Attorney General's argument that the Senate Committee hearings illustrated an intent to exclude local government from the regulatory process. The court noted that the subsequent legislative history of the Federal Environmental Pesti-

141. *Id.* at 194.

142. The Court of Appeals quoted Galvon v. Superior Court, 70 Cal. 2d 851, 859-860, 452 P.2d 930, 76 Cal. Rptr. 642, which cited the test from *Hubbard. See* discussion of *Hubbard's* subsequent history, *supra* note 27.

143. CAL. HEALTH & SAFETY CODE §§ 39000-43835 (West 1979).

144. CAL. WATER CODE §§ 13000-13999 (West 1979).

145. CAL. HEALTH & SAFETY CODE § 39002.

146. CAL. WATER CODE § 13002(a).

147. *County of Mendocino*, 36 Cal. 3d 476 (1984).

148. *Id.* at 488.

cide Control Act evidenced ambivalence on this issue and therefore found the history to be ambiguous.[149]

Based on the mandates of the Health and Safety Code and the Water Code, the court concluded that local government has the authority to impose stricter standards on aerial spraying than those imposed by the state, even to the extent of banning spraying entirely. The court clearly expressed its reluctance to find implicit preemption of local authority:

> It is clear that the initiative is a proper local regulation for health purposes authorized by the constitution unless it conflicts with general laws, and in view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.[150]

In rapid response to the Supreme Court's holding, the state legislature passed Assembly Bill 2635 in September of 1984, and added § 11501.1 and § 14007 to the Food and Agricultural Code. In essence, the bill and new laws explicitly preempted local government from regulating in the area of economic poisons, and specifically expressed the legislature's intent to overturn the holding of the California Supreme Court in *County of Mendocino*.[151]

Thus, the struggle of the citizens of Mendocino County to control their living environment provides an excellent illustration of the conflict between state and local control, both because of the controversial nature of aerial spraying of herbicides and pesticides and because the fight between the citizens and the state was waged consecutively in each available forum of the judiciary and legislature. The total elimination of direct local control over the application of economic poisons seems to be an undesirable and inadequate result. This is especially true given the fact that the ban passed by the citizens of Mendocino County was adopted in response to what was perceived to be the repeated failure of the existing regulatory structure to adequately protect the citizens against potentially unsafe sprayings. In frustration, and believing that they were being exposed to herbicides as a result of the inability of the regulatory structure to adequately control aerial sprayings, the citizens decided

149. *Id.* at 488-93.

150. *Id.* at 484.

151. The note under CAL. FOOD AND AGRIC. CODE § 11501.1 (West 1986) states: "It is the intent of the Legislature by this act to overturn the holding of People ex rel. George Deukmejian v. County of Mendocino et al., and to reassert the Legislature's intention that matters relating to economic poisons are of a statewide interest and concern and are to be administered on a statewide basis by the state unless specific exceptions are made in state legislation for local administration."

that only a ban on such activity could effectively protect the environment. Conversely, the large agricultural holdings in the county and the United States Forest Service, which owns considerable tracts of forested land throughout the area, perceived that the ban was depriving them of the only economically-viable means of controlling damaging plant pests. Both sides expressed valid concerns, so it is disappointing that the system was unable to come up with a compromise solution.

It is noteworthy that since Mendocino County is a general law county, they have no recourse but to accept the legislative mandate of A.B. 2635. Home-rule cities, however, still face future adjudication to decide whether aerial spraying of economic poisons is truly a matter of statewide concern, as implicitly declared by the legislature when they prohibited local control, or whether it is a municipal affair, within the meaning of Article II § 5 of the California Constitution. Since the courts have stated that the judiciary will be the final judge of whether a matter is of local or statewide concern,[152] a suit deciding this question could potentially reserve some control for home-rule municipalities.

In addition, suits brought by taxpayers questioning the propriety of legislative action in a given area remain an alternative means to retain control at the local level. A discussion of the effectiveness and appropriateness of taxpayer suits to challenge legislation is beyond the scope of this paper.

Although the issue of the control over economic poisons in California seems to have been settled for the present, controversies like the one in Mendocino County are presently occurring in other areas of the country.[153] Thus, the role that local government will play in this area is in the process of being determined. It is likely that legislatures will favor state regulation, and that local government will have to rely on the judiciary and upon pressure in favor of local

152. Bishop v. City of San Jose, 1 Cal. 3d 56 (1969).

153. The Chicago suburb of Wanaconda recently passed an ordinance requiring commercial pesticide companies to post warning signs on newly sprayed lawns. Pesticide companies have challenged the ordinance, maintaining that the city ordinance is preempted by state and federal pesticide laws. Pesticide Public Policy Foundation v. Village of Wanaconda, No. 84C8110. Similar ordinances have been passed by other municipalities, some of which have also been challenged. In Wendell v. Bellotti, No. 15119, a county superior court in Franklin, Mass. ruled that a Wendell County ordinance requiring commercial sprayers to appear before a local health board to describe when and where they were going to spray, was preempted by state and federal pesticide regulations. The case has been appealed to the Massachusetts Supreme Court. A.B.A. J., Feb. 1985 at 28.

regulation brought to bear on the policymakers at the state and federal government levels.

VI.
METHODS BY WHICH LOCAL GOVERNMENT CAN ATTEMPT TO AVOID PREEMPTION

State preemption of ordinances frustrates goals found sufficiently important by local citizens to merit articulation in the form of ordinances and regulations. In addition, it is costly and time consuming. Thus, it is important for local governments to structure their regulatory schemes in a way which will circumvent the frustration and costs of a preemption battle. First, municipalities must assess the likelihood that an area that they desire to regulate will meet with a challenge of preemption and then balance the state and local interests involved in order to make the initial decision of whether to regulate. Secondly, municipalities can make tactical choices in the definition and characterization of the environmental changes that they seek to implement which will make the regulations less vulnerable to preemption. Finally, localities can take advantage of a variety of local planning devices to incorporate a scheme of environmental regulation into their existing regulatory structure.

A. Balancing Of State And Local Interests

Local government should first assess the appropriateness of local rather than regional or statewide control in a particular area of regulation. In areas where extensive movement or interaction between cities, counties or states is involved, it is likely that a broader scheme of regulation will better address the safety issues raised by a particular activity. Moreover, a maze of different local regulations will complicate and perhaps defeat the goals of a uniform regulatory scheme.

However, local regulation may be quite appropriate when a local government unit perceives that an area of environmental regulation is inadequately regulated, either because the existing regulations do not control all problems associated with a particular activity, or because unsafe conditions tend to occur despite the existence of a regulatory framework. With that realization, local government should become involved in defining the community's environmental needs and fashioning a regulatory scheme that will meet those needs.[154]

154. An example of a case where state regulations were inadequate to meet the "unique" needs of an area within the state occurred in People v. Jenkins, 207 Cal. App.

As long as local entities are responsible in their regulatory activities and conscientiously consider regional needs as well as their own local needs, a sound basis for the enactment of ordinances will be established.

B. Tactical Choices

Local government can decrease the chance of successful preemptive challenges by characterizing the local regulation as one distinct from any field clearly preempted by a state scheme.[155] The most common use of this strategy in environmental regulation was exemplified in *County of Mendocino*,[156] where the California Supreme Court upheld a local ordinance controlling the aerial spraying of herbicides as a measure necessary to protect public health and water quality.[157] The fact that the protection of the public health and water supply necessitated regulation in the area of economic poisons was incidental.

Similarly, in *People v. Mueller*,[158] an ordinance passed by the City of Redondo Beach to regulate the disposal of fishing bait into the ocean met a preemptive challenge based on the complete regulatory scheme of the California Fish and Game Code. The court upheld the ordinance, finding that "preemption by the state of an area of the law does not preclude local legislation enacted for the public safety which only incidentally affects the preempted area. Protection against pollution equates with protection of the public safety."[159]

Local governments may, therefore, have considerable latitude in environmental regulation designed primarily to protect the public health or air and water quality. While general law entities will still

2d 904, 24 Cal. Rptr. 410 (1962), where a Los Angeles City ordinance prohibiting the carrying of guns in a car was challenged as preempted by extensive state regulation in the field of weapons control. The court noted that the unusually high density of Los Angeles created unique local needs for additional regulation which were not met by the extensive state regulatory scheme: "The state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the state, urban and rural, but it may often, and does often happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of *densely populated municipalities*; so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements (emphasis added)." *Id.* at 907 (citing *In re* Hoffman, 155 Cal. 114, 118, 99 P. 517, 519 (1909)).

155. For an additional discussion of this tactic, see McLeod *supra* note 17, at 733-34.

156. 36 Cal. 3d 476 (1984).

157. *Id.* at 488.

158. 8 Cal. App. 3d 949, 88 Cal. Rptr. 157 (1970).

159. *Id.* at 954.

be vulnerable to a legislative decree of preemption, as occurred in the *County of Mendocino* case, charter municipalities have the power to fight against such a legislative finding with the argument that the regulated area is primarily a municipal affair, rather than a matter of statewide concern.

Local governments can also prevent preemption through cooperative interaction with a local agency of the state. Local branches of state agencies include, among others, health boards, water boards, and air quality agencies. These local agencies are authorized by the state to implement and enforce state environmental programs. Often, the agencies are vested with the power to promulgate policies and standards. By working with a local or regional agency, local government can influence the agency in the adoption of regulations and standards favored by the municipality. The issue of state preemption is by definition automatically bypassed.

Orange County Air Pollution Control District v. Public Utilities Commission[160] illustrates the potential for branches of a state agency to promote local autonomy.[161] The Public Utilities Commission (P.U.C.) granted Southern California Edison permission to build two electrical generating plants. However, the Orange County Air Pollution Control District (O.C.A.P.C.D.) refused to approve the plants, which did not comply with state or local air pollution laws. The court upheld the power of the O.C.A.P.C.D., which they regarded as a subdivision of the state government despite the fact that the District was in fact a county agency. Since the O.C.A.P.C.D. had power equal to that of the P.U.C., the P.U.C. could not authorize Edison to violate that agency's rules.[162]

One commentator recommends that local governments utilize and expand upon this potential power by pressuring for the creation of local state agencies in certain regulatory areas.[163] While duplicative agencies should be avoided, local branches of state agencies would provide a strong base from which to defend locally-derived regulations from state preemption.

---

160. 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971).

161. For a more complete discussion of this subject, see McLeod, *supra* note 17, at 747-50.

162. *Orange County*, 4 Cal. 3d at 948, 953-54.

163. "If successful, they could then seek to influence to their advantage the regulatory standards, personnel and policy of the agency. Were the influence sufficiently powerful, local state agencies would be enforcing standards dictated by local interests; or the regulations of the local agency could be structured so as to easily allow local ordinances to be characterized as falling within them." McLeod, *supra* note 17, at 750.

C. The Use Of Zoning And Land Use Controls By Local Government

Zoning ordinances and land use controls can be used by local governments pursuant to the police power delegated to them by the state legislature. While specific zoning and land use ordinances may meet with preemptive attacks, land use planning usually provides an effective means by which local government can forestall conflicts in environmental regulation—a type of preventative medicine. Through the careful creation of a detailed General Plan, a locality can crystallize its basic philosophy with respect to pollution control and can identify unique local concerns and unusual physical conditions that may exist in the area. Thus, a sensitive ecosystem or a vulnerable aquifer might be described within the General Plan in order to justify and explain local environmental policy decisions. By identifying unique local resources and incorporating them into a plan, a government entity thereby demonstrates that environmental regulation can be competently undertaken on the local level. In addition, industry and potential polluters are notified at the outset of compliance standards expected by local citizens. This advance notice prevents poorly-planned projects which will later require the type of costly modification that leads to litigation.

The wide variety of zoning ordinances available to implement a General Plan provide local government with considerable flexibility.[164] There are several examples of innovative zoning techniques that can be powerful tools in controlling community exposure to waste materials. These include active controls such as aquifer protection zones, which prohibit activity that has the potential to pollute a designated aquifer recharge zone and buffer zones to protect populated areas from dangerous activities. This latter technique may also include requirements that industries handling hazardous wastes provide an open space around the facility and waste storage areas. Passive controls include more traditional zoning to prohibit or discourage the use of surface impoundments that treat or store waste waters, and various disclosure requirements such as community right-to-know legislation and zoning ordinances requiring all prospective industries to file hazardous materials management plans. These examples are not a comprehensive list, but they suggest that there are several tools available to local government which

164. For a more complete discussion of these planning options, see HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT (2d ed. 1980).

make the local regulatory process extremely flexible and an apt forum for innovative and imaginative regulation. In addition, local governments are free to institute fee assessments. These assessments distribute the cost of regulatory programs among the industry being regulated, and secure sufficient funds to ensure the establishment and enforcement of safety regulations. Through the use of care and creativity, local governments can delineate their environmental concerns and implement standards and regulations to ensure the preservation of a safe environment.

VII.
CONCLUSION

Significant opportunities exist for local regulation of a wide variety of environmental concerns. Local governments should carefully identify their regulatory concerns and examine them in the context of existing state and federal regulatory programs. Preemption battles can be avoided by decisions to refrain from regulating in extensively regulated fields, and the careful tailoring of local laws to specific community concerns. Attention to both local and regional needs will be essential to the construction of an integrated regulatory framework that provides for the concurrent participation of federal, state and local agencies. Environmental policies structured to accommodate this participation will maximize effective protection of the environment.

Pamela Corrie