HAZARDOUS WASTE: ENVIRONMENTAL ISSUE OF THE EIGHTIES

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The hazards posed by the Love Canal chemical waste landfill in Niagara Falls, New York, gained nationwide notoriety in August 1978, when the New York State Commissioner of Health declared the site a health emergency and President Carter declared it a national disaster. Since then, continuing media attention has focused on incidents involving the improper handling of hazardous wastes: leaking drums of toxic wastes abandoned in Kentucky fields and Pennsylvania warehouses, midnight dumping of PCB's along North Carolina roads, mercury contamination of ground and surface water in New Jersey, TCE and other suspected carcinogenic chemicals in drinking water in California and Michigan, and the list goes on.

The incidents themselves are not a recent phenomenon. Similar, although less infamous, incidents prompted Congress to enact the Resource Conservation and Recovery Act (RCRA)[1] in October 1976, to deal with "the stepchild of the environmental movement."[2] RCRA was to close "the one big loophole . . . the disposal of solid waste."[3] Since RCRA's enactment more than three and a half years ago, there has been a seeming explosion of public awareness of the hazardous waste problem.

There are three aspects to the problem: (1) the abandoned or inactive waste site, (2) the implementation of RCRA, and (3) the siting of new facilities. RCRA will not solve all the problems associated with hazardous waste because of two serious shortcomings. First, RCRA is prospective and does not provide for the regulation of in-

1. 42 U.S.C. § 6901 *et seq*.
2. 122 Cong. Rec. S17,254 (daily ed. Sept. 30, 1976) (remarks of Sen. Randolph).
3. 122 Cong. Rec. H11,148 (daily ed. Sept. 27, 1976) (remarks of Rep. Skubitz).

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active sites. Second, although RCRA is prospective, it does not answer how new facilities will be sited in the face of increasing public opposition.

I. THE ABANDONED OR INACTIVE HAZARDOUS WASTE SITES

RCRA does not address the hazards posed by abandoned or inactive waste sites except for emergency situations. Section 7003 of the act authorizes EPA to petition a Federal District Court to enjoin any waste activity that presents an imminent and substantial endangerment to human health or the environment, and to ask for other appropriate relief (e.g., cleanup, containment, redisposal). More than nineteen cases have been brought by EPA and the Justice Department under Section 7003.

EPA will exercise limited authority over inactive sites which are adjacent to active sites and might interfere with the ability to monitor the active sites when RCRA permits pursuant to Sections 3004 and 3005 of the Act are processed in the future.[4]

There are no statutory requirements to monitor inactive sites prior to the emergency situation. Further, the actual number and location of potentially dangerous inactive sites throughout the country are still unknown, although Love Canal was declared a national disaster in 1978 and EPA declared the cleanup of hazardous waste dumpsites threatening public health "the highest Agency priority" in July 1979.[5]

The House Subcommittee on Oversight and Investigations (Eckhardt Subcommittee) issued a report in September 1979, after conducting a series of thirteen days of hearings on hazardous waste. The report criticized EPA for its failure to determine the location of all hazardous waste sites and recommended that the agency conduct a national inventory, a critical prerequisite to determining enforcement and clean-up priorities.[6]

A study of hazardous waste disposal sites was prepared for EPA by F. Hart and Associates. However, the Eckhardt Subcommittee found that the study had so many "methodological flaws" that the "estimate of the number of sites and degree of hazards they pose is

4. 45 Fed. Reg. 33155, 33170 (May 19, 1980).
5. EPA Environmental News, July 11, 1979.
6. House Sub Comm. On Oversight & Investigations, H.R. Doc. No. 96-IFC 31, 96th Cong., 2d Sess. (1979).

little better than pure guesswork and thus the cleanup estimates are unreliable."[7]

Amendments to RCRA passed by the House in February 1980 would mandate an inventory of hazardous waste sites and authorize EPA to order monitoring of any site at which the presence of hazardous waste or its release may present a substantial hazard to human health or the environment.[8]

It is generally recognized that there is insufficient existing federal and state funding to provide emergency containment, cleanup and long-term stabilization with respect to abandoned or orphan sites, i.e., sites for which the responsible party cannot be identified or, if identified, is financially incapable of responding to the problem. The fund created by Section 311(k) of the Clean Water Act[9] has been used by EPA to effectuate waste site cleanup where there has been a discharge from a site to navigable waters of oil or a designated hazardous substance.[10] However, although the act authorized $35 million for the fund, the full amount has never been appropriated, and the fund is running out of money. The $10 million fund authorized by Section 504(b)(2) of the Water Act[11] is available to abate and to remedy an emergency caused by the release into any media of any pollutant, but the money for section 504 has never been appropriated.

At least eighteen bills have been introduced in the 96th Congress which would deal with the orphan site problem by creating a "superfund" (sometimes referred to as "ultrafund"). Some funds would cover not only emergency containment and cleanup of waste sites, but also economic losses resulting from real and personal property damage, personal injury, natural resource damage, lost income, taxes, royalties, etc. Further, some funds would cover releases not only of hazardous waste, but of hazardous substances and even oil into the environment. Huge funds would be created (up to $800 million a year) which would be financed in part, if not entirely, by fees on industry.[12]

7. House Sub Comm. On Oversight & Investigations, H.R. Doc. No. 96-IFC 33, 96th Cong., 2d Sess. (1979).
8. H.R. Rep. No. 3994, § 3(*l*),(m) 96th Cong., 2d Sess. (1980).
9. 33 U.S.C. § 1321.
10. Memorandum from Douglas Costle to Regional Administrators dated December 21, 1979, Guidelines for Section 311 Response to Uncontrolled Hazardous Waste Sites.
11. 33 U.S.C. § 1364.
12. The Administration bill (S.1341) provides for the Federal government to contribute 20%, the Florio bill (H.R. 7020) for 50% Federal and the Eckhardt bill (H.R. 6391) for 100% Federal. Most of the remaining bills provide for 100% funding by industry.

One of the most controversial provisions of these bills is the strict and joint and several liability which would be imposed not only on the owner and operator of a hazardous waste facility, but also on the generators and transporters of hazardous waste. Administration and congressional staff have attempted to justify this approach as providing an incentive to increase the standard of care exercised by all who handle hazardous wastes. Industry, on the other hand, has regarded this attempt to hold a party responsible for the release of a hazardous waste that occurs after such waste has left his control, and without regard to whether he has acted negligently or in accord with existing law, as an undisguised attempt to reach the "deep pockets." The waste site operator may be long gone or without substantial assets. However, if at least one large generator is still in business, joint and several liability assures a solvent party. A recent statement by the head of the Justice Department's hazardous waste enforcement section appeared to confirm industry's suspicions: "Government is perfectly prepared to punish the innocent for the sins of the guilty."[13]

Another controversial provision in the leading Senate bill would permit a claimant to recover damages for personal injury even if he could not show the traditional causal relationship between his injury and the liable party. A claimant could recover based on a consideration "of statistical correlation and the increase of incidence of such injury or disease in the exposed population above that which is otherwise statistically probable. The inability of the claimant to demonstrate (1) the particular identity of the substance which caused the injury or disease, (2) the particular source of such substance, (3) the pathway of such substance enroute to the injured party, or (4) an explanation of the etiology of the substance in the injured party, shall not bar recovery."[14]

The fee schemes have been criticized as being inequitable and not following the "polluter pays" principle. The abandoned site problem is considered by many to be a societal problem which should be solved by public funding. Not only industry but the federal government has disposed of hazardous waste in the past in a manner considered environmentally unacceptable by today's standards. Some of the persons and industrial sources responsible for the problem are no longer in business. In other cases, it has been reported that state and local officials were aware of unsound and even illegal prac-

13. FORTUNE, April 21, 1980, at 54.
14. § 4(c) S. 1480, 96th Cong., 1st Sess., (1979).

tices for years before the site attracted widespread public notice but took no enforcement action.[15] These bills, however, would require contributions by a few of today's industries to clean up the pollution caused by others. Most bills would impose fees on petrochemical feedstocks, inorganic elements and compounds and crude oil. However, these producers and suppliers are not the only ones generating hazardous waste today. EPA's draft Economic Impact Analysis of the RCRA hazardous waste regulations identified seventeen major hazardous waste generating industries. The industries which would be most heavily impacted by the fee are not the only or even the largest generators of hazardous waste.[16] Further, the fund would only pay for damages when the responsible party cannot be identified or cannot pay. Therefore, those who contribute to the fund will never receive any benefit from it. The fund will respond to damages only if the liable contributor goes bankrupt. These two factors raise a serious question as to whether these fees are not really taxes and subject to applicable constitutional restraints.[17]

II. THE RCRA REGULATIONS

RCRA was a "sleeper" when enacted, and it continued to be a sleeper over the next few years as EPA requested less than the authorized funding, then spent less than the amount appropriated and diverted money earmarked for development of the RCRA regulations to other environmental programs.

Subtitle C of RCRA establishes the cradle-to-grave regulation of hazardous waste. A manifest system will track waste from its generation to its ultimate disposal. A series of six regulations is needed to implement the hazardous waste management system. EPA must promulgate criteria for identifying the characteristics of hazardous waste and for listing hazardous wastes (Section 3001), standards for generators of hazardous waste (Section 3002), standards for trans-

15. *See* The Courier J., Louisville, Ky., February 4, 1979, at 1, col. 1.
16. The 17 industries generated 23.3 million metric tons of hazardous waste in 1977 as follows: metals smelting and refining—12.8, inorganic chemicals—3.8, textiles—1.7, petroleum refining—1.5, plastics—.9, pesticides—.7, electroplating and metal finishing—.64, organic chemicals—.34, paints and allied products—.22, leather tanning and finishing—.17, storage and primary batteries—.15, explosives—.09, special machinery—.075, petroleum rerefining—.074, pharmaceuticals—.073, electronic components—.064, rubber—.05. BD-34, January, 1979.
17. The House Ways and Means Committee asserted jurisdiction over two bills reported out of their respective committees, H.R. 7020 and H.R. 85.

porters of hazardous waste (Section 3003), standards for owners and operators of hazardous waste treatment, storage and disposal facilities (Section 3004), permit requirements for such treatment, storage and disposal facilities (Section 3005), and criteria for authorized state hazardous waste programs (Section 3006).

Unlike the Clean Air Act,[18] which applies only to facilities with a specified pollutant emission potential, and the Clean Water Act,[19] which applies only to facilities discharging into navigable waters, RCRA covers virtually every industrial, commercial, mining, agricultural and community activity. In implementing RCRA's mandate, EPA was faced with the seemingly impossible task of developing standards which could be applied to the complex variety of treatment and disposal facilities. Most hazardous-waste management is not conducted by companies in the business of hazardous waste disposal, but rather by the generators of hazardous waste who treat and dispose of their wastes onsite.[20] Standards which would appear practical for a commercial landfill operator would be impractical for a chemical plant, a petroleum refinery or a copper smelter.

Ironically, one of the reasons for the rapidly spiraling hazardous waste generation rate is the stringent controls effected by the Clean Air and Water Acts. Pollutants which would otherwise be emitted to the nation's air and discharged into the nation's surface waters are being trapped by pollution control equipment. More than one fourth of the wastes specifically listed as hazardous by EPA in the RCRA regulations are wastewater treatment sludges and air emission control dust and sludges.[21]

RCRA required EPA to promulgate regulations implementing Subtitles C, Hazardous Waste Management, and D, State or Regional Solid Waste Plans, within eighteen months of enactment, i.e., April 1978. The statutory deadline passed, and EPA was not even close to proposing a regulatory program, although it had been working on the problem for more than a year. The RCRA regulations were proving to be the greatest challenge of the Costle administration.[22] By the end of August 1978, four environmental groups and two industry

18. 42 U.S.C. § 7401 *et seq.*

19. 33 U.S.C. § 1321 *et seq.*

20. The results of an Eckhardt Subcommittee survey indicate that 94% of the waste generated by the 53 largest chemical companies is disposed of onsite.

21. 45 Fed. Reg. 33066, § 261.31 (May 19, 1980).

22. Administrator's Third Quarterly Report on the Status of Development of Regulations Under the Resource Conservation and Recovery Act of 1976 at 13, State of Illinois v. Costle, Civil Action No. 78–1689 and consolidated cases (D.D.C. 1978).

associations[23] had filed the 60–day notice required by the citizen-suit provision of RCRA[24] of their intention to institute litigation with respect to EPA's failure to promulgate regulations under Subtitles C and D by the date mandated.

In September 1978, two of the environmental groups and the state of Illinois filed suit against EPA.[25] Several industry associations intervened in the litigation.[26] EPA submitted to the court a schedule for proposing regulations by the end of December 1978, and for promulgation one year later. EPA advised the court that this was "our best estimate of the shortest amount of time in which we can promulgate sound, defensible regulations. . . . Any tighter schedule would, in our opinion, seriously jeopardize our ability to develop a responsible, working national solid waste management program and a set of Subtitle C and D regulations which would withstand judicial review."[27] Judge Gesell accepted EPA's schedule and directed EPA to make quarterly reports to the court on its progress and immediate reports if it appeared that there would be any slippage in the court-approved schedule.

Three of the regulations to implement Subtitle C—the criteria for identifying and listing hazardous waste, standards for generators, and standards for treatment, storage and disposal facilities—were proposed slightly ahead of schedule on December 18, 1978,[28] and a 90–day comment period was opened. Interested parties began the enormous task of developing comments on the proposed regulations and the more than twenty-four draft Background Documents, including a draft Economic Impact Analysis. The major issues raised by the proposals were the definition of "hazardous," the failure to consider the degree of risk posed by different wastes, the application of uniform standards to both new and existing facilities, the overlap with other environmental statutes and regulations, the es-

23. Citizens for a Better Environment, Environmental Defense Fund, Environmental Action, Public Citizen Litigation Group, National Solid Waste Management Association, Utility Solid Waste Activities Group.

24. Section 7002.

25. State of Illinois v. Costle, Civil Action No. 78–1689, (D.D.C. 1978). The Environmental Defense Fund and Citizens for a Better Environment also filed suit.

26. American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, International Central and Southwest Corporation, Mining and Reclamation Council of America, Inc., National Forest Products Association, National Solid Waste Management Association.

27. Proposed Schedule for Promulgation of Solid Waste Regulations and Memorandum in Support Thereof at 2, *Illinois v. Costle.*

28. 43 Fed. Reg. 58946 (Dec. 18, 1978).

tablishment of rigid design instead of flexible performance standards, the financial responsibility requirements, and the small generator exemption. The draft Economic Impact Analysis was criticized for underestimating the cost to industry of the program and for failing to address some industries at all. For example, the only segment of the petroleum industry covered in the draft Analysis was refining. However, the proposed regulations would cover drilling muds and produced brine from oil and gas exploration and production facilities[29] and used automotive oil generated by service stations which performed oil changes.[30] The comment period on the RCRA regulations closed on March 16, 1979. It soon became apparent that EPA's promulgation schedule had been overly optimistic. On June 1, EPA advised the court that promulgation of the regulations on schedule appeared "unlikely."[31] The issues raised by the comments were complex; many questioned the basic assumptions underlying the regulations. EPA had received over 900 comments, totaling six linear feet, and it would take eight persons, working full time, three months merely to sort the comments by subject.[32]

Meanwhile, efforts were under way to amend RCRA. Various industry groups, concerned about the proposed overly broad definition of "hazardous," sought statutory relief from the potentially enormous financial impact. The petroleum industry wanted drilling muds and produced waters exempted from Subtitle C regulation;[33] the coal industry wanted EPA to defer to regulations by the Office of Surface Mining under the Surface Mining Control and Reclamation Act;[34] the paper industry wanted existing NPDES-permitted facilities exempted from costly retrofitting to comply with proposed design standards;[35] the utility and mining industries wanted a two-year moratorium on regulation of large volume but low hazard wastes such as fly ash, cement kiln dust, mining overburden, smelting slag, etc.[36] EPA and the Justice Department, having developed a

29. 43 Fed. Reg. 59016, § 250.46–6 (Dec. 18, 1978).
30. 43 Fed. Reg. 58954, § 250.10(b) (Dec. 18, 1978).
31. Affidavit of Administrator Douglas M. Costle Notifying Court That Promulgation of Certain RCRA Regulations According to This Court's Schedule Appears Unlikely, *Illinois v. Costle*.
32. *Id.* at 6.
33. § 7, S. 1156, 96th Cong., 1st Sess., (1979); § 3(d), H.R. 3994, 96th Cong., 1st Sess., (1979).
34. § 11, S. 1156, § 3(b)(3), H.R. 3994. Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.*
35. § 3(a)(2), H.R. 3994.
36. § 7, S. 1156; § 3(d), H.R. 3994.

hazardous-waste enforcement program and anxious to increase their enforcement authority, proposed amendments to strengthen regulatory and enforcement mechanisms.[37] Finally, both EPA and industry, recognizing that failure to promulgate the regulations by the statutory deadline would result in mass closure, when the regulations became effective, of treatment, storage and disposal facilities which had come into existence since RCRA was enacted,[38] supported an amendment which would grant these facilities interim status.[39]

In September 1979, EPA asked for a two-week extension of time within which to file its third quarterly report to the court. When the report was filed on October 12, EPA declared that the hazardous waste program could not be promulgated before April 1980. It had taken EPA much longer than anticipated to address all the comments. More comments had been received on these regulations than on any other proposed regulation in the agency's history.[40]

Plaintiffs Environmental Defense Fund and Environmental Action filed a motion for an expedited hearing "to get to the bottom of this imbroglio."[41] In its response, EPA assured the court that, although it was behind the court-approved schedule, "the development of the regulatory Subtitle C program is proceeding in an expeditious and orderly manner."[42] EPA explained in detail some of the critical problems raised by the comments and what measures had to be taken in response to such comments. The court accepted EPA's revised schedule. The hazardous-waste program would be issued in two phases. The first phase, to be promulgated by the end of April 1980, would establish the criteria for identifying and listing hazardous waste, the standards for generators and transporters of hazardous waste and interim status standards for existing treatment, storage and disposal facilities. Phase II regulations, which would set standards for new treatment, storage and disposal facilities and for in-

37. Draft Bill sent by Administrator Costle to the Honorable Thomas P. O'Neill, Jr., Speaker of the House, under cover letter dated April 20, 1979.
38. Section 3005(3) grandfathers only those facilities in existence on the date of enactment, October 21, 1976.
39. § 10, S. 1156; § 3(e), H.R. 3994.
40. Administrator's Third Quarterly Report at 7, *Illinois v. Costle*.
41. Plaintiffs Environmental Defense Fund and Environmental Action's Motion for an Expedited Hearing at 2, *Illinois v. Costle*.
42. Defendant's Response to Prehearing Comments of Plaintiffs Environmental Defense Fund/Environmental Action and Partial Response to Plaintiff Citizens for a Better Environment's Memorandum in Support of Motion for Order to Show Cause at 3, *Illinois v. Costle*.

terim status facilities which receive a final permit, would be promulgated in October, 1980.

The first phase of the regulations was promulgated on May 19, 1980,[43] almost three weeks after the scheduled date. But nothing about RCRA has ever proceeded as planned. The regulations were so voluminous (about 2,000 typewritten pages) that it took the Office of the Federal Register two weeks to print them. The portion of the regulations pertaining to reporting and recordkeeping had yet to be cleared by the Office of Management and Budget, which expressed concerns over the burden of those requirements. In the preamble, EPA revealed that the standards for treatment, storage and disposal facilities would be issued in *three* phases over the next *five* years instead of two phases over six months. Portions of the regulations were issued as a final rule. Portions were issued as interim final with a 60-day comment period. Other portions, which had been changed substantially from the proposed version, were re-proposed with a sixty-day comment period. Eleven wastes were proposed for addition to the interim final list of hazardous wastes. Fifty-four specified wastes, proposed to be listed, were not on the promulgated waste list because EPA had not completed the necessary background documents which contain the technical substantiation for listing. Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy and utility type wastes would be temporarily excluded from regulation until Congress acted on pending legislation to amend RCRA.

Substantive legal challenges to these regulations by both industry and environmental groups are likely. EPA adopted many of industry's suggestions for making the regulations less onerous. However, the promulgated interim status standards are mostly procedural. The substantive standards for treatment, storage and disposal facilities will be established in Phase II and III regulations. Therefore, industry still does not know what it must eventually comply with and whether it will face a continually moving target for compliance over the next decade as the Subtitle C program is phased in. The most serious problems with the promulgated regulations concern the criteria for identifying and listing hazardous wastes. A major issue for industry will be EPA's attempt to redefine the statutory scope of Subtitle C to include regulation of wastes which are not discarded but used, reused, recycled and reclaimed. This approach

43. 45 Fed. Reg. 33066.

is accomplished by the redefinition in the regulations of two statutory definitions. "Solid waste," as redefined in the regulations, would include wastes and manufacturing or mining by-products which are "sometimes" discarded.[44] The statutory definition of solid waste is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material. . . ." "Treatment" as redefined in the regulations would include the statutory definition of "resource recovery," i.e., the recovery of material or energy from solid waste.[45] These two definitional changes permit EPA to regulate resource recovery under Subtitle C. The environmentalists have numerous concerns with the final regulations, particularly some of the changes advocated by industry and adopted by EPA, and are expected to file suit.

The Phase I regulations promulgated on May 19 become effective November 19, 1980, more than four years after RCRA's enactment. As EPA develops more specific design and operating standards under Phases II and III, the number of litigable issues will undoubtedly increase, and RCRA may spawn the most protracted environmental litigation to date.

III. RCRA'S SHORTCOMING: SITING

Although RCRA is prospective, probably its most serious shortcoming is that it does not solve the problem of siting new facilities in the face of increasing public opposition.

The General Accounting Office (GAO) issued its first report on the implementation of the RCRA hazardous waste regulatory program in December 1978. The GAO met with EPA personnel at headquarters and six regional offices, regulatory officials in ten states, various industry associations, forty-five generators and twenty-eight treatment and disposal facilities to obtain their respective views of the problem. The GAO concluded that there is a shortage of environmentally sound hazardous-waste disposal facilities. The shortfall will become more acute in the future as more wastes are found to be hazardous, as facilities that cannot meet RCRA's standards close and as waste from problem sites is redisposed.[46]

44. 45 Fed. Reg. 33155, § 261.2(b) and (e).

45. 45 Fed. Reg. 33155, § 260.10(a)(73).

46. *How to Dispose of Hazardous Waste—A Serious Question That Needs to Be Answered*, CED–79–13, December 19, 1978, at 11.

The impact of the existing shortfall is demonstrated by the state of Kentucky's dilemma in properly disposing of the wastes dumped in the Valley of the Drums. Except for one site in Ohio, all other suitable sites are over 1,000 miles away. As a result, the transportation costs alone for redisposal are estimated at several million dollars. Aside from this financial impact is the attendant hazard posed by transporting hazardous waste thousands of miles by truck over public highways or by rail on deteriorating tracks.[47]

Waste disposal sites have never been the sort of industry that states and communities want to attract. States and local communities have by statute, regulation, ordinance and even court action sought to restrict, if not totally to prohibit, waste disposal in their jurisdiction. A New Jersey law which prohibited the importation of any liquid or solid waste generated or collected outside of the state, except in accordance with regulations of the Department of Environmental Protection, was challenged all the way to the United States Supreme Court. The Court held that the statute violated the Commerce Clause.[48]

A few months after the Supreme Court decision, the Tenth Circuit held an Oklahoma statute invalid as a violation of the Commerce Clause.[49] That statute barred the importation of industrial wastes unless their state of origin had enacted substantially similar standards for industrial waste disposal and had entered into a reciprocity agreement with Oklahoma. More recently, the Louisiana Supreme Court overturned a parish ordinance that barred the disposal of hazardous waste within the parish as inconsistent with the regulatory scheme of the Louisiana waste statute and RCRA, and therefore preempted by both state and federal constitutions.[50]

Outright bans on disposal are not the only means of effectively precluding new capacity within a jurisdiction. For example, the State of Kentucky requires, as prerequisites for a permit to conduct hazardous waste disposal, approval by (1) the State Department for

47. From 1971 through 1978, there were more than 18,000 hazardous material incidents reported to the Department of Transportation. Approximately 96% of the incidents occurred on highways and railroads. See Report of the Interagency Task Force on Compensation and Liability for Releases of Hazardous Substances Department of Justice (June 1979).

48. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

49. Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978), and Oklahoma v. Lamberton, 582 F.2d 1267 (10th Cir. 1978).

50. Rollins Environmental Services v. Iberville, 371 So. 2d 1127 (La. 1979).

Natural Resources and Environmental Protection *and* (2) both houses of the state legislature *and* (3) the governor.[51]

Prohibitive legislation is prospective and does not require the undoing of past disposal. However, a recent Illinois case ordered the removal of wastes buried at a permitted hazardous waste landfill because they presented a "prospective" nuisance.[52] The complaint alleged that the hazardous waste landfill and the transportation of wastes to it constituted a common-law nuisance, and sought injunctive relief. The United States Environmental Protection Agency filed an amicus curiae brief setting forth the public's need for the landfill. The operator had a permit from the Illinois EPA to operate the landfill and, in addition, had separate, supplemental permits from the state for each waste buried at the site. Prior to the first day of trial, the defendant had obtained 186 permits. Nonetheless, the Illinois Appellate Court upheld the trial court's decision enjoining the continued operation of the site and ordering the removal of all toxic wastes together with any contaminated soil and reclamation of the area. The court held that "the operation of the landfill threatened a catastrophe" and that "the serious nature of the threat justified issuance of the injunction although (a) the possible catastrophe was remote in time and uncertain of occurrence, and (b) the [lower] court did not balance the benefits of the landfill against the harms that might result. . . ."[53]

The GAO reported that public opposition to the siting of hazardous waste management facilities is the major barrier to building new sites and expanding old ones and that such opposition is expected to increase in the future.[54] The report recommended that EPA identify the magnitude of the siting problem and then propose solutions, including a stronger federal role.[55]

The Eckhardt Subcommittee does not believe that public opposition will fade in the near future, and believes that the solution may be to locate new facilities on federal or state land or to enact legislation giving the United States or states special eminent domain powers.[56] A study prepared by an EPA contractor in November

51. KY. REV. STAT. § 224.855.

52. Village of Wilsonville v. SCA Services, Inc., 77 Ill. App. 3d 618 (1979).

53. *Id.* at 641.

54. *How to Dispose of Hazardous Waste,* note 46 *supra,* at 11.

55. *Id.* at 22.

56. H.R. No. 96–IFC–31 at 28.

1979[57] concluded that public opposition is a critical problem. It is most critical in the siting of new facilities. But even after a facility is sited, public opposition continues. "Local communities can and have forced operating facilities to close," [58] an obvious reference to the landfill at Wilsonville, Illinois. It is disturbing that the EPA report suggested no substantive changes in government involvement in the siting process; the states should continue to have the leading role, and EPA's efforts should be limited to financial and technical support for the states. Such support is already mandated under both Subtitles C and D of RCRA.[59] The only specific role the report suggests for EPA is funding for long-term liability of closed facilities. EPA has been working on this issue for some time.[60] The National Solid Waste Management Association drafted a bill to cover all post-closure liability as well as liability during site operation for damages in excess of $5 million per occurrence, which was introduced by Senator Randolph in June 1979.[61]

EPA has formed a Siting Committee, whose charter is to examine assistance to state governments, to explore compensation incentives to states and local communities to permit siting of a waste facility and to examine siting of such facilities on federal land. The latter would require an interagency task force, including representatives of the Department of Interior. A final Agency policy paper is expected by the end of 1980.

CONCLUSION

The solution of the hazardous-waste problem will take time and money and the cooperation of Congress, federal and state regulatory officials and all persons who generate, transport, treat, store and dispose of hazardous waste. The creation of a federal cleanup fund should solve the problem of the abandoned sites. RCRA regulations should assure that what has happened in the past will not happen in the future, that today's waste will not become tomorrow's environmental nightmare. In the long run, the salutary impact of the Act should be less hazardous waste generated and disposed of, and more recycling and reuse of formerly discarded material.

57. *Siting of Hazardous Waste Management Facilities and Public Opposition*, SW–809, U.S.E.P.A., November 1979.
58. *Id.* at III.
59. Sections 3011, 4001, 4007, 4008.
60. Administrator's Third Quarterly Report, note 22 *supra* at 5.
61. S. 1325, 96th Cong., 1st Sess. (1979).

The most challenging issue will be siting. Unless new capacity can be opened in the coming years, the entire RCRA program is threatened. The EPA report on siting contains a dire warning: continuing public opposition, coupled with anticipated closures and increased demand for proper facilities following RCRA implementation, may result in "no place to put all this hazardous waste, and the national effort to regulate hazardous waste may collapse."[62] We must all strive to assure that this warning does not become a reality.

62. SW–809, note 57 *supra*, at III.