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# THE HAZARDS OF OUR HAZARDOUS WASTE POLICY

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## INTRODUCTION

Solid waste regulation has traditionally been the stepchild of federal pollution control law. In the areas of air and water pollution control a mature federal presence has culminated in comprehensive regulatory statutes of general applicability,<sup>1</sup> whereas the Resources Conservation and Recovery Act of 1976<sup>2</sup> (RCRA) represents but a tentative second step in a comparatively recent federal effort.<sup>3</sup> The eclipse of federal solid waste law by other pollution media has to a great extent been the result of four historic assumptions about solid waste: 1) solid waste is relatively innocuous; 2) solid waste management is an inherently local and state problem; 3) solid waste problems are susceptible to technological solutions; and 4) remedial technology can and should be developed and applied primarily by the private sector. It is the purpose of this article to show that even though these assumptions may once have been correct, their persistence despite a changing definition of solid waste has handicapped American hazardous waste policy.

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1. The first Federal Water Pollution Control Act was enacted in 1948 (Pub. L. No. 80-845). The Act was significantly amended in 1956 (Pub. L. No. 84-660), 1965 (Pub. L. No. 89-234), 1966 (Pub. L. No. 89-753), 1970 (Pub. L. No. 91-224), 1972 (Pub. L. No. 92-500), and 1977 (Pub. L. No. 95-217). The Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) has been codified at 33 U.S.C. § 1251 *et seq* (1976).

Federal air pollution control legislation originated with the Air Pollution Act of 1955 (Pub. L. No. 84-159). It was substantially modified by the Clean Air Act of 1963 (Pub. L. No. 88-206) and amendments in 1965 (Pub. L. No. 89-272), 1967 (Pub. L. No. 90-148), 1970 (Pub. L. No. 91-604), and 1977 (Pub. L. No. 95-95). The Clean Air Act has been codified at 42 U.S.C. § 7401 *et seq*.

2. Pub. L. No. 94-580, 42 U.S.C. § 6901 *et seq* (1976).

3. The Solid Waste Disposal Act, as amended (Title II of Pub. L. No. 89-272 (1965), and Pub. L. No. 91-512 (1970)) authorized funding for research and planning. Regulation of solid waste facilities was limited to mandatory guidelines for federal installations. RCRA completely replaced the previous language of the Solid Waste Disposal Act.

For the conceptual differences between the Clean Air Act and Clean Water Act on the one hand and RCRA on the other, see text material at footnotes 26-30. In general, the Clean Air Act and Clean Water Act attempt to regulate all dischargers to air and water, whereas RCRA seeks only to regulate certain aspects of the solid waste process—hazardous waste disposal and open dumps.

Solid waste regulation has also been subordinated to other environmental concerns because it is subversive in ways which deprive it of a broad constituency. First, the solid waste problem is subversive of America's production ethic to a greater degree than either air or water pollution:

Unlike air or water pollution, pollution of the land by discarded materials is not exclusively caused by the by-products of the productive process. A large volume of our waste represents the actual product of our industrial and manufacturing processes. These wastes are the direct result of the demand for products and a need to dispose of them once they have served their purpose. These wastes are the result of the American lifestyle which includes an often wasteful emphasis on convenience or advertising.<sup>4</sup>

With regard to solid waste, the product itself is often the externality. Thus, solid waste pollution compels society to confront basic questions of economics and ideology to an extent that air and water pollution do not.

Second, the solid waste problem contains an implicit indictment of American environmentalism. At least temporarily, air and water pollution control have merely caused the changing of the situs of pollution rather than diminishing the absolute amount of residuals.<sup>5</sup> Sludges from air and water pollution control processes have been classified as solid waste, a term which has become the catchall of American pollution control. RCRA's definition of "solid waste" illustrates this trend:

The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained material resulting from industrial, commercial, mining, and agricultural operations and community activities. . . .<sup>6</sup>

The elements of "solid waste" (the term itself is a misnomer<sup>7</sup>) are

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4. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON H.R. 14496, 94th Cong., 2d Sess. 9 (1976) (hereinafter "leg. hist.").

5. For example, the application of Phase I ("BPT") effluent limitations under the Clean Water Act has definitely resulted in more sludge from municipal and industrial treatment processes. However, the increased stringency of effluent limitations during Phase II, the enforcement of industrial pretreatment requirements, and new source performance standards may well reduce the overall amount of generated residuals by encouraging process changes and recycling.

6. RCRA §1004 (27), 42 U.S.C. §6903 (27) (1976).

7. The House Committee On Interstate And Foreign Commerce recognized the inappropriateness of the term, and recommended substitution of "discarded materials." The Committee would also have excluded agricultural and mine wastes from RCRA's ambit (leg. hist. 2, 3). It is not clear from the legislative history why these recommendations were not followed.

heterogeneous physically and conceptually. This "muck stops here" waste category includes materials which are readily disposable (organic household garbage) and other materials which society either does not desire to or know how to dispose of completely (e.g., mining wastes, automobile tires, and persistent chemical wastes). It is convenient for environmentalists and industrialists alike to identify a category in which superannuated refrigerators and contaminated sludge from municipal treatment plans are considered as if they were remnants of a family picnic in Peoria. The engrafting of a class of intractable pollutants upon a class of innocuous but prolific pollutants to form a composite solid waste category has distorted the original definition of solid waste and distracted us from our most compelling pollution problem—dealing with the hazardous residues of production and pollution control processes.

According to United States Environmental Protection Agency (EPA) estimates, ten to twenty percent of all industrial wastes, excluding mining and agricultural wastes, will be listed as hazardous.<sup>8</sup> Thus, of the approximately 345 million tons of industrial wastes generated annually, some 46 million tons are hazardous. Perhaps 90 percent of these hazardous wastes, or 41 million tons, is being disposed of improperly. Approximately 80 percent of the hazardous wastes annually generated by American industry are disposed of on the generator's site in pits, ponds, lagoons, or industrial landfills. EPA studied 50 on-site disposal areas, and found that in 43 cases toxic chemicals were leaching into groundwater in unacceptable concentrations. The remaining 20 percent of hazardous industrial wastes is transported to off-site disposal areas such as municipal landfills, ocean dumping sites, and hazardous waste treatment and disposal facilities.

New Jersey generates more hazardous industrial waste than any other state: approximately 350,000 tons per year. Much of New Jersey's hazardous waste is discharged into publicly owned sewage treatment works, which presently dump their sludge into the Atlantic Ocean. But New Jersey industries will soon be required to adopt land-related disposal methods for these wastes because of the 1981 Congressional deadline for curtailing ocean dumping of sewage sludge,<sup>9</sup> and also because of strengthened EPA pretreatment regulations.<sup>10</sup>

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8. The statistics in this paragraph are derived from statements by EPA officials summarized in 9 BNA ENV. REPTR. CURR. DEV. 1301 (November 17, 1978). See also COMPTROLLER GENERAL OF THE UNITED STATES, HOW TO DISPOSE OF HAZARDOUS WASTE—A SERIOUS QUESTION THAT NEEDS TO BE RESOLVED (December 19, 1978).

9. Section 4 of Pub. L. No. 95-153, amending Pub. L. No. 92-532, 33 U.S.C. § 1420.

10. 40 C.F.R. Pt. 403, 43 Fed. Reg. 27746 (June 26, 1978).

The tragedy at Love Canal in Niagara Falls, New York, is only one of an unremitting series of hazardous waste horror stories,<sup>11</sup> perhaps the most hideous of which is the incalculable damage to public health and the environment caused by Kepone disposal in Hopewell, Virginia.<sup>12</sup> The most frequent result of inadequate hazardous waste disposal is the pollution of increasingly critical groundwater supplies.<sup>13</sup> State hazardous waste programs range from comprehensive to nonexistent.<sup>14</sup>

Congress' "overriding concern" in enacting RCRA was "the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic, or lethal."<sup>15</sup> A federal regulatory approach was thought to be necessary for the management of hazardous wastes because:

[h]azardous wastes typically have little, if any, economic value; are often not susceptible to neutralization; present serious danger to human life and the environment; and can only be safely stored, treated or disposed of at considerable cost to the generator. Without a regulatory framework, such hazardous waste will continue to be disposed of in ponds or lagoons or on the ground in a manner which results in substantial and sometimes irreversible pollution of the environment.<sup>16</sup>

One of the Congressional Committees which drafted RCRA declared that "the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. . . ."<sup>17</sup>

11. For details of the Love Canal incident, see 9 BNA ENV. REPTR. CURR. DEV. 581 (August 11, 1978); see also *Emptied Niagara Neighborhood Now Looks Like A Disaster Area*, N.Y. TIMES, November 22, 1978, at B4. Previous incidents are described in leg. hist., 17-22 and COUNCIL ON ENVIRONMENTAL QUALITY, EIGHTH ANNUAL REPORT, 47 (1977). The pollution at Love Canal was caused by an abandoned hazardous waste disposal site. This article does not deal with the problem of financial responsibility for damage caused by active, inactive, and abandoned sites. For a discussion of the abandoned site issue see GAO REPORT, *supra* note 8, at 23-27.

12. See Goldfarb, *Kepone: A Case Study*, 8 ENV. L. 645 (1978).

13. See CEQ REPORT, *supra* note 11, at 46; see also COMPTROLLER GENERAL OF THE UNITED STATES, WASTE DISPOSAL PRACTICES—A THREAT TO HEALTH AND THE NATION'S WATER SUPPLY (June 16, 1978).

14. Leg. hist., 23-24.

15. Leg. hist., 3. RCRA defines "hazardous waste" as "a solid waste or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed. (RCRA, § 1004(5), 42 U.S.C. § 6903(5) (1976).

16. Leg. hist., 4.

17. *Id.*

## ANALYSIS OF RCRA

RCRA's approach to hazardous waste management<sup>1 8</sup> consists of four major elements: 1) federal identification of hazardous wastes; 2) a manifest system for tracing hazardous wastes from generator, to transporter, to disposal facility; 3) federal minimum standards for hazardous waste disposal, enforced through permits for disposal facilities; and 4) state implementation of hazardous waste management programs at least equivalent to the federal program.

EPA is responsible for issuing regulations containing criteria for identifying hazardous wastes and listing particular hazardous wastes.<sup>19</sup> The initial hazardous waste list may be revised by EPA whenever appropriate. State governors may petition EPA to identify or list a material as a hazardous waste, and EPA must either grant or deny the petition within 90 days. Moreover, any person may petition EPA "for the promulgation, amendment, or repeal of any regulation" under RCRA.<sup>20</sup> EPA must take action on a citizen petition "within a reasonable time" and publish in the Federal Register its reasons for taking such action.

Regulations are also to be promulgated with regard to generators and transporters of listed hazardous wastes.<sup>21</sup> Generators of hazardous wastes must keep records and report to the federal government, initiate a manifest system "to assure that all such hazardous waste generated is designated for treatment, storage or disposal in . . . facilities . . . for which a permit has been issued,"<sup>22</sup> and properly label and containerize hazardous wastes delivered to transporters and disposal facilities. The duties of a transporter involve recordkeeping and reporting, accepting only properly labeled and containerized wastes, complying with the manifest system, and, most important, trans-

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18. RCRA, SUBTITLE C, §§ 3001-3011, 42 U.S.C. §§ 6921-6931 (1976).

19. RCRA § 3001, 42 U.S.C. § 6921. Most of the SUBTITLE C regulations were required to be promulgated within 18 months after RCRA's enactment on October 21, 1976. EPA was unable to meet this April 21, 1978 deadline, and was subsequently sued by number of environmental groups (GAO REPORT, *supra* note 8, at 3). Proposed regulations including 1) criteria for identifying and listing hazardous wastes, identification methods, and a hazardous waste list; 2) standards applicable to generators of hazardous wastes for recordkeeping, labeling, containerizing, and using a transport manifest; and 3) performance standards for hazardous waste treatment and disposal facilities, were issued on December 18, 1978 (43 Fed. Reg. 58946, proposing regulations at 40 CFR Pt. 250). Final regulations are expected to be promulgated early in 1980, to take effect during mid-1980 (GAO REPORT, *supra* note 8, at 3). On January 3, 1979, the United States District Court for the District of Columbia issued a compliance schedule for promulgation of SUBTITLE C regulations. This court-ordered timetable is substantially the same as EPA's own schedule (9 BNA ENV. REPTR. CURR. DEV. 1696, January 12, 1979).

20. RCRA § 7004, 42 U.S.C. § 6974 (1976).

21. RCRA §§ 3002 and 3003, 42 U.S.C. §§ 6922 and 6923.

22. RCRA § 3002(5), 42 U.S.C. § 6922(5) (1976).

porting all such hazardous waste only to the permitted disposal facility which the generator identifies on the manifest.

Permits are not required of generators or transporters of hazardous wastes but disposal, treatment, or storage of these wastes is prohibited except in accordance with a permit.<sup>23</sup> In order to obtain and retain a permit, an owner or operator of a disposal facility (which includes treatment and storage) must meet EPA performance standards governing location, design, construction, operation, and maintenance of such facilities. The applicable performance standards become permit conditions, in addition to the recordkeeping and reporting requirements. The manifest system terminates with the receipt of the wastes by the owner or operator of the disposal facility and his notification to the generator.

A state is authorized to administer and enforce a hazardous waste regulatory program in lieu of the federal program if EPA finds that the state program is equivalent to the federal program and is consistent with the programs of neighboring states.<sup>24</sup> No state may impose less stringent requirements than those included in federal law, but a state may elect to be more stringent. Twenty-five million dollars per annum has been authorized for fiscal years 1978 and 1979 to fund grants to states for the development and implementation of state hazardous waste programs.

EPA is the primary enforcement authority where a state program has not been approved. Even subsequent to approval, EPA can enforce directly against a violator after giving notice to the state. If an approved program is later determined to be inadequate, EPA may withdraw program authorization and reinstitute the federal program in that state.

RCRA provides EPA with a broad range of enforcement mechanisms, including compliance orders, civil actions for injunctions, civil penalties of up to \$25,000.00 per day of violation, permit suspension or revocation, and criminal indictments for knowing transportation to an unpermitted facility, unpermitted disposal, and making false statements in applications, manifests, labels, and reports. State programs must "provide adequate enforcement of compliance with" RCRA, but state enforcement tools may be less comprehensive and incisive than those which RCRA provides EPA.<sup>25</sup>

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23. RCRA § 3005(a), 42 U.S.C. § 6925(a) (1976).

24. RCRA § 3006, 42 U.S.C. § 6926 (1976).

25. EPA Proposed Guidelines For State Hazardous Waste Programs, § 250.72(a)(3). See also proposed regulations, *supra* note 19.

## EVALUATION OF RCRA

In evaluating RCRA's approach to hazardous waste regulation, it is helpful to compare RCRA to other environmental statutes. Both the Clean Air Act and Clean Water Act impose discharge limitations on producer-dischargers.<sup>26</sup> Discharges are illegal if they violate emissions limitations contained in State Implementation Plans (for sources of air pollution) or effluent limitations included in National Pollutant Discharge Elimination System permits (for dischargers to waterways). In contrast, RCRA's focus is on the disposal facility, not the generator: "Rather than place restrictions on the generation of hazardous waste, which in many instances would amount to interference with the productive process itself, the Committee has limited the responsibility of the generator for hazardous waste to one of providing information."<sup>27</sup>

RCRA's axiom of hazardous waste management—primary regulation of waste disposal rather than generation—perpetuates the antiquated "presumption of innocuousness" of solid waste, and complicates the regulatory process by separating generation from disposal. Although RCRA imposes certain recordkeeping and reporting requirements on generators,<sup>28</sup> it is doubtful whether understaffed and underfunded environmental agencies will be able to monitor and enforce these duties without a permit program or its equivalent. Moreover, by attempting to control hazardous waste without inhibiting production, Congress has ignored the successful "technology forcing" approach of the Clean Air Act<sup>29</sup> and the "available technology" orientation of the Clean Water Act<sup>30</sup> in favor of a system which appears convoluted and misdirected.

It goes without saying that the ultimate goal of pollution control is the diminution of residuals by recycling and reuse. In theory, recycling will render the production process more efficient by reducing raw material and disposal costs. The effluent limitation approach incorporated in the Clean Air Act and Clean Water Act encourages recycling and reuse by imposing the actual costs of disposal on the producer of goods, thus removing the artificial public

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26. Clean Water Act, § 301, 33 U.S.C. § 1311, Clean Air Act § 110, 42 U.S.C. § 7410.

27. Leg. hist., 26.

28. See note 19, *supra*.

29. See La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA LAW REVIEW 771 (1977); Bonine, *The Evolution of "Technology-Forcing" in the Clean Air Act*, BNA ENV. REPTR. MONOGRAPH No. 21 (1975).

30. See Goldfarb, *Better Than Best: A Crosscurrent in the Federal Water Pollution Control Act Amendments of 1972*, 11 LAND AND WATER L. REV. 1 (1976).

subsidy which pollution in general has traditionally represented. In sum, both the Clean Air Act and Clean Water Act attempt to decrease residuals by making actual disposal costs an inescapable responsibility of producers.

In defiance of this basic tenet of pollution control policy, RCRA divorces generation from disposal, and adopts an excessively complicated system whereby responsibility is fragmented among generators, transporters, and disposal facilities. Why should generators not be legally responsible for their hazardous waste disposal? Under such a regime, generators could still take advantage of economies of scale by transporting wastes for off-site treatment even though generators would remain legally responsible for the wastes until they have been disposed of in an acceptable manner. This would be preferable to the present system under RCRA, where the high costs of waste disposal, the awkwardness of the statutory scheme, and the chronic insufficiency of resources of state agencies will tempt unscrupulous generators to circumvent the manifest system and continue to condone the illicit dumping which constitutes the bane of hazardous waste management.<sup>31</sup> To adopt a metaphor as grisly as a hazardous waste incident, the "cradle to grave" RCRA management scheme is likely to result in a higher frequency of "induced abortions."

Undoubtedly, RCRA's implementation will cause a shift from on-site to off-site storage and disposal.<sup>32</sup> It may be that placing direct responsibility on generators will stimulate the law-abiding among them to acquire transportation and disposal facilities, but anti-monopoly arguments appear insignificant beside the public health benefits which would result from such regulation. More likely, a relative certainty of enforcement will induce generators to find innovative means of waste disposal: recycling or parasitic-symbiotic relationships with other industries. Residuals can never be completely eliminated, but placing legal responsibility for hazardous waste disposal on generators will maintain the pressure for recycling through an administratively feasible system.

As if this fundamental flaw in RCRA were not enough, two other factors—both arising from specious assumptions about solid waste—militate against an effective hazardous waste policy. First, there is the myth of private sector competence to effectuate technological

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31. See e.g., Leepson, *Midnight Riders*, ENVIRONMENTAL ACTION, Vol. 10, No. 11 (October 7, 1978). Generators may also be encouraged to "toll" processes producing hazardous wastes: i.e., spin off these activities to undercapitalized and irresponsible subsidiaries or "friendly companies" (see Goldfarb, *supra* note 12).

32. See text at note 8, *supra*.

solutions to the hazardous waste problem. According to the Council on Environmental Quality:

[t]he technology for environmentally sound treatment, storage, and disposal of hazardous waste is generally available. It is far from fully used because there has been no economic incentive or, until passage of RCRA, little legal compulsion to do so. Good hazardous waste management can cost 10 to 40 times as much as unsatisfactory methods in current use—dumping, ponding, and burial without adequate safeguards. According to a recent study, the hazardous waste industry was comprised of 95 firms with 110 sites in 1975. Average utilization of capacity was 53 percent, ranging from 30 to 80 percent, depending on the process and the region of the country. The study estimated that there was environmentally adequate capacity for 5.3 million tons of hazardous waste in 1974. This compares with an estimated 29 million metric tons of hazardous waste generated by 14 important industries in 1974.<sup>33</sup>

The author has already questioned the legal compulsion exercisable under RCRA. It is also questionable whether there is in fact an economic incentive to use existing treatment capacity and increase capacity to meet even current industrial needs. This inquiry is critical because RCRA is predicated on the existence of adequate capacity to store, treat, and dispose of hazardous wastes.<sup>34</sup> If the current serious shortfall of treatment capacity continues into the future, RCRA will fail because it is not technology-forcing as to generators.<sup>35</sup>

Because of the significantly greater cost of proper hazardous waste management, unscrupulous generators will continue to engage in illegal dumping through ostensibly independent contractors. Honest generators will seek every possible means of reducing the cost of waste treatment, from recycling to acquisition of transportation and disposal facilities, to participation in waste exchanges.<sup>36</sup> Thus, a company considering entering the hazardous waste disposal field or enlarging present capacity will face the unattractive prospect of massive capital investment, significant legal liability, close government regulation, unpredictable future regulatory steps, and tenuous demand. Moreover, RCRA does not authorize low cost loans or tax incentives for construction of hazardous waste disposal facilities. All in all, the hazardous waste disposal business seems to be a risky one at best.

The second myth preventing effective hazardous waste policy is

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33. CEQ REPORT, *supra* note 11, at 46-47.

34. GAO REPORT, *supra* note 8, at 5.

35. *See id.* at 5-10 for a discussion of capacity shortages.

36. *But see id.* at 17-21, which concludes that volume cannot be appreciably reduced.

that of solid waste as a uniquely local and state problem. One of the most troublesome dilemmas confronting hazardous waste managers "is that most people simply do not want a solid waste disposal project in their neighborhoods, especially for hazardous material."<sup>37</sup> The siting issue is so formidable that an EPA official has been quoted as predicting that RCRA's hazardous waste control program may "fall flat" because of facility siting problems.<sup>38</sup> RCRA does not regulate the siting of facilities, and municipalities regularly reject the development of such facilities because of public opposition. In fact, some municipalities have attempted to expel existing facilities on public nuisance grounds.<sup>39</sup> No state presently possesses explicit legislative or administrative authority to override local exclusions of hazardous waste facilities.<sup>40</sup> For example, the State of Minnesota was compelled to return unexpended federal funds intended for the location, design, and construction of a state hazardous waste facility because public opposition prevented the location of a suitable site.<sup>41</sup>

EPA's reaction to the siting issue has been the assertion that states should conclusively determine the locations of hazardous waste facilities.<sup>42</sup> But it is unclear how states will be insulated from the protests of indignant municipalities. Furthermore, the siting of hazardous waste facilities is a problem transcending state boundaries. It is a regional concern because the economics of hazardous waste treatment dictate large, guaranteed waste streams.<sup>43</sup> Rhode Island Governor J. Joseph Garrahy, head of the hazardous waste advisory group to the New England Regional Commission, has recently stated:

Both individual states and industries acting alone will find it difficult to develop the necessary [hazardous waste] facilities. The volume of wastes generated within individual states, particularly the less industrial states, seldom justifies the construction of complex facilities to service each state. The economic infeasibility of privately developed facilities for each state, combined with regulatory prob-

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37. CEQ REPORT, *supra* note 11, at 49. See also GAO REPORT, *supra* note 8, at 10-17.

38. Gary Dietrich, EPA's Associate Director for Solid Waste, in 9 BNA ENV. REPTR, CURR. DEV. 1045 (September 29, 1978).

39. See *Village of Wilsonville v. Earthline Corporation*, 65 Ill. App.3d 392, 282 N.E.2d 689 (1978) where an Illinois court ordered the closure of a major hazardous waste facility as well as the removal of thousands of barrels of wastes previously buried, despite state permits and EPA approval of the site. The removal order has been stayed pending appeal.

40. There is case law in a few states declaring state preemption of local zoning decisions involving sanitary landfills. See *Carlson v. City of Worth*, 25 Ill. App. 3d 315, 322 N.E.2d 852 (1974); *Town of Gloucester v. Rhode Island Solid Waste Management Corp.*, 390 A.2d 348 (R.I. 1978); *Ringlieb v. Township of East Orange*, 59 N.J. 348, 283 A.2d 97 (1971).

41. *Supra* note 38; See also GAO REPORT, *supra* note 8, at 13.

42. See remarks of Steffen Plehn, EPA Deputy Administrator for Solid Waste, reported at 9 BNA ENV. REPTR. CURR. DEV. 1178 (October 20, 1978).

43. *Id.*

lems and the difficulty of siting such facilities, discourage private initiatives to develop needed facilities.<sup>44</sup>

From every perspective, regional hazardous waste management systems are the most sensible approach.

The siting issue aside, there is a good deal of uncertainty about RCRA's mode of implementing hazardous waste management programs, which is to authorize state programs with supportive federal supervisory and enforcement power. Experience with similar statutory schemes indicates that many states will institute their own environmental protection programs in areas covered by federal legislation only where there is sufficient inducement to overcome the natural inclination to save money and "let the Feds take the heat."<sup>45</sup>

One way to disarm state resistance to carrying out a fundamentally federal program is to make it financially worthwhile for a state to do so. Federal program grants can persuade state legislators and administrators that the program would be less expensive than anticipated, and that federal funds are too tantalizing to be foregone. RCRA authorizes \$25 million per annum for fiscal years 1978 and 1979 for hazardous waste program grants, but even assuming full funding of the RCRA hazardous waste regulatory provisions, more than half of this amount will be spent for state surveys of abandoned hazardous waste disposal sites.<sup>46</sup> Without substantially more funding for program grants, states will choose either not to implement hazardous waste programs, or else to institute programs for the wrong reasons. State officials appear often to euphemistically claim that state-administered programs will result in greater "flexibility" and "responsiveness" to industry than federally administered programs. However, there is some evidence that "flexibility" may in reality be favoritism toward state programs.<sup>47</sup>

### RECOMMENDATIONS

The author recommends that Congress establish regional hazard-

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44. 9 BNA ENV. REPTR. CURR. DEV. 1288 (November 10, 1978). The New England Regional Commission is developing a regional hazardous waste management plan.

45. The author is relying on his personal experience as Special Consultant to the Division of Water Resources, New Jersey Department of Environmental Protection.

46. 9 BNA ENV. REPTR. CURR. DEV. 1302, 1343 (November 17, 24, 1978).

47. Citizens of Ohio have sued EPA to compel the withdrawal of Ohio's authority to administer its own discharge permit program on the ground that state agencies have been inordinately lenient with violators (8 BNA ENV. REPTR. CURR. DEV. 1587). The State of New Jersey prohibited disposal in the state of most solid wastes generated outside the state until the United States Supreme Court struck down the ban as "economic protectionism" (*City of Philadelphia v. State of New Jersey*, 98 S.Ct. 2531 (1978)).

ous waste management boards with exclusive authority to site hazardous waste facilities and license hazardous waste transportation, treatment, and disposal. Regional boards should have the power of eminent domain to assist in their siting authority. These boards should be funded by charges to be imposed upon generators of hazardous waste, based upon the toxicity and persistence of wastes generated. Rates for transportation and disposal should also be set by the boards. Generators, transporters, and disposers of hazardous wastes should continue to be subject to EPA regulations and state enforcement, but boards should be granted backup enforcement authority. State hazardous waste planning, monitoring, and enforcement programs should be partially funded by grants from the regional management boards. Generators should be made jointly and severally liable with transporters and disposers for proper waste disposal, and generators should also be required to obtain permits coordinated with other discharge permit programs.

It is recognized that such direct federal control is not a panacea in every policy area, nor is it desirable in other than exceptional cases. But hazardous waste management is exceptional for the following reasons: 1) the magnitude of potential danger to health and the environment; 2) the inadequacy of private sector capacity for management under current conditions; 3) the regional nature of hazardous waste management; and 4) the need for substantially greater funding than is presently available. The system outlined above would combine the advantages of direct federal control with those of private sector capital and expertise in the field of hazardous waste management.