COMMENT

Between a Rock and a Hard Place in Illinois: Constitutional Responses to Adverse Waste Facility Siting Decisions

INTRODUCTION

The problem of where to dispose of solid waste promises to be one of the most complex, expensive and emotional issues to confront this Nation as it prepares to enter the twenty-first century. With recycling technology lagging far behind this country's ability to produce trash, we must continually search for new places to put all the things that we have discarded. ... Everyone would agree that trash must be disposed of, but very few would volunteer to have it dumped in the environment near their homes. The simple truth is that no one wants to live near a landfill ... However, the "not in my backyard" (or "NIMBY") attitude ... while understandable, is not conducive to finding legal and efficient solutions to this dilemma.¹

This familiar recognition of the tension between public opposition to neighboring waste² facilities and shrinking disposal capacity³ suggests


2. "Waste" refers to both solid and hazardous waste throughout the comment unless specifically limited. "[W]aste' means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, ...." ILL. REV. STAT. ch. 111 1/2, para. 1003.53 (1991).

3. "Hazardous waste" means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise
that technical, political, planning and legal entities should act collectively to solve the nation’s waste problems. Although not every region of the nation is troubled by vanishing disposal capacity, the problem is critical in some regions and becoming critical in others.

Illinois is no stranger to the waste dilemma. It is a leader among states in waste generation. Moreover, the large volume of waste generated in Illinois may soon surpass the state’s ability to assure adequate disposal.
capacity. Although Illinois has embraced waste reduction and recovery as preferred alternatives to disposal, it recognizes that it must continue to site sanitary landfills and hazardous waste disposal facilities as a matter of public policy. Many authors agree that assurance of adequate disposal capacity represents sound public policy because promotion of technically correct siting reduces the possibility of illegal dumping.

The need for such assurance of adequate disposal capacity is coterminous with the overwhelming public opposition to additional waste sites. Moved by fear and armed with votes, citizens are formidable opponents for locally undesirable land uses (LULUs) such as waste facilities.

7. The Illinois General Assembly recently found that current waste management practices do not correct the imbalance between increasing demand and decreasing capacity. Illinois Solid Waste Management Act [hereinafter ISWMA], ILL. REV. STAT. ch. 111 1/2, paras. 7052(a)(1)-(3) (1991). See also infra notes 29-40 and accompanying text for an empirical analysis of current disposal capacity.

8. "Sanitary landfill" means a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the Board may provide by regulation.


11. See Reilly, supra note 10, at 68.
The nature of the opposition should not be underestimated, nor should its resources. This is an issue that has triggered the emotions of rich and poor, powerful and weak, and educated and illiterate. The public opposition directed at American involvement in Viet Nam and the anti-nuke protests are likely to be dwarfed by the organizational and technical expertise of people fighting against hazardous waste facilities in their communities.\(^\text{12}\)

Strident opposition to local siting attempts is not without reason. After all, waste facilities traditionally mean increased local costs which are not offset by local benefits arising from the operation.\(^\text{13}\) Nevertheless, local self-interest must yield to technically sound waste management if we are to avoid a "tragedy of the commons."\(^\text{14}\)

Commercial waste facility developers and companies which treat waste on-site stand prepared to offer technically sound solutions to diminishing disposal capacity.\(^\text{15}\) In Illinois, however, attempts to site modern facilities and to improve existing on-site treatment have been


13. This author recognizes the disadvantages perceived by local residents. The negative externalities commonly associated with waste facilities include increased risks to human health, decreased property values, and decline in surrounding environmental quality. Moreover, citizens understand that the costs are not offset to a large degree by economic gain to the community because waste facilities are capital rather than labor intensive. In short, there is more to lose than to gain from a waste facility; see, Wright, supra note 10, at 779; Lawrence Susskind, The Siting Puzzle: Balancing Economic and Environmental Gains and Losses, in Piecing Together Economic Development and Environmental Quality 1985, at 1-2 (Proceedings of the 13th Annual Illinois Dep't of Energy and Natural Resources Conference, Chicago, Sept. 13th and 14th, 1984). Thus, their decision-making is rational when their view includes only the local scene. However, beyond the local horizon is the real risk that inadequate waste handling capacity will lead to greater national risks.


Centralized decisionmaking is more efficient than decentralized decisionmaking whenever conditions are such that rational but independent pursuit by each decisionmaking unit of its own self-interest leads to results that leave all units worse off than they would have been had they been constrained to adopting consensual decisions applicable to all.


15. See Sussna, supra note 10, at 35. In Illinois, one hundred and seventy-two (172) siting proposals for regional pollution control facilities (RPCFs) were submitted between 1981 and 1990. DIVISION OF LAND POLLUTION CONTROL, ILLINOIS ENVTL. PROTECTION AGENCY, REGIONAL POLLUTION CONTROL FACILITY SITING IN ILLINOIS, i (1990) [hereinafter IEPA SITING REPORT].
frustrated by a statutory scheme which emphasizes local participation over technical requirements. Private waste management entities have found themselves lodged between a rock and a hard place. They have invested large sums in attempts to provide necessary disposal capacity for wastes generated by others but have often been denied an operating permit due to the near-veto power vested in county boards. This comment is designed to provide environmental and land-use practitioners with constitutionally-grounded arguments which will help extricate their waste-management clients from between the rock and the hard place.

Part I of this comment discusses the waste management dilemma embodied in the Illinois statutory siting scheme and perpetuated by Illinois courts. I(A) provides additional empirical support for the proposition that disposal capacity is and will continue to be a real issue in Illinois. I(B) outlines the Illinois statutory siting criteria and explains how the criteria are applied. I(C) examines the role played by Illinois courts in interpreting the criteria, in dealing with appeals based, in part, upon staunch public opposition, and in actively promoting the local government veto over waste disposal facilities.

16. See infra notes 27-40 and accompanying text.
17. For example, in recent years, Laidlaw Waste Systems, Inc. has attempted to site four facilities. Those applications have resulted in two local denials. Two are pending. The amount of money invested in the local approval portion of the siting attempts ranges from two hundred thousand to several million dollars with no guarantee of any return on investment. A company representative explained that Illinois has one of the more onerous siting statutes in the country because the process is very political at the local level. The company believes that the statute provides for technical criteria which are demonstrable, but the statutory process has frustrated siting attempts due to almost universal community disapproval of siting any facilities. The company faces an uphill battle with each siting attempt because it must invest large sums of money to demonstrate the technical viability of state-of-the-art waste facilities to county boards with no guarantee that local government will hear the technical information over vocal public opposition. Telephone Interview with Miles Stotts, Regional Environmental Manager, Laidlaw Waste Systems, Inc. of Illinois, Arlington Heights, Illinois (March 30, 1992).
18. See, e.g., Marla Donato, Environment on Edgar's Mind, Garbage a Top Priority of Governor, State EPA Official Says, Chi. Trib., April 15, 1991, § DuPage at 2 (reporting that Illinois residents are generating more garbage, depleting capacity, and failing to approve new disposal outlets). See also infra notes 70-133 and accompanying text for an in-depth discussion of Illinois siting denials which have been challenged in court.
19. As suggested in the introductory comments, many public policy considerations are incorporated in the debate over how to accomplish waste facility siting. While the aim of this comment is not to provide the state with solutions to its waste dilemma, to the extent that the analysis contained herein promotes sound siting, Illinois may become the beneficiary of future increases in disposal capacity.
Part II analyzes whether the Supremacy Clause provides the practitioner with a viable argument that comprehensive federal environmental legislation effectively preempts the Illinois siting statute. II(A) discusses the historical development of preemption doctrine and lays the foundation for proper analysis of the role of local participation in waste siting in light of comprehensive federal regulation. II(B) asks whether either the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) explicitly or implicitly preempts Illinois' siting statute. II(C) argues that a basis for preemption is currently embodied within the legislative intent of both federal laws and, alternatively, that future legislation, directed at national capacity shortages, is likely to unambiguously preempt local vetoes of waste sites.

Part III queries whether recent developments in "takings" doctrine, which are arguably more favorable to property owners, provide the impetus for waste management developers to seek either invalidation of the siting scheme or just compensation pursuant to the mandate of the Fifth Amendment. III(A) offers an overview of the Supreme Court's historical treatment of Fifth Amendment claims. III(B) analyzes three recent Supreme Court decisions and their progeny in lower federal and state courts with a view toward providing the petitioner with a body of recent case law which may be used to indicate the illegitimacy of the Illinois siting statute. III(C) concludes that the time may be ripe for Illinois waste management entities to assert a Fifth Amendment claim against the state's siting scheme because it deprives them of investment-backed expectations and deprives them of economically viable use of their property.

I. PUBLIC OPPOSITION AS A DOMINANT FACTOR IN WASTE FACILITY SITING IN ILLINOIS

One author has recently conveyed the frustration caused by Illinois's siting statute which allows public participation as follows:

20. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2.


23. See infra notes 325-27, 337 and accompanying text.

24. U.S. Const. amend. V ("[N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.")

25. See infra notes 289-91 and accompanying text.
Given the sense of public concern for the environmental and health hazards associated with solid waste disposal, particularly hazardous waste, much of the legislative and regulatory initiatives have attempted to concentrate on developing some means of institutionalizing a decision-making process for establishing new disposal sites, which is both workable in terms of providing sufficient capacity to handle wastes now being generated and also achieves public confidence. The general method used, and one which has, in fact, been mandated by Congress, is that which includes at a minimum, public participation in the process.

Unfortunately, few decision-making processes are currently achieving anything except to provide an arena for displays of mass discontent on the part of the host community, and protracted and seemingly endless litigation.26

Part I of this comment addresses the source of waste developers' frustration with the siting process and is subdivided into three sections. Empirical support is provided for the propositions that the overall scheme has created extreme difficulties for commercial waste facilities and industrial generators and has placed the state in a precarious position regarding capacity assurances. Next, the statutory criteria is described in some detail. Finally, the role played by Illinois courts in perpetuating siting difficulties is analyzed; particular emphasis is focused on the Illinois Supreme Court's decision in Village of Carpentersville v. Pollution Control Board27 because the case illustrates well how Illinois courts have perpetuated siting difficulties and left waste generators, processors, and facility operators between a rock and a hard place.

A. THE NEED TO ASSURE ADEQUATE WASTE DISPOSAL CAPACITY

If Illinois had all the capacity necessary to assure that wastes could be properly disposed of, then the mechanism for approving additional facilities would be less pivotal to this discussion. However, the state has admitted that its siting mechanism has not been successful in assuring capacity for all types of waste in all geographic regions of the state.28

27. 553 N.E.2d 362 (Ill. 1990).
28. See supra note 9 and accompanying text. (The General Assembly has declared the need for additional waste sites as a matter of public policy, but has not moved for change in the siting process.).
Although Illinois presently hosts numerous disposal sites, many are approaching capacity. As part of an on-going project, the Illinois EPA assesses the state's experience with the siting process. Although the IEPA reports that since 1981 local governments have approved seventy-five percent (75%) of the permit applications submitted, the statistic is misleading as to available capacity for several reasons. It fails to account for low approval of new facility applications which is only fifty-eight percent (58%). It includes approvals in Cook County which are exempt from the siting statute. Forty-four of the approvals were for expansions and modifications to existing sites. Moreover, many of the approvals represent applications for transfer stations which do not add capacity and which are not as threatening to communities. The recent net decline in disposal capacity is most telling of the Illinois experience in siting facilities.

The prospect for adding capacity for disposal of hazardous waste is even more dismal. Although Illinois recently certified to the Federal Environmental Protection Agency, pursuant to the CERCLA man-

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29. MEHNERT, EDWARD, ET AL., ILLINOIS DEPT. OF ENERGY AND NATURAL RESOURCES, STATEWIDE INVENTORY OF LAND-BASED DISPOSAL SITES FY '88 UPDATE 23-31 (1990) (providing update for computerized tracking of waste facilities sponsored by the Hazardous Waste Research and Information Center with information gathered from IEPA and Northeastern Planning Commission) (figs. 2-10 provide scatter maps indicating waste disposal sites by category).
31. See IEPA SITING REPORT, supra note 15, at i.
32. Id. at 9.
33. Id. (indicating that local governments have a better record of approval for modifications and expansions of landfills as opposed to new facilities). Since 1981, only five (5) new landfills have become operational. Id. at 19.
34. ILL. REV. STAT. ch. 111 1/2, para. 1039.2(h) (1991). "Nothing in this Section shall apply to any existing or new regional pollution control facility located within an unincorporated area of any county having a population over 3,000,000 or within the corporate limits of cities or municipalities with a population of over 1,000,000." Of the total local approvals, sixteen were approved by Cook County which does not have the same notice and public hearing requirements. IEPA SITING REPORT, supra note 15, at 11-12.
35. IEPA SITING REPORT, supra note 15, at 26, 34.
36. Id. at 41.
37. This author maintains that public opposition to facility siting is gathering strength and represents a continuing threat to disposal capacity. The IEPA siting report indicates a net reduction in disposal capacity of fifty-nine (59) million cubic yards over a two year period from 1988 through 1990. IEPA SITING REPORT, supra note 15, at i.
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that it could assure capacity for the next twenty years, the empirical support for such an assertion is less than convincing. State officials themselves doubt the validity of the certification of capacity assurance for hazardous wastes. The plans have been called a "paperwork exercise" which are "particularly inaccurate and unreliable for states that are large importers" and "do not reflect actual hazardous waste management movement or capacity."

The evidence is clear that there is a current need for additional waste sites and that Illinois has not adequately responded to that need. The state's ability to assure adequate capacity is critical to this author's preemption argument in part II because capacity assurance is a focal point of federal environmental legislation. Furthermore, capacity assurances could become more important in the future if Congress authorizes the states to restrict imports, requiring Illinois to become more self-sufficient. Thus, environmental and land-use practitioners should not overlook the argument that the need for additional disposal capacity provides the impetus for asserting that the siting scheme is not conducive to providing capacity assurances or that the scheme

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39. Illinois has filed its capacity assurance plan with the EPA. The plan was submitted to the EPA on October 17, 1989. The EPA directed states to indicate sufficient capacity by showing the intent to site new facilities and implementation of waste minimization programs. Illinois assured capacity. DIVISION OF LAND POLLUTION CONTROL, ILLINOIS ENVTL. PROTECTION AGENCY, CAPACITY ASSURANCE PLAN 52-97 (October 17, 1989) [hereinafter ILL. CAP] (projecting adequate capacity for disposal of hazardous waste through the year 2009, except in the category of energy recovery). The report highlights Illinois waste minimization legislation and efforts but excludes discussion of present and future siting potential. This critical exclusion is made more significant by the IEPA's inclusion of facilities seeking permits but which have no guarantee of becoming operational. Id. at 55. The data provided in this plan conflicts with evidence from other IEPA reports about the potential for siting hazardous waste treatment, storage, and disposal facilities. IEPA SITING REPORT, supra note 15, at 9-50. Moreover, the study uses nothing more than pure speculation regarding the ability to assure capacity through alternative treatment technologies. The IEPA suggested that incinerators would meet the demand for wastes presently landfilled but subject to the landfill ban. ILL. CAP, supra at 62-63. However, the report fails to inform the federal EPA of the state's problems with siting incinerators. See, e.g., Laurie Goering, Notice of Robbins Incinerator Didn't Meet State Law, State Suit Says, CHI. TRIB., December 14, 1991, § 1, at 5.


41. See infra notes 212-13 and accompanying text.

42. See discussion infra parts II(B) and II(C).
inappropriately frustrates developers' plans for meeting the need.

B. THE ILLINOIS SITING SCHEME

In 1975, the Illinois Supreme Court issued a declaratory judgment that a local ordinance imposing conditions on a landfill, which had been authorized by the Illinois Environmental Protection Agency (IEPA), was preempted by a statewide, unified permitting program and, thus, invalid. The court ruled that a condition in the IEPA permit which required operators to comply with local land-use ordinances was an improper delegation of responsibility from the state agency to localities. In 1981, the General Assembly of Illinois responded to public outcry against the court's ruling by enacting Senate Bill 172. Amending the Illinois Environmental Protection Act, Senate Bill 172 granted counties and municipalities authority to approve sites for various waste management landfills and facilities. All waste permitting is governed by Title X of the Illinois Environmental Protection Act. Facilities designated as Regional Pollution Control Facilities (RPCF) must seek approval pursuant to the Act. Illinois courts have interpreted the statute to include local approvals for any horizontal or vertical expansions of pre-existing facilities.

44. Id.
49. Id. ch. 111 1/2, para. 1039(c) (1991). A Regional Pollution Control Facility is defined as:

[A]ny waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator that accepts waste from or that serves an area that exceeds or extends over the boundaries of any local purpose unit of government. . . . The following are not regional pollution control facilities: (1) sites or facilities located within the boundary of a local general purpose unit of government and intended to serve only that entity; (2) waste storage sites regulated under 40 CFR, Part 761.42; (3) sites or facilities used by any person conducting waste storage, waste treatment, waste disposal, waste transfer or waste incineration, or a combination thereof, for wastes generated by such person's own activities . . .

50. M.I.G. Investments, Inc. v. Illinois Envtl. Protection Agency, 523 N.E.2d 1 (Ill. 1988). Considering an above-ground vertical expansion of an existing landfill, the court held that the expansion affected the siting criteria stating: "it is clear that the legislature intended to invest local governments with the right to assess not merely
The law was designed to grant home-rule units of government authority to regulate waste facility siting concurrently with the state. The procedures contained within the Act are exclusive. The system for granting permits is bifurcated with authority divided between the Illinois Environmental Protection Agency and local county boards or the governing body of an unincorporated municipality. This bifurcated process grants localities a great deal of discretion with only limited direction. For waste generators who treat or process waste on site, the process may become trifurcated because they must also gain local zoning and other land use approvals. The procedures for seeking county board approval emphasize local, public participation. For example, an applicant initiates the approval process by written notification to all property owners within 250 feet of a boundary of a proposed site and to members of the General Assembly from the district. The applicant next files a copy of the proposal with the county board that is then made available for inspection. Furthermore,
the public is allowed to file written comment on the proposal any time prior to thirty days after the last public hearing. The statute further mandates at least one public hearing after general notice of the hearing has been published. The express purpose of the hearing is to "develop a record sufficient to form the basis of appeal of the decision . . . ."

The siting statute lists ten criteria to be considered by local boards in siting approvals. Overall, the criteria are not technically specific. Some of the criteria call for a "public preference decision" based upon subjective judgment of the county board. One author noted

59. Id.
60. Id.
61. Id. para. 1039.2(d).
62. Id. para. 1039.2(a).

The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each regional pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets the following criteria:

(i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
(ii) the facility is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected;
(iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;
(iv) the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed;
(v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;
(vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;
(vii) if the facility will be treating, storing, or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment, and evacuation procedures to be used in case of an accidental release;
(viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan, the facility is consistent with that plan; and
(ix) if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met.

Id. Although the statute numbers only nine, the addition of general language allowing county boards to consider the developer's previous record makes ten.

the absence of technical requirements and suggested that the Pollution Control Board (PCB) review of county decisions promotes lack of consideration by the county of critical data.64

Recently, however, Illinois appellate courts have interpreted the criteria as charging the county with technical considerations concerning public health and safety.65 In *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*,66 the court held that criterion (ii) mandates consideration of technical information.

We believe this provision clearly and unambiguously provides that the county board is empowered to consider all the public health, safety and welfare ramifications surrounding the design, location and operation of the proposed facility. Adopting Waste Management’s position would vitiate the fact-finding authority granted to the county board . . . because technical information of varying degrees must be addressed in order for the local authority to assess the effect the proposed facility will have on the public health, safety and welfare. . . . [W]e conclude that the county board does have the authority to consider any and all of the technical details associated with the landfill siting decision.67

While the *Waste Management* court made a forceful argument that technical information should be considered, neither the statute nor prior court decisions lend guidance as to the type and scope of information which should be gathered and reviewed. Moreover, the realities are that counties do not possess the technical support necessary to make such determinations and county board members lack technical expertise.68

While the statutory criteria do suggest that technical data should be considered, this author questions whether it is appropriate for county boards, comprised of laypersons, to consider such complex matters. County review of complex technical specifications subjects permit applicants to double review of such matters. The review is

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64. Gergits, *supra* note 54, at 122.
65. See, e.g., McLean County Disposal, Inc. v. County of McLean, 566 N.E.2d 26, 28 (Ill. App. Ct. 1991). Ironically, after pronouncing that the county should consider technical data, the court held that the county board was under no obligation to heed the recommendations of its technical advisor. *Id.* at 33.
68. See Gergits, *supra* note 54, at 123.
needlessly duplicative and is more appropriately delegated solely to the IEPA. Additionally, imposing a complete technical review in the first instance requires the permit applicant to invest large amounts of time, money, and resources in technical support of a proposal for siting long before there is any real possibility that such investments will be worthwhile. The level of review suggested by the Waste Management court is actually counterproductive to meaningful public participation. Rather than hearing from concerned citizens about the immediate local impact on the surrounding community, county boards will be immersed in technical data. Citizens may not be inclined to participate in county hearings if the review focuses on technical matters because most citizens are ill-equipped to comment on such matters in a meaningful way. Thus, Illinois courts have complicated the siting review at the local level and have further distorted the original goal of the Act to provide a unified, statewide system for waste disposal. Extending technical review to the local level is one problematical aspect of the role played by the Illinois courts.

C. THE ROLE OF ILLINOIS COURTS

Illinois courts have added substantive meaning to the siting criteria. All statutory criteria must be considered and met before approval will be deemed valid. If the applicant fails to meet one criterion, the reviewing authority need not consider other criteria which were met. The courts have considered at least five criteria on appeal either from approvals or denials of the county board.

The first criterion, need for the facility, has been frequently litigated. The applicant defines the area intended to be served by the facility. The applicant is not required to show "absolute necessity"

69. See Stotts, supra note 17.
71. See Waste Management of Ill., Inc. v. Pollution Control Bd., 543 N.E.2d 505, 507 (Ill. App. Ct. 1989). After the court affirmed the McHenry County Board's (MCB) denial of the Waste Management application on criterion (ii), Waste Management repetitioned the county for approval. MCB again denied the petition based upon failure of the applicant to fulfill criteria (ii) and (iii). During the hearing on the second petition, the record generated from the first petition was incorporated. In the present appeal, Waste Management asserted that criterion (iii) had been established according to the doctrine of collateral estoppel. The court held that Waste Management had waived its right to assert collateral estoppel by failing to assert it before the MCB and by offering additional testimony regarding the criterion at the hearing. Id. at 507-08.
for the facility.73 Rather, "the applicant must show his landfill is reasonably required by the waste needs of the area, taking into consideration its waste production and disposal capabilities."74 Neither must the applicant eliminate every other potential location in the area.75 Present and future capacity in the county as well as capacity of nearby facilities may be considered.76 Urgent need and convenience can be established by factors such as little life expectancy remaining, no prospect of future expansion at other facilities, and potential for increase in garbage generated.77 While the courts have added some specificity to the need requirement, there is no concrete guidance for the county. This leaves open the possibility for arbitrary decisions by local boards as to criterion (i), and the concurrent possibility that the denial may not be substantially related to an important local objective.

Likewise, judicial interpretation of criterion (ii), concerning the determination that a facility protects health, safety, and welfare, has led to arbitrary and irrational results.78 In intermediate reviews of local  

73. Id.  
75. Id.  
76. Waste Management of Ill., Inc. v. Pollution Control Bd., 530 N.E.2d 682, 691 (Ill. App. Ct. 1988) (affirming county finding that nine year capacity was sufficient for the present time. The Board's calculation included the opportunity to use existing facilities outside the county.). Allowing the county board to make capacity determinations makes little sense when one considers that the state is not even capable of accurately predicting capacity. The reader should also note that the board was relying upon exports to other areas in order to preserve its own capacity. Because McHenry County borders Wisconsin, it may have been utilizing out-of-state facilities. County boards should be leery of measuring remaining capacity based upon exports to bordering states because of the possibility that they may soon be disallowed.  
78. Consider, for example, the following statement made by a reviewing court about the PCB's affirmance of a local board denial for a site:  
The petitioners assert that the opinions expressed by the City's expert witness, Dr. Nolan Aughenbaugh, have no recognized scientific basis. Dr. Aughenbaugh stated that . . . the site is underlain by a continuous system of vertical fractures that extends all the way to the St. Peter sandstone protecting the St. Peter aquifier [sic]. . . . We note that this St. Peter sandstone overlays the entire State of Illinois. Therefore, according to Dr. Aughenbaugh's theory, there is no way to build a safe landfill in the State of Illinois. It is the PCB, however, that is the governing body properly designated with the duty to weigh credibility, or lack thereof, of such witnesses. . . . Since it is not our function to determine which witnesses are more expert than others, . . . we are of the opinion that the PCB's decision as to criterion (ii) will
siting decisions, the PCB originally interpreted this criterion narrowly as involving only factors affecting the site above ground level. 79 However, the courts, through decisions like Waste Management, have transformed the inquiry into one which involves technical subsurface factors. Citizen opposition groups now retain experts to testify as to technical matters such as leachate into groundwaters. 80 The courts typically defer to the county board’s findings on such issues involving public health without a substantial review of the technical data. 81 One attorney, who is heavily involved in siting litigation in Illinois, noted “[t]he court has even held that the localities’ own technical standards may be stricter than the IEPA’s or PCB’s requirements” and concluded “[t]his virtually limitless authority under criterion (ii) conveys effective veto power over local siting to county boards and municipalities.” 82

When considering criterion (iii), minimizing incompatibility with the surrounding area, courts are likely to be deferential to local appraisals of the impact a facility will have. Again, county boards are free to accept testimony either that the site is incompatible and that property values are likely to decrease or that there would be no depreciation. There simply are no hard and fast guidelines. 83 Generally, “[t]his criterion requires an applicant to demonstrate more than minimal efforts to reduce the landfill’s incompatibility. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility.” 84

There is less room for conflicting testimony regarding the 100 year floodplain requirement. Previously, the statute required the Illinois Department of Transportation to certify that the site was not within the floodplain. However, the required IDOT certification was deleted from the statute. No preferred method for certifying the

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81. Id. at 397.
83. Moore v. Illinois Pollution Control Bd., 561 N.E.2d 170, 179 (Ill. App. Ct. 1990) (affirming a rare siting approval noting that the applicant’s witness had testified that the impact to the surrounding community would be negligible and that property values were unlikely to decline).
floodplain was inserted. It remains unclear what evidence that the floodplain requirement has been met should be considered by the county board.

The sixth criterion, impact on traffic flow, has been debated by the appellate courts. It has been interpreted to require only that the applicant demonstrate that the facility design minimizes impact on traffic and danger to motorists. Testimony is given regarding line of sight to access drives, speed limit on abutting streets, width and condition of roads, and likely changes in traffic patterns.

Criterion (ix), compliance with county waste management plans, has not been specifically litigated in the appellate courts. However, the language allowing counties to impose their own waste management plans upon private developers is closely linked to the courts' interpretation of criterion (ii). Counties are authorized to impose technical requirements which are more stringent than those imposed by either the PCB or the IEPA. County plans often include recommendations that specific technologies be implemented by the waste facility developer in order to protect groundwater from contamination, that designs incorporate screening around the facility as desired by adjoining landowners, that the facility meet operating requirements beyond those established by IEPA and PCB regulations, and that traffic be routed and roads constructed and maintained at the expense of the developer.

These plans may incorporate by reference siting regulations of the IEPA. This requirement raises an important issue for practitioners: whether an independent determination of compliance with IEPA technical regulations constitutes an improper delegation of authority to the county board. Whether or not the courts will validate criterion (ix) in an as-applied challenge, it is clear that waste facility developers and operators face substantial negative consequences from duplicative review.

89. See, e.g., MCHERY COUNTY BOARD, GUIDELINES FOR A NEW SOLID WASTE DISPOSAL FACILITY IN MCHERY COUNTY, ILLINOIS 12-18 (Sept. 18, 1990) [hereinafter MCHERY GUIDELINES].
90. Id. at 12.
91. The criterion may also apply to presently existing facilities if counties adopt
Practitioners should also note that county plans may require significant exactions from the site developer. For example, a plan may require the developer to make value assurances to adjoining property owners or pay into a general fund for county purposes. Additionally, the county may condition the permit on assurances that the property will be used for specific purposes upon post-closure of the facility. Practitioners would be wise to review carefully county-specific waste management plans for the existence of these exactions and other requirements such as restrictions on transfer of ownership.

Thus, Illinois courts have taken an aggressive posture in promoting local participation in the siting of waste facilities. Incrementally, their decisions have charged county boards with ultimate decision-making authority and have defined the statutory criteria expansively. Moreover, the statutory scheme offers little chance that an adverse siting decision will be reversed on review for several reasons. First, the county board must "develop a record sufficient to form the basis of appeal," must reduce its decision to writing, must specify the reasons for its decisions based upon the statutory criteria, and must act within 180 days after the application is filed. Despite the mandatory language in the statute requiring the board to state reasons for granting or denying an application, the courts have held that boards need not give specific reasons. In fact, board members are not required to review the record generated by the hearing before rendering a decision. Obviously, when the county does not consider the record nor state its reasons for denial, the applicant is required to speculate about the real reasons in subsequent reviews.

local plans which authorize continual monitoring of operations and which apply retroactively.

92. As used herein, "exaction" means impact fees, financial or other conditions which are imposed upon prospective land developers for "public amenities" either related or unrelated to the effect a particular development may have on the community. For a discussion of exactions and incentive zoning, see Jerold S. Kayden, Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases, 39 J. Urb. Contemp. L. 3 (1991). See also discussion infra parts III(B)-(C) for analysis of the use of exactions in the waste site permitting process.


94. Id. at 19.

95. Id. at 17.

96. See infra notes 97-109 and accompanying text.


Second, review by the Pollution Control Board of adverse local decisions is granted as a matter of right subject to a thirty-five (35) day time limitation for filing petitions.\textsuperscript{100} After notice, the PCB conducts a hearing which "shall be based exclusively on the record before the county board."\textsuperscript{101} Although the petitioner is charged with the burden of proof, no additional testimony or evidence is allowed.\textsuperscript{102} The PCB must consider the record, the county's written reasons, and the "fundamental fairness of the procedures used by the county board."\textsuperscript{103} The PCB applies the against the manifest weight of the evidence standard of review. "[A] decision is contrary to the manifest weight of the evidence only if the opposite result is clearly evident, plain, or indisputable from a review of the evidence."\textsuperscript{104} Applicants who have been denied permits have suggested that the PCB should have greater discretion because of its "informed knowledge and technical expertise."\textsuperscript{105} Rejecting this contention, courts have emphasized that the legislature intended local governments to decide site suitability and that the fact-finding function should remain on the local level.\textsuperscript{106} This deferential standard of review prevents the PCB from reversing local denials even when, in its imminent technical wisdom, it might have found that the statutory criteria were met. Again, in a regulatory scheme which imposes strict technical guidelines on developers, it strains reason to suggest that decision-making should be vested in government officials lacking technical expertise.

Third, review of PCB decisions is granted as a matter of right to the appellate court in the district where the facility is located when the applicant files a petition within thirty-five (35) days of a final PCB order.\textsuperscript{107} The reviewing court is "limited to a determination of whether

\textsuperscript{100} ILL. REV. STAT. ch. 111 1/2, para. 1040.1(a) (1991).

\textsuperscript{101} Id.

\textsuperscript{102} Id. This provision has been labelled a "procedural anomaly" because it places a trial-like burden of proof on the petitioner but the limited review of the record mimics appellate procedure. The review procedure has been further muddled by a refusal by the PCB to hear oral arguments. MORAN, supra note 51, at 5-46.

\textsuperscript{103} ILL. REV. STAT. ch. 111 1/2, para. 1040.1(a) (1991).


\textsuperscript{106} See, e.g., id. The court noted that the PCB is not merely a "rubber stamp" for county boards. But the court only cited to three PCB reversals. Id. at 596-97.

\textsuperscript{107} ILL. REV. STAT. ch. 111 1/2, para. 1041(a) (1991).
the administrative agency's decision is contrary to the manifest weight of the evidence, and as such, a reviewing court should not reweigh the conflicting testimony.\textsuperscript{108} Holding that the providence of granting or denying a waste permit is primarily a matter of assessing credibility, the appellate courts have consistently refused to reweigh evidence or reassess credibility of expert witnesses.\textsuperscript{109}

The original goal of the Illinois siting statute — to promote public participation by vesting limited authority to approve sites in local boards — has been transformed into a system in which technically correct siting gives way to blind public opposition. The appellate courts in Illinois have promoted the transformation actively and with little regard for original legislative intent. While almost everyone would agree that the siting process should incorporate some method of public participation, the current scheme grants citizens too much power over the process. The manner in which the statute promotes public participation has been criticized because the public can influence board members, but they have no role in which to provide thoughtful input.\textsuperscript{110}

The Illinois Pollution Control Board reviews the influence of public opposition on county board members as part of the fundamental fairness finding required by the statutes.\textsuperscript{111} In \textit{City of Rockford v. Winnebago County Board},\textsuperscript{112} the PCB considered a local decision which was ripe with procedural infirmities. The PCB held that the process employed by the county board was unfair for three reasons: (1) bias of county board members, (2) substantial ex parte contacts with members of Save The Land, Inc., and (3) board members acted in their legislative rather than quasi-judicial roles by considering evidence outside the record.\textsuperscript{113} Although the opinion notes egregious

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108. Metropolitan Waste Systems, Inc. v. Pollution Control Bd., 558 N.E.2d 785, 787 (Ill. App. Ct. 1990); see File v. D & L Landfill, Inc., 579 N.E.2d 1228, 1232 (Ill. App. Ct. 1992) (noting that the court would not substitute its own judgment or reweigh evidence presented by experts even where evidence is conflicting); Moore v. Illinois Pollution Control Bd., 561 N.E.2d 170, 177 (Ill. App. Ct. 1990) (holding that reassessing the evidence or credibility of witnesses lies within the expertise of the hearing board); City of Rockford v. Illinois Pollution Control Bd., 465 N.E.2d 996, 998 (Ill. App. Ct. 1984) (refusing to recognize that purpose of statute was to create a statewide program ensuring "ecologically sound regional pollution control facilities").


110. See Gergits, \textit{supra} note 54, at 124.


112. 83 POLL. CONTROL BD. OP. 47 (Nov. 19, 1987).

113. \textit{Id.} at 75.
\end{flushright}
abuse of the process by the citizen group and board members, the PCB remanded for reconsideration by the county, excluding four board members who wore Save The Land buttons during the previous hearings.\footnote{114} Two dissenting voices questioned the propriety of the remand, noting that the entire statutory scheme had broken down and was endangering the state’s ability to provide waste disposal capacity.\footnote{115}

The force of public opposition is also apparent in appellate opinions reviewing siting denials.\footnote{116} In \textit{Waste Management of Illinois v. Pollution Control Board},\footnote{117} the court rejected the applicant’s argument on appeal that the board members had excess ex parte contacts with citizens, because the applicant was unable to prove that the contacts were anything more than expression of public sentiment about the site.\footnote{118} Although the court recognized that the strong public op-

\footnote{114. \textit{Id.} at 76-77.}
\footnote{115. \textit{Id.} at 87-97. Both dissenters thought that the Winnebago County hearing was so unfair that the procedural failures could not be cured by a remand to the county. \textit{Id.} The dissenters went on to comment on the overall breakdown of the statutory siting statute. J. Meyer explained that the city of Rockford has been seeking approval for the site since 1970 to no avail. \textit{Id.} at 95. He implies that the problem with the siting scheme is widespread and calls for the state to again vest the siting function in the IEPA. \textit{Id.} at 97. The following summary of his comments supports this author’s view that the state must seek a new process:

Illinois is facing a very serious waste disposal problem. A recent Agency report states that the average life of remaining landfill space in the state is 5.3 years. . . . It is now almost impossible for a unit of local government to approve the siting of a new regional pollution control facility, regardless of the practical consequences . . . .

There is no question in my mind that the county’s decision in this case was irrevocably tainted by ex parte contacts. . . . A remand does not cure the fact that the county board decision was a result of a fundamentally unfair process.

In sum, this case points out the failure of the legislature, this Board, the courts, and local government to effectively deal with the pressing problem of solid waste disposal. . . . The local site approval process . . . has relieved the pressure from the state and placed it on local government. The response of local government has simply been to refuse to allow almost any new regional pollution control facilities. We must remedy this situation before our solid waste disposal problem becomes a true nightmare.

\textit{Id.} at 97 (Meyer, J., dissenting).

\footnote{116. \textit{See City of Rockford v. County of Winnebago}, 542 N.E.2d 423, 431 (Ill. App. Ct. 1989) (holding that public opposition to a facility will not render a county board’s denial of approval void unless the applicant can prove that public opposition was the sole reason for the denial).


\footnote{118. \textit{Waste Management of Ill., Inc. v. Pollution Control Bd.}, 530 N.E.2d 682, 697 (Ill. App. Ct. 1988).}}
position could have some effect on the board members in their adjudicatory role, the contacts did not make the hearing "fundamentally unfair.""119 Rather than finding that public opposition had tainted the siting process, Illinois courts have consistently noted that the statute requires public participation and that the intensity of that participation will not form the basis for reversal of local decisionmakers.120

The objectivity of local, elected officials on this issue has been questioned.121 The courts have been unwilling to find that the bias has so affected a board member that reversal of the decision is necessary. In *A.R.F. Landfill, Inc. v. Pollution Control Board*,122 appellants presented newspaper quotes from county board members which exhibited extreme preadjudication prejudice against siting any landfill. One member was quoted as saying: "We need to start speaking out. We need to stand up and say, if eight saints stand on their heads, I still won't vote for a landfill."123 Nevertheless, the court did not find that the process was fundamentally unfair.124 Important to the court's ruling was that the appellant had waived this basis for appeal by failing to make timely objection to the asserted bias.125

The evidence that Senate Bill 172 has vested local authorities with too much power over siting of RPCFs is substantial. The Supreme Court of Illinois recently compounded the mistake made by the Illinois General Assembly. Prior to the enactment of the sweeping amendments to the Illinois Environmental Protection Act, the Illinois Supreme Court, in *County of Cook v. John Sexton Contractors Co.*,126 held that even if the IEPA issued an operating permit, local jurisdictions exercising home-rule authority could exclude facilities through zoning ordinances. However, the power was withheld from non-home-rule units of government.127 The central focus of the dispute was concern that granting non-home-rule units authority would undermine statewide, uniform siting standards. The issue was presented to the court

119. *Id.* at 698.
121. *See Gergits, supra* note 54, at 125.
124. *Id.* at 394.
125. *Id.* at 394.
numerous times before it was finally put to rest in *Village of Carpentersville v. Pollution Control Board.*

Rather than taking the necessary step of reducing local control over environmental matters, the Illinois Supreme Court’s interpretation of section 39(c) of the siting act has increased the potential for conflict between federal, state, and local policy. In fact, *Village of Carpentersville* allows local zoning ordinances to preempt uniform state laws. The facts in this case show how the conflict between regulations may deprive an owner of a valuable property interest. The appellant, Cargill, Inc. manufactured resins, a by-product of which was a hazardous waste water which emits a noxious odor. Pursuant to EPA recommendations, Cargill closed its facility to improve emission controls on its liquid waste incinerator. The Agency required Cargill to increase its stack height to 100 feet. However, the Village had an aesthetic height restriction of 35 feet and would not grant Cargill a variance. The court affirmed the zoning restriction despite its conflict with statewide standards for emission controls. The conflict between state and local standards left Cargill between a rock and a hard place, unable to operate its manufacturing process after making substantial investment in it. The decision has been criticized because “the court’s expansive view of local powers overlooks clear limitations on local authority that are still found throughout the Act and that have been acknowledged by at least one other court.”

Two arguments made by Cargill, and summarily dismissed by the court, are explored further by this author in Parts II and III. The *Village of Carpentersville* Court simply refused to consider Cargill’s


129. *Village of Carpentersville v. Pollution Control Bd.*, 553 N.E.2d 362, 367 (Ill. 1990). The court stressed that it was not reversing its prior stance on the issue, but that it was interpreting an amendment to 39(c) which indicated that the legislature no longer intended the Act to override local zoning. Thus, the General Assembly has determined that, under the Act, the zoning powers of local governmental units, both home and non-home-rule, should be broader than the minimum powers to share concurrent jurisdiction with the State that are provided for in section 6 of article VII.

130. *Id.* at 363.

131. *Id.*


133. *Id.* at 364-65.

argument that the result of the court's interpretation of 39(c) would be in conflict with federal environmental legislation which could jeopardize future state receipt of superfund reimbursements. The court also denied Cargill's claim that the statute, as interpreted, results in an unconstitutional taking of its property. The court stated that the statute did not effect a taking, rather the taking could only occur if the Village refused to grant a variance. Thus, the court recognized that a subsequent refusal by the Village of a variance could result in a taking of Cargill's property. Whether the federal preemption argument or the takings claim, if fully developed and argued in future site denials, will be successful in future litigation by commercial waste developers will be analyzed in Parts II and III of this comment.

Thus, Part I demonstrated how the Illinois legislature and Illinois courts have placed waste generators and site developers between a rock and a hard place. The following parts of this comment analyze whether those commercial entities can squeeze out of that position by asserting constitutional constraints to the current siting scheme.

II. FEDERAL PREEMPTION OF STATE AND LOCAL SITING RESTRICTIONS

The current power of local governments in Illinois to frustrate siting may be constrained in the future by federal preemption of that power. Because regulation of the environment by various levels of government has created inherent "political frictions" and frustrated national policy objectives, practitioners facing adverse siting decisions should consider the preemption doctrine as a ground for appeal.

135. 553 N.E.2d at 368. The court noted that "it is extremely unlikely that the scenario envisioned by Cargill will occur." Id. It further stated that even if the argument were true, the problem could only be addressed at the legislative level. Id. See discussion infra Part II for this author's argument that the court could have addressed the problem by employing federal preemption analysis.

136. Village of Carpentersville v. Pollution Control Bd., 553 N.E.2d 362, 367 (Ill. 1990). The reader should note that the court was apprised of the fact that Cargill had already been refused a variance by the Village. Id. at 363.

137. Robert E. Manley, Federalism and Management of the Environment, 19 URB. LAW. 661, 666 (1987) (recognizing political frictions between various levels of government in environmental policy-making and calling for standards at the macro (federal) level and more cooperation from components of the micro level (states, localities, and administrative agencies)).

Preemption issues may arise in siting litigation because federal, state, and local governments each have their own peculiar regulatory concerns. When the local governments assume regulatory powers characteristic of federal concerns, the potential for conflict between regulations is great and often leaves developers guessing about which regulation or policy to follow. The potential for conflict is greatest when a permit is sought because county boards and zoning authorities have an interest distinct from federal and state technical considerations.

This part of the comment examines the conflict between the national agenda to assure adequate disposal capacity and local veto power over siting decisions. The analysis includes an overview of general federal preemption placing emphasis on decisions interpreting the preemptive effect of federal environmental statutes and regulations. Next, the goals of two federal statutes, RCRA and CERCLA, are compared with the Illinois siting scheme for potential conflict. Finally, this part looks forward to the dual possibilities that Congress may authorize states and/or localities to impose burdens upon the import of wastes and may pass legislation which explicitly preempts local control of siting. Such possibilities strengthen the argument that siting statutes featuring local veto power conflict with federal goals of safe and adequate waste disposal.

A. THE PREEMPTION DOCTRINE APPLIED TO ENVIRONMENTAL STATUTES GENERALLY

Congress strikes the necessary balance between federal and state powers; the role of the courts is to decide what balance Congress intended. Thus, if Congress acts pursuant to an enumerated power, any state or local legislation which conflicts with that act may fall victim to the preemption doctrine. If Congress legislates on environmental matters, it regulates pursuant to its Commerce Clause power under the Constitution. The Commerce Clause, in combination with

139. See, e.g., supra notes 128-34 and accompanying text.
140. National Solid Wastes Management Ass'n, v. Alabama Dep't of Env't, 910 F.2d 713, 715 (11th Cir. 1990) (discussing the court's role in determining whether Alabama's newly enacted "land disposal restrictions" (LDRs) were preempted by a 1984 RCRA amendment allowing the EPA Administrator authority to grant a variance to the land disposal ban deadline), cert. denied, 111 S. Ct. 2800 (1991).
142. U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have the power ... [t]o regulate Commerce ... among the several States ... ").
143. See Ruhl, supra note 14, at 301.
the Supremacy Clause, permits Congress to preempt state and local environmental regulation. This preemptive power is limited only by
the powers reserved to the states by the Tenth Amendment. 144 "Although it is often difficult to draw the line where federal authority
ends and state police powers begin, the interstate effects of pollution
and development necessarily fall within the federal domain." 145

Thus, the Supremacy Clause mandates that federal environmental
law will prevail over state and local law whenever there is a conflict. 146
Preemption issues may arise in a number of different ways. Federal
laws preempt conflicting state laws whenever Congress states its intent
to preempt state law. Congressional intent to preempt may be stated
in express terms in a given statute. 147 Because Congress rarely expresses
its intent to preempt in explicit terms, the Supreme Court has developed
several preemption "touchstones" to determine Congressional intent. 148

The Court employs several tests to infer Congressional intent.
Intent to preempt is found where Congress (1) pervasively legislates,
(2) has occupied a given field, or (3) where it may be found that there
is no room left for state supplementation of federal law. 149 Congress
is not required to occupy the field and where a federal regulatory
scheme is not pervasive, states are free to regulate unoccupied areas. 150
However, an intention to preempt may be implicit even when Congress
has not regulated an entire field if state law conflicts with federal law.

A state law may conflict with federal statutes when it "stands as
an obstacle to the accomplishment and execution of the full purposes
and objectives of Congress." 151 But divergent purposes alone will not

144. U.S. CONST. amend. X ("The powers not delegated to the United States by
the Constitution, nor prohibited by it to the States, are reserved to the States
respectively, or to the people.").
145. Ruhl, supra note 14, at 304.
146. Jonathan R. Stone, Supremacy and Commerce Clause Issues Regarding
State Hazardous Waste Import Bans, 15 COLUM. J. ENVTL. L. 1, 5 (1990) (analyzing
environmental preemption and negative commerce clause cases and suggesting states
enter compacts for disposal of wastes to avoid "civil war").
147. See Exxon Corp. v. Hunt, 475 U.S. 355, 362 (1986); Jones v. Rath Packing
148. Russell Chapin, Harmonizing Federal Preemption Doctrine with Garcia's
Cession of State and Local Interests to the Political Process, 23 URB. L. 45, 46
149. See Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2484 (1991);
Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development
Comm'n, 461 U.S. 190, 203-04 (1983); Rice v. Santa Fe Elevator Corp., 331 U.S.
218, 230 (1947).
151. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); see also Michigan Canners &
form the basis for preemption. Rather, the test is whether both statutes can stand "without impairing the federal superintendence of the field . . . ."152 A variation on the impairment test is the impossibility of dual compliance with both federal and state law.153 The same tests apply to federal regulations whenever Congress delegates responsibility to administrative agencies to promulgate pervasive regulations in a particular field.154 The delegation to federal agencies may have a preemptive effect over conflicting state laws or regulations even when the agency has decided not to promulgate regulations in the field.155

No matter what preemption basis the Court uses in its analysis of Congressional intent, the Court will not lightly trespass on traditional state police powers and will find preemption only when Congress expresses a "clear and manifest purpose."156 Historically, environmental regulation has been deemed a residual police power.157

Due to the groundswell of public sentiment favoring strict environmental regulation during the last decade,158 Congress has entered the arena of environmental regulation in a comprehensive manner. Congress has passed many environmental statutes directed to the


153. Id. at 143. "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." Id. at 142-43 (citations omitted). When engaging the physical impossibility test, the Court examines whether the specific regulated area is one in which national supervision is critical or whether the subject is one which requires national uniformity. Id. at 143-44.


157. National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 676 (7th Cir. 1990) (citations omitted) (discussing federal regulation of environmental issues), aff'd, Gade v. National Solid Wastes Management Association, See generally Ruhl, supra note 14, at 303 ("[P]ower to regulate land use within its boundaries has great import for environmental law.").

158. U.S. citizens have adopted a "greener" attitude regarding their environment. A 1988 Gallup poll determined that the public considered the environment the foremost of all political issues and that a presidential campaign could rise or fall based upon the candidate's environmental posture. Bill Kemp, Environmental Issues Come of Age in the 1990's, ILL. ISSUES, Apr. 1990, at 13.
widespread concern for the environment. Likewise, state and local
governments regulate in the field. "The resulting patchwork of legis-
lation and regulation emerging from government at various levels and
reflecting different approaches to control has repeatedly generated
issues of federal preemption of state and local laws. . . ."159 Although
there are numerous and varied environmental statutes and regulations
at the federal level, Congress has not made its intent to occupy the
total field of environmental law explicit nor has any court found that
Congress has implicitly occupied the field.160 Therefore, waste man-
agement practitioners should analyze specific conflicts in the statutes
or regulations and resort to either the physical impossibility test or the
obstacle to national goals test. These bases for preemption in the
environmental field continue to be considered by the courts "statute-
by-statute."161

The two federal statutes under which the preemption argument
frequently arises are the Resource Conservation and Recovery Act
(RCRA)162 and the Comprehensive Environmental Response, Compen-
sation and Liability Act (CERCLA).163 Neither statute contains express,
unambiguous preemptory language. Congress has, therefore, plowed
a fertile field for preemption claims in the courts.164 Recent cases
discussing preemption in the environmental field generally are instruc-

159. Killian, 918 F.2d at 673 (citing International Paper Co. v. Ouellette, 479
160. Id. at 673.
161. Id.
162. 42 U.S.C. §§ 6901-6992 (1988). RCRA is the primary statute regulating the
treatment, storage, and disposal of hazardous wastes. It defines certain categories of
wastes as "hazardous" and sets standards for the generation and transportation of
listed wastes. It further determines permit requirements for TSD facilities. RCRA has
been labeled a "cradle to grave" statute because its intent is to regulate waste from
the initial generation to the final disposal site through a manifest system. DANIEL P.
SELM & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW §6.04(2), at 6-24 (1990)
(The authors devote chapter five of their treatise to various constitutional limits on
state environmental lawmaking.). As currently codified, RCRA embodies the Solid
Waste Disposal Act (SWDA) at subchapter IV, 42 U.S.C. §§ 6941-6949(a) (1988) and
therefore, also controls solid wastes at the federal level by requiring states to adopt
minimum standards.
163. 42 U.S.C. §§ 9601-9675 (1988). CERCLA is commonly known as the statute
which implements the Superfund program. It was designed to locate and remediate
the most dangerously contaminated sites in the country. The government is empowered
to order cleanup of the sites and seek reimbursement from potentially responsible
parties (PRPs).
164. See Stone, supra note 146, at 8-26 (offering a complete discussion of
preemption litigation under RCRA and CERCLA).
tive for practitioners who intend to challenge state and local regulation. A brief review of those cases follows, but practitioners should note that preemption arguments are necessarily fact specific. The challenge should be directed at statutory language and construction of specific portions of statutes or regulations. Specific statutory and regulatory bases for preemption, under RCRA and CERCLA, of the Illinois siting statute are outlined in the section following the review of environmental preemption cases.

A RCRA preemption argument first reached the Supreme Court in City of Philadelphia v. New Jersey. Several cities outside New Jersey, as well as private landfill operators within the state, challenged a New Jersey law which banned the importation of solid wastes. The Supreme Court upheld a prior ruling by the New Jersey Supreme Court that the statute was not preempted by related federal environmental statutes.

Since City of Philadelphia, lower courts have addressed many RCRA preemption arguments because the statute allows room for supplemental state laws and local ordinances. The statute envisions a cooperative federal/state partnership in the field of solid waste. States are permitted to develop their own regulatory scheme as long as it meets minimum federal standards and is generally consistent. Moreover, RCRA contains a statutory "savings" provision which reserves in states some regulatory authority over hazardous wastes. States

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167. City of Philadelphia v. New Jersey, 437 U.S. 617, 620 n.4 (1978). The Court relegated its preemption analysis to note 4 finding "no 'clear and manifest purpose of Congress' to pre-empt the entire field of interstate waste management, either by express statutory command or by implicit legislative design." Id. (citations omitted). However, the Court did strike the New Jersey ban under Commerce Clause analysis. See infra notes 227-30 and accompanying text.

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or in any regulation adopted
must also adopt minimum standards for regulating solid wastes and are prohibited from allowing open dumps.  

Pursuant to the RCRA savings provision, states have imposed more stringent regulations generally and have attempted to impose local bans on disposal specifically. The provision is ambiguous about the extent of state authority to undermine national objectives. This ambiguity has spurred litigation over the scope of the provision and debate about whether it ultimately allows state and local governments to restrict permitting and disposal.

Lower courts have reached different conclusions over the meaning of the savings clause and the authority of states to impose absolute restrictions on disposal. In Rollins Environmental Service, Inc. v. Parish of St. James, the Fifth Circuit invalidated a local ordinance which constructively prohibited the plaintiff from operating a transfer, storage, and disposal (TSD) facility for polychlorinated bi-phenols (PCBs). The court found that the ordinance improperly constituted a de facto ban on disposal of PCBs in frustration of Congressional objectives. Relying upon Rollins, the Southern District of California enjoined San Diego from enforcing a local ordinance which required a conditional use permit for the operation of a hazardous waste under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

Id.

171. Stone, supra note 146, at 22.
173. Stone, supra note 146, at 25 (providing a discussion of the legislative history of the savings clause and concluding that the clause was not intended to allow states to enact import bans).
174. Compare Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986) (holding that the section 3009 “savings clause,” allowing states to impose more stringent requirements, means only that state and local governments may adapt laws to meet local conditions but may not subvert federal objectives) with Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985) (holding that RCRA did not preempt an ordinance restricting waste from a coking plant because common-law nuisance theory was preserved).
175. 775 F.2d 627 (5th Cir. 1985).
176. Rollins Envtl. Servs., Inc. v. Parish of St. James, 775 F.2d 627, 635-36 (5th Cir. 1985).
incinerator in *Ogden Environmental Services v. City of San Diego*. The issue before the court was whether the city, in good faith, denied the conditional use permit based upon peculiar local conditions. The court held that a denial based upon generalized concern about health, safety, and welfare was preempted by federal policy favoring the development of such facilities.

The success of a federal preemption argument in the area of waste facility siting seems to depend upon whether a particular court will find that Congress intended RCRA to be a national agenda which overrides state and local concerns. In addition to *Rollins* and *Ogden*, one other court has noted that RCRA is a "national regulatory scheme, even though that scheme is not on its face preemptive (of State programs)." Other courts have held that the savings clause prevents preemption of state and local law.

The preemption doctrine remains central to litigation involving state and local waste import bans and other restrictive acts. For example, in *National Solid Wastes Management Association v. Alabama Department of Environmental Management*, the Eleventh Circuit Court of Appeals held that the 1984 amendment to RCRA, authorizing the EPA to establish effective dates for variances to the land disposal ban, pre-empted an Alabama statute, which became effective prior to federal EPA mandate and prohibited land disposal. The court reasoned that Congress intended that Congress intended the authority to vary the

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178. Ogden Envtl. Servs., Inc. v. City of San Diego, 692 F. Supp. 1222, 1225 (S.D. Cal. 1988). "[T]he city's response ... ignores the significant overlay of important federal legislation and national interests ... This court's role is not simply to review the City's action under the deferential substantial evidence standard which is traditionally invoked by state courts when reviewing local land use decisions." Id. at 1224.
179. Hazardous Waste Treatment Council v. South Carolina, 766 F. Supp. 431, 435 (D.S.C. 1991) (finding that the problem was national in scope and that new facilities were needed and required under RCRA's overall mandate).
effective date of the land ban to rest solely with the federal EPA. The pretreatment capacity determination was to be made on a “nationwide basis” to avoid civil war. Under the present state of the law, it is likely that state and local governments will try to avoid preemption claims by tailoring laws within the savings clause of RCRA. Because many courts have followed the Supreme Court’s lead in City of Philadelphia by invalidating state laws on Commerce Clause grounds, preemption issues are seldom reached.

The Supreme Court has recently shown a willingness to review cases involving federal preemption of state and local environmental regulation. In Wisconsin Public Intervenor v. Mortier, the Court held that local regulation of pesticides was not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) because Congress had not manifested its intent to supplant local regulation, because it had not occupied the field, and because the court found no actual conflict in the regulations. Mortier provides guidance regarding the Court’s current position on the preemption doctrine as applied to environmental regulation. The Court focused on the lack of explicit preemptory language, limited the statutory construction inquiry, and required an actual physical impossibility rather than a conflict in goals approach. The Court recently decided another environmental preemption case involving a conflict between state licensing of hazardous waste workers and OSHA.

B. CONFLICT BETWEEN THE NATIONAL GOALS OF SAFE AND ADEQUATE WASTE DISPOSAL AND LOCAL OPPOSITION TO SITING IN ILLINOIS

Although the Supreme Court has never construed federal environmental statutes to imply Congressional intent to occupy the entire field

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183. Id.
187. Id. (relying primarily on language establishing a regulatory partnership between the levels of government and holding that the federal goal of promoting technical expertise was insufficient to preempt the local pesticide ordinance).
188. Gade v. National Solid Wastes Management Ass’n, 112 S. Ct. 2374 (1992). A plurality of the Justices in part II of the opinion held that the Illinois licensing act for hazardous waste workers was “impliedly preempted” “[by OSH Act Section 18(b)] as in conflict with the full purposes and objectives of the . . . Act.” Id. at 2383. A majority of the Court agreed in part III of the opinion that the dual impact of the licensing statute — promote public safety as well as occupational safety — did not save the state statute from federal preemption. Id. at 2388.
of environmental regulation, it has not foreclosed arguments grounded upon other bases of the preemption doctrine. Specifically, the door remains open to the argument that the Illinois siting statute conflicts with the national goals of safe and adequate waste disposal because the effect of the statute is to grant local governments constructive veto power over the development of new facilities. National goals related to siting waste facilities are currently embodied in RCRA and CERCLA. This section examines the issue of whether the effect of public participation in local siting requires the state siting statute to yield to the federal objectives established by RCRA and CERCLA.

Congress stated the national policy and objectives underlying RCRA. It desired to create a federal/state partnership for carrying out hazardous waste management in an environmentally sound way. Congress also sought to provide for the promulgation of guidelines for solid waste management. Despite its call for cooperation among Federal, State, and local governments, Congress stated the national policy to be, in pertinent part: "Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and environment." This policy statement implies that Congress was aware that sites for disposal would continue to be necessary even if recovery technology became successful. Promotion of new waste management facilities is implicit in the national objectives.

Under subchapter three, pertaining to hazardous wastes, states may develop their own programs in lieu of federal programs, including permitting programs. Requirements for state-administered permitting have been promulgated by the EPA. Illinois has received final authorization for select portions of its hazardous waste regulatory program. The EPA divides authorization into three categories: fully incorporated, authorized but not incorporated, and not authorized. Some of the state regulations are incorporated by reference into the federal statute and are enforceable by the federal EPA. Portions of the Illinois's siting statute are selectively authorized but not incorporated by reference. Significantly, the sections of Title X of the

190. Id. § 6902(a)(7).
191. Id. § 6902(a)(8).
192. Id. § 6902(b).
196. Id. § 272.701(a)(2)(i)-(ii).
Illinois Environmental Protection Act which apply to permitting of RPCFs and require local approval are not authorized. Illinois's siting statute, discussed in Part I, is designated as broader than the federal program and is not authorized. This fact should be considered significant to the practitioner who appeals a siting denial on the basis of preemption because the exclusion of the siting statute from federal approval may imply that the statute contravenes national policy which encourages development of new, environmentally sound facilities.

Likewise, the goal of subchapter four of RCRA, pertaining to nonhazardous solid waste, is to provide a comprehensive federal program to assist states in implementing plans which promote sound disposal practices. Congress directed the EPA Administrator to promulgate guidelines to achieve that objective. The guidelines provide instruction to states for developing plans consistent with RCRA objectives. The guidelines require general state assurances of adequate disposal capacity. An approved state must submit an annual work program which includes plans to increase the number of facilities. To assure the EPA that no open dumping will be encouraged, states must demonstrate that they have adequate regulatory power and plans to meet disposal needs. Thus, a waste permit applicant who is unsuccessful in the Illinois permitting process may argue that the entire siting scheme is preempted by the national goal of adequate disposal facilities and the regulatory directives to states requiring development of new facilities.

However, it remains less than clear that a siting statute which emphasizes public participation is an obstacle to the implementation

197. The only subsections of the Illinois permitting statute which are approved are ILL. REV. STAT. ch. 111 1/2, paras. 1039 (a),(d),(g),(k). See 40 C.F.R. § 272.701(a)(2)(i) (1991). The portion of the statute construed in Village of Carpentersville, ch. 1039(c), is not specifically authorized.
199. 42 U.S.C. § 6941 (1988); see also id. § 6943(a)(6).
200. Id. § 6942(b).
201. The guidelines are codified at 40 C.F.R. §§ 256.01-256.65 (1991).
202. Id. § 256.01(b)(4),(6).
203. Id. § 256.05(d)(2).
204. Id. § 256.40-41(a).
In order to comply with section 4003(6), the State plan shall provide for adequate resource conservation, recovery, storage, treatment and disposal facilities and practices necessary to use or dispose of solid and hazardous waste in an environmentally sound manner.
Id. § 256.40. Meeting the adequacy requirement entails assessing statewide need for new facilities. Id. § 256.41.
of federal objectives. The possibility that a reviewing court would not find the siting act preempted is strong because RCRA also mandates some public participation; it, however, suggests only minimum guidelines.205 The method to encourage public participation under RCRA differs significantly from the Illinois scheme. For example, RCRA envisions a permit process which is initiated at the state level for a technical review of the permit application. Public participation is encouraged to a limited degree only after the applicant has met all technical requirements. Notice and an opportunity for a public hearing at the local level is provided after a State agency completes its review.206 A specific guide for public participation during permitting has been promulgated by the EPA and requires a public hearing “if the State determines there is a significant degree of public interest in the proposed permit.”207

The recommended method to encourage public participation differs vastly from Illinois's current method.208 Although the EPA has clearly stated that public participation serves important objectives,209 it is equally clear that neither Congress nor the EPA intended local participation to result in absolute veto of new facilities. In the final analysis, this preemption argument may fail because the guidelines for public participation are minimal requirements and may be subject to the RCRA savings provision. But if the permit applicant can demonstrate that the Illinois siting statute has the effect of granting local veto power and could deprive the state of necessary disposal capacity, then there may be a chance that a court will find the preemption argument persuasive.210 Considering the requirement for public participation equally with other sections of RCRA suggests that too much local power may stand as an obstacle to attainment of national objectives.211

206. Id.
208. See id. § 256.65(a) (calling for an “advisory group [with a] balanced viewpoint in accord with 40 CFR 25.7(c)”). The advisory group is suggested as an aid to local or state decisionmakers, in part, to “foster a constructive interchange among the various interests present . . . and enhance the prospect of community acceptance of agency action.” 40 C.F.R. § 25.7(b) (1991). The advisory group should be composed of equal membership from four sectors: private citizens, public interest groups, public officials, and citizens with economic interests in the project. Id. § 25.7(c).
211. See, e.g., 42 U.S.C. § 6926(f) (1988) (requiring that information distributed
State and local attempts to avoid additional siting of waste facilities may also run afield of CERCLA. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA), which established a deadline for state assurance of sufficient capacity for treatment and disposal of hazardous wastes generated over the next twenty years.213 Congress opened the door permitting states to fashion their own solutions either by increasing disposal capacity within the state or by entering interstate compacts for export of wastes to neighboring states.214 This method of delegating some authority to the states while preserving federal review authority under the threat of Superfund money withdrawal has fanned the interstate waste-ban fire.215

States, struggling to meet federal capacity assurance requirements to insure Superfund monies, have tried to maintain capacity by banning imports or discouraging imports by placing a moratorium on new facilities. In fact, some states, to keep imports out, have prevented development of commercial facilities entirely.216 This response is not defensible because the nation suffers from a capacity shortage.217 Under

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213. (9) Siting- Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which
(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated or destroyed,
(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
(C) are acceptable to the President, and
(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.
214. Id.
216. See Senate Hearings II, supra note 3.
217. See Senate Hearings I, supra note 3.
SARA's mandate for capacity assurances, Illinois waste companies may be able to overcome adverse local siting decisions by urging the preemption doctrine.

A state siting statute which effectively prevents siting is repugnant to a national policy objective of encouraging siting of new facilities. However, like RCRA's language, SARA's mandate may be construed as ambiguous and prevent courts from holding that it preempts local siting processes.\(^{218}\) Despite the ambiguity, the EPA has promulgated regulations concerning federal aid in the remediation of state Superfund sites based upon SARA assurances.\(^ {219}\) Moreover, the EPA published suggested criteria which indicate that if shortfalls in capacity appear in a state submission, then the state must be able to assure that state and local laws will not impede additional capacity development.\(^ {220}\) In addition to the ambiguity contained in the amendments to CERCLA, the uncertain method of measuring capacity provided by Congress may render the preemption analysis unpersuasive at this time.\(^ {221}\)

C. THE FUTURE OF PREEMPTION DOCTRINE AS APPLIED TO SITING DENIALS IN ILLINOIS

Although RCRA and the SARA mandates may not presently supply the necessary Congressional intent to preempt local siting denials, emerging trends in state protectionism and the possibility of a more explicit statement from Congress increase the likelihood that a preemption argument will successfully overcome a siting denial in the future. In response to shrinking disposal capacity and the federal

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\(^{218}\) See Stone, \textit{supra} note 146, at 26. Citing significant legislative history of SARA, this author concluded that SARA was intended to address the NIMBY problem. "[T]he process of site selection should find a way to transcend blanket local vetoes. No Community should be able to remove itself from consideration on political grounds alone." \textit{Id.}

\(^{219}\) See, \textit{e.g.}, 40 C.F.R. § 35.6105(b) (1991); 40 C.F.R. § 300.510(e) (1991).


\(^{221}\) Illinois received federal approval of its first capacity assurance plan on May 7, 1990. On February 15, 1992, Illinois submitted its revised plan for approval to the EPA. The EPA is currently considering the revised plan. The capacity assurance provision of SARA is not being administered as a real mandate at the present time due to the extreme differences in methodologies used by the various states in making their assurances. The EPA does not consider it prudent to withhold superfund money from states at the present time. However, the EPA continues to work with the states to improve data collection and analysis. Once the projections are found to be reliable, there is a possibility that the mandate will be enforceable. Telephone interview with Karen Lumino, Region V EPA, (Mar. 5, 1992).
capacity assurance mandate, many states and localities have attempted to preserve capacity by imposing burdens on imported wastes or banning imports altogether. As more states attempt to protect their waste disposal resources, the pressure to allow such protectionism mounts. If states are allowed to ban imports in the near future, Illinois may be forced to alter its siting process to favor increased siting of new facilities.

Again, Congress regulates the environment under the authority granted to it by the Commerce Clause. Even when Congress does not exercise its powers to regulate the environment in a specific area, states may be precluded from enacting laws which have the effect of impeding the free flow of interstate waste. When the Supreme Court applies a dormant Commerce Clause analysis, it will employ one of three methods, depending upon whether the law is protectionist, discriminatory, or evenhanded.

The Supreme Court, in *City of Philadelphia*, designed the framework for dormant Commerce Clause analysis to be applied to state laws banning the importation of wastes. First, where a law exhibits patent economic protectionism, "a virtual *per se* rule of invalidity has been erected." In determining whether the New Jersey import ban violated the dormant Commerce Clause, the Court implicitly acknowledged a legitimate local purpose, but went one step further by recognizing that "the evil of protectionism can reside in legislative means as well as legislative ends." Thus, even if a state has a legitimate purpose, where the means discriminate on the basis of the origin of the article of commerce, the law will be invalid. The Court took note of the effect that upholding such laws would have on the interstate management of wastes.

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228. *Id.* at 625.
229. *Id.* at 626.
230. Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New
In the ten years following the *City of Philadelphia* decision, the lower federal courts applied the dormant Commerce Clause analysis with varying results.\textsuperscript{231} However, analysis of the more recent cases illustrates that, in most instances, the lower courts rely on the benchmark decision in *City of Philadelphia*. States and localities attempt to circumvent *City of Philadelphia* with legislation that professes to advance local environmental goals. Most of the measures are clearly protectionist and are urged either to assure future capacity for their own citizens to the detriment of interstate commerce or to prevent the political suicide of siting new waste facilities. Seven states have recently attempted to enforce protectionist measures to no avail: Alabama,\textsuperscript{232}

Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.\textsuperscript{1992:7771}

Id. at 629. Ironically, Justice Stewart accurately predicted the future events. Pennsylvania is now one of the states leading the quest to move Congress to grant states authority to ban waste imports because New Jersey is overburdening its landfills. See *Senate Hearings II*, supra note 3, at 29 (Statement of New Jersey Governor James J. Florio).

231. Stone, supra note 146, at 18-22. Stone traces the cases from 1978 forward, and additional discussion of the lower federal court cases during that time frame is not necessary. This comment traces only the most recent commerce clause cases and argues that the *Philadelphia* approach remains the prominent analytical tool to invalidate state and local attempts to ban importation of wastes.

232. National Solid Wastes Management Ass’n v. Alabama Dep’t of Envtl. Management, 910 F.2d 713 (11th Cir. 1990), modified on other grounds, 924 F.2d 1001 (11th Cir. 1991) (invalidating “black list” of twenty-two states seeking to export waste to Emelle, Alabama’s hazardous waste disposal outlet on the same dormant commerce clause analysis employed in *City of Philadelphia*), cert. denied, 111 S. Ct. 2800 (1991). \textit{But see} Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367 (Ala. 1991) (holding that additional fee charged to out-of-state waste entities did not violate the Commerce Clause), \textit{rev’d}, 112 S. Ct. 2009 (1992). (Delivering the opinion for the Court, Justice White relied upon *City of Philadelphia* to strike the $72.00 additional fee imposed upon out of state waste as facially discriminatory.) Id. at 2013. Justice White was unconvinced that Alabama had proven unique or even legitimate local purpose and concluded:

To the extent Alabama’s concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point of origin of the waste, and it remains within the State’s power to monitor and regulate more closely the transportation and disposal of all hazardous waste within its borders. Even with the possible future financial and environmental risks to be borne by Alabama, such risks likewise do not vary with the waste’s state of origin in a way allowing foreign, but not local,
Indiana, Louisiana, Ohio, South Carolina, Georgia, and Washington. One industry representative summarized the result of state protectionism: "The ultimate waste ban is to have no disposal facility at all."

The many state and county attempts to restrict importation of waste and prevent siting continue to be met with resistance by the courts under the dormant Commerce Clause approach. Rather than offering a real solution to a problem increasingly national in scope, political subdivisions are treating immediate symptoms with no real plan to remedy the underlying disease. This ad-hoc approach is due, partly, to the unclear federal environmental directives and partly to political fear. Because pollution respects no boundaries, the search for waste to be burdened.

Id. at 2015-16.  
235. National Solid Waste Management Ass'n v. Voinovich, 763 F. Supp. 244 (S.D. Ohio 1991) (striking fees imposed upon imported wastes because the state's taxing power was threatening to interstate commerce).  
236. Hazardous Waste Treatment Council v. South Carolina, 766 F. Supp. 431 (D.S.C. 1991) (holding that there was no clear language in federal environmental statutes which would authorize South Carolina to regulate waste to the detriment of interstate commerce).  
237. Diamond Waste, Inc. v. Monroe County, 939 F.2d 941 (11th Cir. 1991) (invalidating a county ordinance designed to preserve landfill space because the legitimate local interest could have been promoted by means having less impact on interstate commerce).  
238. BFI Medical Waste Systems, Inc. v. Whatcom County, 756 F. Supp. 480 (W.D. Wash. 1991) (rejecting county attempt to exclude out-of-county medical wastes as discriminatory). But see Evergreen Waste Systems, Inc. v. Metropolitan Servs. Dist., 820 F.2d 1482 (9th Cir. 1987)(upholding county-imposed ban as regulating in-state and out-of-state wastes evenhandedly). State attempts to circumvent previous rulings by instructing counties to ban waste from out-of-county to avoid also waste moving in interstate commerce have now been halted by the Court's recent ruling on the issue. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Nat. Resources, 112 S. Ct. 2019 (holding that "a State . . . may not avoid the strictures of the Commerce Clause by curtailing movement of articles of commerce through subdivisions of the State, rather than through the State itself."). Id. at 2024.  
a real solution should include interstate, interregional, and national agendas.

In response to political pressure from the state level, Congress may amend RCRA and CERCLA to authorize state restrictions on waste imports. However, Congress is unlikely to surrender all control over the issue and may pass legislation strengthening the capacity assurance requirement. A grant of authority to the states tempered by a concurrent requirement for capacity assurances may become the new national waste management agenda. It is well-settled that Congress may authorize states to regulate an article of commerce.\textsuperscript{240} Under an express grant of authority, states may regulate even if the regulations would otherwise impermissibly burden interstate commerce.\textsuperscript{241} Congress has left windows in federal environmental legislation to allow states some discretion to regulate.\textsuperscript{242} To date, however, it has not expressly allowed states to manage wastes through import restrictions.

There are some indications that Congress may approve such measures soon. In support of the movement to allow states to regulate interstate transport of waste, Senator Coats (Indiana) urged, "[w]e are in a race between reform and crisis."\textsuperscript{243} In 1990, Coats attached a "surprise amendment" to an appropriations bill which was ultimately rejected in the conference committee.\textsuperscript{244} Many senators from states which have become "dumping grounds" have joined Senator Coats with their support for legislation to allow state import bans.\textsuperscript{245} In the 102d Congress, Senators introduced eight bills which allow states authority to impose import restrictions of various types.\textsuperscript{246} House

\textsuperscript{241} Id.
\textsuperscript{242} See supra notes 168-73 and accompanying text.
\textsuperscript{243} Solid Waste, 22 Env't Rep. (BNA) 485 (June 6, 1991) (urging approval of state authority to ban imports so that Indiana can extend the remaining life of its landfills which is estimated at seven years for waste generated solely within the state).
\textsuperscript{244} Id. at 486.
\textsuperscript{245} Sponsors and co-sponsors of legislation to grant state authority to impose import bans are listed by state, alphabetically, with party designation: AL-Shelby (D); AZ-DeConcini (R); IA-Grassley (R); KS-Dole (R), Kassebaum (R); KY-Ford (D), McConnell (R); LA-Breaux (D), Johnston (D); MS-Lott (R); MT-Baucus (D), Burns (R); NH-Smith (R); NM-Bingaman (D), Domenici (R); ND-Burdick (D); OK-Boren (D); RI-Chafee (R); SC-Hollings (D), Thurmond (R); SD-Daschelle (D); UT-Hatch (R); VA-Warner (R); WA-Gorton (R); WV-Rockefeller (D); WI-Kasten (R); WY-Simpson (R). Search of LEXIS, LEGIS Library, Bill Tracking Report file, Mead Data Central, Inc. (Nov. 6, 1991) (search for sponsors of all current bills on the topic).
\textsuperscript{246} See S. 153, 102d Cong., 1st Sess. (1991); S. 175, 102d Cong., 1st Sess.
members introduced thirteen similar bills.247

Senators have proposed bills which amend existing environmental statutes and can be divided into two general categories. The first category of bills grants state authority to either restrict imports outright or to impose fees with few limitations.248 In contrast, the second type grants the states more limited authority in connection with imported waste: the authority is often conditioned upon the states’ compliance with a long-term plan or upon a compact agreement with other states.249

The House bills follow this same general line, and few grant the states total authority.250

The likelihood that one of these bills will survive the legislative process and become law is slim.251 However, Senate Bill 976, containing comprehensive amendments to RCRA, remains alive in the legislative process.252 As currently written, the bill announces new Congressional


248. See S. 197, 102d Cong., 1st Sess. § 1 (1991) (allows states to impose fees in connection with treatment or disposal of solid waste); S. 1086, 102d Cong., 1st Sess. § 5 (1991) (authorizing states which are in compliance with capacity assurances to restrict hazardous waste imports and to impose fees on the basis of origin).

249. See, e.g., S. 976, 102d Cong., 1st Sess. (1991) (RCRA reauthorization bill granting states the power to restrict or prohibit imports upon a showing that the state is in compliance with an approved solid waste plan and that the exporting state is not in compliance); S. 175, 102d Cong., 1st Sess. (1991) (allowing states to enter regional compacts and to restrict wastes from states not parties to the compact agreement after a specified deadline).

250. See supra note 247 (statement based upon this author's review of House bills in the current Congress).

251. Most of the bills, cited supra notes 246-47, that were introduced in the 102d Congress have less than a ten percent (10%) chance of success on either floor. Most will die in committee. Search of WESTLAW, Federal, Billcast database, Information for Public Affairs, Inc. (Nov. 14, 1991) (These statements are based upon author's search in the Billcast database of all current bills on the topic. The odds are predicted based upon statistical research supplied by the Center for Public Choice, George Mason University, and are not those of the author.). But see S. 1086 and H.R. 607, Billcast (odds better than fifty percent that these two bills will meet with approval on the House and Senate Floors). Id.

findings which may lend support to preemption of local siting denials.

"[N]ew waste management facilities are not being sited and many
communities are managing waste in existing facilities without the best
available environmental controls, or are engaged in long-distance
transportation of wastes to other management and disposal facilities
in other States, or both."253

Furthermore, the bill amends subtitle D of the Solid Waste
Disposal Act to require a solid waste capacity assurance mandate as a
counterpart to the current hazardous waste requirement in CERCLA.
One national objective of the amendment is "to assist in developing
and encouraging permitted capacity pursuant to the permit require-
ments in section 4010, to meet the Nation's solid waste recycling,
treatment, storage, and disposal needs estimated pursuant to section
4003."254 Under the proposed act, states will be required to demonstrate
a plan which "implements the national policy."255 States must also
demonstrate that siting mechanisms will result in new municipal solid
waste management facilities. If local government is unable or unwilling
to site new facilities, the State must implement a binding mechanism
for overcoming local disputes.256 It is clear, therefore, that if enacted,
Congress will have stated more explicitly its intent to preempt state
and local laws which impede siting.

Finally, S. 976 proposes to amend RCRA to authorize importing
states to impose fees and other restrictions on imports from states not
in compliance with the new provisions.257 A state is allowed to impose
fees only if the fees are applicable throughout the state and if the state
does not discriminate against particular facilities.258 A state desiring to
further restrict imports must demonstrate full compliance with the new
mandates under section 4003 of the proposed act.259

On one hand, a Congressional grant of state authority to restrict
imports may be adverse to Illinois because it currently is a major
exporter of solid and hazardous wastes. On the other hand, if Illinois's
neighbors ban Illinois' wastes, Illinois may respond by promoting the
siting of new waste facilities. However, if the state is to encourage
new sites, then it will have to remove the public opposition impediment
currently embodied in the siting statute. Attorneys litigating for com-

253. Id. § 101(a)(10).
254. Id. § 401(b)(3).
255. Id. § 402(c)(a)(1).
256. Id. § 402(c)(7)(A)-(B).
258. Id. § 4013(a)(2).
259. Id. at § 4013(b)(1)-(4).
mercial waste developers should closely monitor activity in this Congress and the next to determine whether Congress has indeed granted the states explicit authority to impose particular restrictions. Attorneys should also be alert to new Congressional statements which may provide better bases for application of the preemption doctrine to local denials of waste permits. If Congress makes a clear statement that the national objective is to increase technically sound disposal facilities, then the Illinois siting statute, as currently interpreted and administered, will clearly be in conflict with that national goal.

III. A FIFTH AMENDMENT RESPONSE TO LOCAL SITING DENIALS IN ILLINOIS

Just as practitioners appealing siting denials must watch for developments in Congress which will strengthen their preemption argument, they should also monitor developments in the jurisprudence of regulatory takings. This is true because the Illinois siting statute is little more than a state guide for local land-use decisions. Because the statute provides for onerous local regulation of the siting process, the Fifth Amendment may become prominent in litigation stemming from waste permit denials. The very real connection between environmental law and local land use law has been noted by several commentators. Although the siting statute was passed as part of the state environmental regulatory scheme, practitioners should not overlook the argument that the statute regulates property. Nor should they ignore the real possibility that a permit denial pursuant to the statute may give rise to a claim against the government for just compensation.

This part of the comment makes the argument that recent Supreme Court decisions involving the Fifth Amendment may have shifted the analytical balance in favor of developers so that stringent regulations of the siting process may now be scrutinized more closely. In Part III(A), a brief review of the history of the regulatory takings doctrine sets the stage for analysis of the validity of the statute as an exercise of the state's police power. Whether the statute effects a taking depends upon recent changes in the approach taken by the Supreme Court in regulatory takings analysis. Part III(B) reviews the legitimacy of the

statute as a health, safety, and welfare measure. Part III(C) considers whether the adverse economic impact arising out of siting denials meets the Supreme Court tests for compensable takings.

A. HISTORY OF THE REGULATORY TAKINGS DOCTRINE

The Fifth Amendment provides in absolute terms "private property [shall not] be taken for public use, without just compensation."\(^{261}\) Implicit in this language is the fundamental tension between state need to protect public health, safety, and welfare and the secured position of individual property rights. Resolution of the inherent tension in the Fifth Amendment has been the subject of intense judicial inquiry. A comparison of two early takings cases reveals the central theoretical debate over the meaning of the clause.

In *Mugler v. Kansas*,\(^{262}\) the Court sustained a state statute prohibiting the manufacture or sale of liquor over the objections of the plaintiff that the law substantially diminished the value of his property. In broad, sweeping terms, Justice Harlan denied that the statute was an exercise of eminent domain because he recognized the state's power to regulate for the protection of the health and safety of its citizens.\(^{263}\) The legitimacy of the exercise of the police power in prohibiting the sale of liquor was analyzed according to the Court's substantive due process principles.\(^{264}\) The *Mugler* Court focused upon the legitimate purpose of the prohibition rather than on the denial of just compensation for violation of individual property rights. "Thus, a valid exercise of the police power could never amount to a taking of property, for it is the very exercise of the police power which defines individual property rights."\(^{265}\)

Thirty-five years later, in *Pennsylvania Coal Co. v. Mahon*,\(^{266}\) Justice Holmes interpreted the clause to require state compensation for regulations, even within a state's police power, which go "too far" and deny landowners all use of their property.\(^{267}\) While recognizing that a state may regulate for the public good, Holmes admonished: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by

\(^{261}\) U.S. CONST. amend. V.

\(^{262}\) 123 U.S. 623 (1887).


\(^{264}\) *Id.* at 669.


\(^{266}\) 260 U.S. 393 (1922).

\(^{267}\) *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
a shorter cut than the constitutional way of paying for the change. . . . [T]his is a question of degree — and therefore cannot be disposed of by general propositions.''\textsuperscript{268} The statute construed by Justice Holmes prohibited the mining of coal in ways which might cause subsidence. Finding the statute an unlawful exercise of the state's police power, Holmes set the stage for the debate over how far the power reaches before a compensable taking is effected.\textsuperscript{269}

Four years later, the Court was again called upon to decide how far states may go in regulating land use pursuant to its police power. In \textit{Village of Euclid v. Ambler Realty Co.},\textsuperscript{270} the Court validated a comprehensive zoning plan which had the effect of reducing the value of the plaintiff's land because it was located within a tract which the ordinance designated for residential development.\textsuperscript{271} Although the Court recognized that the value and marketability of the plaintiff's land would be diminished, it held that the zoning in question was a proper exercise of the police power because the landowner did not show the zoning ordinance to be "clearly arbitrary and unreasonable, bearing no substantial relation to the public health, safety, morals, or general welfare."\textsuperscript{272}

More recently, the Supreme Court has described the balancing approach established by early takings cases as one which is fact dependent: "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'"\textsuperscript{273} How rights should be balanced and which test should be used have been a central focus of scholarly debate. One analysis has suggested that balancing of rights may be the only rational method.\textsuperscript{274}

\textsuperscript{268.} \textit{Id.} at 416.
\textsuperscript{269.} \textit{Id.} at 413, 415.
\textsuperscript{270.} 272 U.S. 365 (1926).
\textsuperscript{272.} \textit{Id.} at 395.
\textsuperscript{273.} \textit{Andrus v. Allard}, 444 U.S. 51, 65 (1979) (making the point that each case under the clause involves an ad-hoc factual inquiry requiring more judgment than application of logic).
Others have suggested that the test should involve inquiry into whether the government is regulating uses which have external costs for society such as those typically labeled a nuisance.\(^\text{275}\) One scholar calls for a literal interpretation of the Fifth Amendment to protect individual property rights from all governmental regulation with the exception of very limited exercise of the police power.\(^\text{276}\) Yet another author maintains that the lack of a principled basis for deciding takings cases presents special problems in light of expectations of property owners.\(^\text{277}\)

The Court has resorted to an arguably more structured test for determining when a taking has been effected by government regulation. While the Court continues to engage in balancing, a new element is now factored into the analysis—the investment-backed expectation of the property owner.\(^\text{278}\) Drawing from Pennsylvania Coal, Justice Brennan equated the statute which made it impractical for the property owner to mine coal with frustration of an investment-backed expectation when he wrote the majority opinion in Penn Central Transportation Co. v. City of New York.\(^\text{279}\) In Penn Central, the plaintiff Michelman reviews recent cases and scholarly criticism of the Court's failure to develop a principled basis for deciding takings issues and concluded his analysis as follows: "I would not take their vulnerability as sufficient reason to repudiate a rule-of-law ideal, but rather as a sign that balancing — or better, the judicial practice of situated judgment or practical reason — is not law's antithesis but a part of law's essence." \(^\text{Id. at 1629.}\)

\(^{275}\) See Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971) (maintaining that if property owners engage in activities that involve costs for the public, the regulation is permissible. If no social costs are involved, the government should be required to compensate the property owner for regulation which deprives her of the best use.); see also Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles Part II— Takings as Intentional Deprivations of Property without Moral Justification, 78 Cal. L. Rev. 55 (1990) (seeking to explain previous takings decision and to provide the court with a basis for deciding future cases. Peterson's moral justification theory states that "a compensable taking occurs whenever the government intentionally forces A to give up her property, unless the government is seeking to prevent or punish wrongdoing by A."). \(^\text{Id. at 59.}\)

\(^{276}\) Richard A. Epstein, Takings, Private Property and The Power Of Eminent Domain (1985) (maintaining that modern interpretations of the police power are too broad and calling for "diligent judicial supervision in land use cases"). \(^\text{Id. at 263.}\)

\(^{277}\) Susan Rose-Ackerman, Against Ad Hocery: A Comment on Michelman, 88 Colum. L. Rev. 1697 (1988) (pointing out the problems associated with the Court's reliance on case-by-case determinations but not offering her own theory to solve the ad hoc problem).


alleged that a New York landmark preservation law had worked a taking of its property by restricting its ability to improve its property—Grand Central Terminal.280 Applying a three part test, Brennan held that the law did not frustrate any distinct investment-backed expectation of the plaintiff because the plaintiff maintained a reasonable use of the terminal.281

In Agins v. City of Tiburon,282 decided one year later, the Court considered a California law which had the effect of downzoning the plaintiff’s property and thereby limited its development potential. The Court assimilated prior holdings into a simple two-part test to be used to determine whether a taking has occurred. “The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”283 The Court determined that the law encouraging the development of open spaces was substantially related to the purpose of protecting the citizens of Tiburon from the ravages of urbanization. The Court did recognize that development would be limited but denied that the plaintiff was prevented from making “‘best use’ of the land or that a ‘fundamental attribute of ownership’ had been taken.284

The cases analyzed above involve substantive questions arising out of the application of the Fifth Amendment. Practitioners should not ignore the procedural requirements fashioned by the Court. In particular, before the Court will decide whether a claimant’s property has been taken, it reviews whether the claim is ripe.

As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.285

281. Id. at 124, 138. Factors to consider include the nature of the governmental act or regulation, the economic impact on the property owner, whether the regulation interferes with the owner’s investment-backed expectation, and the character of the regulation. Id. at 124-28.
284. Id. at 262.
The importance of insuring that a claim is ripe for a takings determination cannot be overstated. The Court considers this threshold matter important because the substantive factors cannot be analyzed until the government entity has rendered a final decision on how it will apply the regulations in question. Thus, the ripeness issue requires then both a final decision and exhaustion of state remedies, which may include seeking a variance or filing an inverse condemnation action. However, whenever such attempts would be futile, the Court will consider the substantive merits.

The historical Supreme Court cases demonstrate that several factors should be considered by courts when called upon to decide whether a taking has occurred. A court should look at whether the government is acting pursuant to its traditional police power and whether the means of effectuating that power are substantially related to the identified purpose. Additionally, courts should inquire whether the regulation being reviewed frustrates a distinct investment-backed expectation.

B. THE ILLEGITIMACY OF THE ILLINOIS SITING STATUTE

The Court's historical tests are important to the attorney who litigates waste permit denials. This is true because whenever a state imposes permit conditions, it is inevitably operating pursuant to its police power. When a state burdens property rights pursuant to its police power, the conflict between public concerns and private rights is resolved according to a "legitimacy" review of the statute. The legitimacy review has been further refined by recent Supreme Court cases which, arguably, favor the property owner or developer.

In 1987, the Supreme Court decided a trilogy of takings cases: *Keystone Bituminous Coal Association v. DeBenedictis*, *Nollan v. 452 U.S. 264 (1981)).

[T]he Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the state fails to provide an adequate postdeprivation remedy for the property loss."

*Id.* at 195 (citing *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

286. *Id.* at 191.

287. See *id.* at 197.


California Coastal Commission,290 and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California.291 Considered together, these cases have the potential to affect state and local laws regulating waste facility siting because those laws are now subject to a more stringent legitimacy review. However, because these decisions raised as many questions as they answered, additional review of lower court cases interpreting the trilogy is necessary to determine whether the Illinois siting statute effects a taking.

The first level of the legitimacy review asks whether a regulation was enacted to promote a legitimate state interest. In Keystone Bituminous Coal Association v. DeBenedictis,292 a five-to-four decision, the Supreme Court considered whether the revocation of a mining permit under Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act constituted a regulatory taking.293 In the majority opinion, Justice Stevens carefully distinguished Pennsylvania Coal by showing that the present Pennsylvania subsidence act was enacted for a "public purpose"294 rather than for private gain and that the regulation fell within the public nuisance loophole left by Justice Holmes in Pennsylvania Coal.295 Applying a deferential standard, Stevens decided the balance in favor of the public interest:

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.296

The majority characterization of the Pennsylvania Act as one which was designed to prevent a nuisance stirred a strong dissent by four of the justices. Writing for the dissent, Justice Rehnquist argued

294. Id. at 485.
295. Id. at 491.
296. Id. at 491-92 (citations omitted).
that the majority expanded application of the nuisance exception beyond the point allowed by prior precedent. Rehnquist noted that the nuisance exception to the just compensation clause was only applied in a narrow way in previous decisions. Additionally, he added that the exception had never been applied to "allow complete extinction of the value of a parcel of property." Resolution of the nuisance issue is central to any action maintained by commercial waste developers because the court will have a natural tendency to characterize their operations as a potential nuisance.

Keystone has been cited most often for its discussion of the weight to be given to state authority under the police power. Lower courts have consistently applied the first prong of the test, which requires that the regulation substantially advance a legitimate state interest, and held police powers to be very broad. However, courts do not always reach similar results when applying the test. A comparison of the analysis in two cases, both of which involve takings claims brought by poultry processors, highlights the difference in approaches taken by federal courts.

In Empire Kosher Poultry, Inc. v. Hallowell, the Third Circuit held that the first component of the Keystone decision was controlling when it held that a poultry quarantine did not constitute a taking of the plaintiff's property. The government's exercise of its police power to control the spread of disease carried by the poultry was legitimate. In contrast, the Federal Circuit found a USDA quarantine to be a taking of turkey farmer's property in Yancey v. United States. The most important point made by the Yancey court was that the Keystone opinion did not stand for the proposition that an exercise of the police

297. Id. at 512 (Rehnquist, C.J., dissenting).
298. Id. at 513 (Rehnquist, C.J., dissenting).
299. See infra notes 306-08 and accompanying text for a more expansive analysis of the nuisance exception applied to environmental permitting.
301. 816 F.2d 907 (3d Cir. 1987).
303. 915 F.2d 1534 (Fed. Cir. 1990). This court decided that the burden of a quarantine benefiting the public should be carried by the public. Yancey v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990).
power "conclusively forecloses all claims for just compensation."  

Although both Empire Kosher and Yancey dealt with facts which arguably established the existence of a nuisance, in Yancey, the Federal Circuit Court recognized that the existence of a nuisance does not end the inquiry of whether a taking has occurred.\(^3\,\text{superscript 105}\) The opposite conclusions may be explained by the Federal Circuit’s expertise in regulatory takings claims and the frequency with which those claims are reviewed. The Federal Circuit is more likely to engage in balancing private and public interests even where a possible nuisance is involved.\(^3\,\text{superscript 106}\)

Using the balancing of rights approach, the Federal Circuit and the United States Claims Court have held in favor of developers of wetlands in two significant cases: Florida Rock Industries, Inc. v. United States\(^3\,\text{superscript 107}\) and Loveladies Harbor, Inc. v. United States.\(^3\,\text{superscript 108}\) These

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\(^{3\,\text{superscript 104}}\) Id. at 1540.

\(^{3\,\text{superscript 105}}\) Id.

When adverse economic impact and unanticipated deprivation of an investment backed interest are suffered, as when the poultry quarantine forced the Yanceys to sell their turkey flock, compensation under the Fifth Amendment is appropriate. Even when pursuing the public good, as the USDA was doing when it imposed the poultry quarantine, the Government does not operate in a vacuum. . . . Why should the Yanceys be forced to bear their own losses when their turkeys were not diseased?

\(^{3\,\text{superscript 106}}\) See, e.g., Ciampitti v. United States, 18 Cl. Ct. 548, 557 n.14 (1989) (recognizing that defendants had a colorable claim for compensation although their activity could be described as an environmental hazard). \textit{But see} Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990) (finding that a regulation requiring plaintiff to decommission uranium mill and dispose of tailings was an appropriate police power act enacted to preserve public welfare); Allied-General Nuclear Servs. v. United States, 839 F.2d 1572 (Fed. Cir. 1988) (arguing that Keystone revitalized the nuisance exception and that a moratorium on plutonium production and recycling was a valid exercise of police power).

\(^{3\,\text{superscript 107}}\) 791 F.2d 893 (Fed. Cir. 1986). The federal circuit recognized the possibility that a taking had occurred and remanded to the lower court with the following instruction:

\[\text{[T]he court should consider, along with other relevant matters, the relationship of the owner’s basis or investment, and the fair market value before the alleged taking, to the fair market value after the alleged taking. In determining the severity of economic impact, the owner’s opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.} \]

\(^{3\,\text{superscript 108}}\) 15 Cl. Ct. 381 (1988). The court stated that "[u]nder the undisputed facts given, it is hard to imagine a takings claim more deserving of compensation. Plaintiff’s
cases are important to the present inquiry because each involved developmental permit denials and each arguably denied that the nuisance exception allows the government to exercise police powers for which compensation is never owed.\(^{309}\)

Given the divergent rulings by state and federal courts on the nuisance exception, it is clear that *Keystone* left many takings questions unanswered. Courts continue to grapple with the issue of whether an activity constitutes a nuisance and may be regulated or whether the harmful activity is only one factor in the equation. Because the *Keystone* Court warned against allowing the nuisance exception to swallow the rule, lower courts should accept arguments from practitioners litigating siting difficulties regarding the balancing of their clients’ property rights.\(^{310}\) While some may argue that *Keystone* has invited more stringent regulation of the environment, “[t]he simple invocation of an environmental stake is not sufficient to justify government action under the police power....”\(^{311}\) Moreover, the pervasive nature of federal and state environmental regulation renders activities within the scope of those regulations outside the nuisance exception.\(^{312}\)

In *Lucas v. South Carolina Coastal Council*,\(^{313}\) the Supreme Court has recently breathed new life into the role of nuisance analysis in takings cases. In the lower court, Lucas conceded that South Carolina could regulate his beachfront property pursuant to its police power, land has suffered a severe economic impact. The permit denial has reduced the property’s current value to, at most, only two percent of what it was previously.” Id. at 396. However, due to the procedural posture of the case, on cross-motions for summary judgment, the court remanded for a determination of the property value remaining after the permit denial. Id. at 399.

309. In a recent commentary, an attorney involved in *Florida Rock* analyzed whether these cases suggest a trend in the courts to afford private property owners more protection from stringent governmental regulation. The author notes that the Government intends to appeal the cases and that one or more may find its way to the Supreme Court for review. John A. DeVault III, *Regulatory Takings: Can the Government Be Liable?*, NAT. RESOURCES & ENV’T, Summer 1991, at 10, 54.


312. Yankee Atomic Elec. Co. v. Secretary of Commonwealth, 526 N.E.2d 1246, 1254 (Mass. 1988) (Lynch, J., dissenting) (arguing that petition to close Yankee nuclear plant constitutes a taking of all use of the property). Justice Lynch concluded: “Force of logic compels the conclusion that nuclear power, which is both permitted and extensively regulated by the government, cannot constitute a public nuisance.” Id. While there is a dearth of cases citing to the trilogy cases brought by waste developers, the state of the law certainly suggests that a permit denial or other adverse regulatory measure may give rise to a compensable taking.

but maintained that just compensation was due because he had been denied all use of his property.\(^{314}\) The Supreme Court of South Carolina held in favor of the Coastal Council when it declared that where a statute is designed to prevent a "serious public harm," the state owes no compensation even where all value in the property is destroyed.\(^{315}\)

Although Justice Scalia recognized the line of cases supporting regulation of harmful uses without the necessity of compensation, Scalia took issue with South Carolina's characterization of the Beachfront Management Act as preventing a nuisance. He noted the difficulty in distinguishing between an act which is designed to prevent a harm and one which confers a benefit to the public, stating the distinction "is often in the eye of the beholder."\(^{316}\) In placing total regulatory takings on the same plane as physical invasion of property, the Court gave crucial guidance to state courts who will undoubtedly face this issue repeatedly in the months to come:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do

\(^{314}\) Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991), rev'd, 112 S. Ct. 2886 (1992). Lucas purchased property on a barrier island off the coast of Charleston with the intent to build residences. At the time he purchased the property, Lucas was not required by South Carolina's coastal management legislation to seek a permit from the Coastal Council. Lucas, 112 S. Ct. at 2889. However, in 1988, the passage of the Beachfront Management Act changed the boundaries approved for development and affected the property owned by Lucas dramatically—no development whatsoever was permitted. Id.


\(^{316}\) Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2877 (1992). The Court explained that "'[h]armful or noxious use' analysis was . . . simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests' . . . ." Id. (citations omitted). The Court further explained its desire to move away from the "harm preventing/benefit conferring" distinction:

[I]t becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation— from regulatory deprivations that do not require compensation. A \textit{fortiori} the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power.

\textit{Id.} at 2899.
The opinion does, at long last, clarify the Court's position on the proper analysis of the first prong of the legitimacy inquiry — states' ability to exercise police power without incurring an obligation to compensate affected landowners. However, a new level of uncertainty has been injected as governmental entities and landowners must now ascertain how new land uses fit into the mold created by common-law principles of state nuisance law. No land-use laws will be more affected than those which purport to regulate the environment. The *Lucas* decision promises to renew the debate over how the nuisance exception is to be applied to environmental laws. The Court's reversal of the South Carolina Supreme Court should strengthen the chance that the Illinois siting statute will be deemed a regulatory taking for which compensation is due even though it purports to regulate a nuisance pursuant to state police powers.

The second level of the legitimacy review asks whether the regulation substantially advances the asserted legitimate state interest. The

317. *Id.* at 2900. The Court concludes its opinion by providing a list of factors to be included in state court application of nuisance law as applied to takings claims: (1) degree of harm to public and private property or resources, (2) the social value of the landowner's proposed activities, (3) the suitability of those activities to the location, (4) the ease or difficulty by which the landowner and the government can minimize the asserted harm of the proposed activities, (5) consideration of implied lack of any common-law prohibition as evidenced by similar uses by similarly situated landowners, and (6) failure by the State to prevent similarly situated landowners from engaging in similar activities. *Id.* at 2991.

Under this analysis, the Court considered it highly unlikely that South Carolina nuisance law would prohibit Lucas from improving his land as "common-law principles . . . rarely support prohibition of the "essential use" of land." *Id.* Nevertheless, the Court remanded the case to the South Carolina Supreme Court allowing an opportunity for it to apply common-law principles of nuisance to the facts. *Id.*

318. See David Kaplan & Bob Cohn, *Pay Me or Get Off My Land*, NEWSWEEK, Mar. 9, 1992, at 70. Discussing the nuisance exception, the article notes the potential affect that a ruling favoring the plaintiff would have on environmental laws. "[W]hat the justices do is paramount: a decision may effectively gut a generation of land regulation . . . A victory for Lucas would signal 'open season on environmental laws' . . ." *Id.* This prediction was perhaps accurate as the court did conspicuously include examples of takings cases which involved state attempts to preserve wetlands. *Lucas*, 112 S. Ct. at 2897. In the future, all environmental regulation may be suspect, or at a minimum, may be reviewed with a heightend level of scrutiny under state nuisance law.
leading case is *Nollan* v. *California Coastal Commission*.[319] The Nollans owned property adjoining a public beach. They desired to destroy the existing improvement and replace it with a three-bedroom home.[320] They applied for and were granted a permit from the California Coastal Commission “subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side.”[321] The Commission believed the easement was necessary to preserve public access to the beach.[322] Because the condition invaded the Nollans’ right to exclude others from their property, the Court had little trouble establishing a physical taking.[323]

Justice Scalia recognized that a condition which substantially advanced a legitimate purpose and which did not substantially interfere with property rights might pass constitutional muster. However, Justice Scalia heightened the scrutiny to be applied to the “nexus” of the legitimate state interest and the regulation which achieves the interest.[324] If a state land-use regulation lacks the essential nexus between means and ends, and if the conditions of the regulation do not serve the exact state interest, the regulation may not be constitutional. Thus, authorities responsible for the granting of use permits will, in the future, be required to insure that “a close fit exists between the regulation and the condition sought to be alleviated by it.”[325]

Strictly interpreted, *Nollan* is only instructive for cases involving a physical invasion of property, a scenario unlikely to occur in the context of a commercial siting of a waste facility. However, the decision may be more beneficial if it is considered for its value in supplying a heightened standard of review for takings cases. Most of

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320. *Id.* at 827-28.
321. *Id.* at 828.
322. *Id.* at 828-29.
323. *Id.* at 837.
324. *Id.*
325. *Id.* (citations omitted).

[The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an “out-and-out plan of extortion.”]

*Id.*
the debate among commentators has focused upon the standard of review because of its heightened potential to favor property owners over governmental entities.\textsuperscript{326}

Since the decision, most lower courts have declined to use the heightened scrutiny approach.\textsuperscript{327} In fact, many relegate discussion of the case to footnote status.\textsuperscript{328} However, if the lower courts do begin to take the decision seriously, the reach of the decision may be greater. For example, local ordinances requiring certain permit conditions for approval may have to exhibit the close fit between health and safety goals and the condition designed to promote those goals. It may serve to dispel the sometimes arbitrary conditions imposed by local governments during a permitting process.\textsuperscript{329} The decision may also have significance for waste facility developers who are often faced with demands from a municipality for exactions in return for permit approval.\textsuperscript{330}

Recognition of the Nollan standard of review in regulatory takings cases by the lower courts is critical to the present inquiry because this author maintains that the current Illinois siting scheme imposes conditions on permitting of waste facilities which may not meet the

\textsuperscript{326} Compare Michelman, \textit{supra} note 274, at 1601, 1608 (contending that there may be "less than meets the eye" in the recent decisions and stating that a narrow reading of Nollan is most appropriate because of its focus on the physical aspect of the taking) and Steven J. Lemon et al., Comment, \textit{The First Applications of the Nollan Nexus Test: Observations and Comments}, 13 \textit{Har. Envtl. L. Rev.} 585, 590 (1989) (explaining that the courts may continue to balance without actually applying a heightened scrutiny standard) \textit{with} MANDELKER I, \textit{supra} note 260, §1.16, at 15 (Supp. 1991) (urging that Nollan has delivered a new era. He notes that the change may be dramatic as the Court applies heightened scrutiny and could reverse the presumption of constitutionality of many land-use regulations) \textit{and} Peterson, \textit{supra} note 275, at 99-100 (stating that the Court has demonstrated a willingness to examine the true legislative purpose).

\textsuperscript{327} A recent student comment reviewed the prominent articles, which appeared in the 1988 issue of the Columbia Law Review, on the Nollan decision and recent takings decisions to illuminate the confusion created by the "nexus" approach applied in the decision. The authors conclude with two points about the decision's effect on environmental regulators. First, the heightened scrutiny approach may result in a "considerable decline in regulatory activities" to the detriment of the environment. Second, the resulting confusion in the lower courts over the meaning of Nollan may leave some planners uncertain about the scope of their authority to regulate. See Steven J. Lemon et al., \textit{supra} note 326, at 602.

\textsuperscript{328} See, e.g., Estate of Himelstein v. City of Fort Wayne, 898 F.2d 573, 576 n.3 (7th Cir. 1990).

\textsuperscript{329} E.g., Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 666 (4th Cir. 1989).

\textsuperscript{330} See generally Kayden, \textit{supra} note 92.
"substantial nexus" test. Scholarly debate engendered by the Nollan decision contemplated whether the scope of judicial review in takings cases would indeed become more intensive or applied in a heightened fashion. After nearly five years, it remains unclear whether lower federal and state courts view the decision as a revision of the previous rational basis standard. The courts are split on the issue.

While most of the federal circuits have cited the decision, the critical inquiry is whether the circuit actually recognized and applied the substantial nexus test. One circuit court concluded that "Nollan did not revolutionize takings law." A similar assumption was made in other federal cases. However, other federal courts have recognized that Nollan requires a more stringent analysis of the fit between the ends and means of any given regulation over private property.

331. See supra notes 89-95 and accompanying text.
332. See supra notes 326-27 and accompanying text.
333. Based upon author's comprehensive review of cases citing Nollan through March 1992. See also infra notes 334-39 and accompanying text.
335. See Samaad v. City of Dallas, 940 F.2d 925, 939 (5th Cir. 1991) (distinguishing Nollan on the basis of lack of physical invasion in the instant case and deciding on other grounds that the regulation governed a nuisance); Conti v. City of Fremont, 919 F.2d 1385, 1389 (9th Cir. 1990) (applying only a rational basis standard to age restrictions contained in conditional permit); Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2d 1290, 1294 (9th Cir. 1990) (distinguishing the instant permitting requirement as one which was a legitimate land use regulation); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988) (holding that prohibition of billboards is related to city's interest but failing to support either the legitimacy of the interest in aesthetics or to discuss the substantial relationship); Allied-General Nuclear Servs. v. United States, 839 F.2d 1572, 1577 (Fed. Cir. 1988) ("[T]he prevailing opinion in Nollan concedes that use for purposes within the object of the power reserved will be valid even if detrimental to the owner's full utilization of the property.").
336. See McDougal v. County of Imperial, 942 F.2d 668 (9th Cir. 1991) ("To hold that a legitimate public interest alone precludes a taking without regard to the degree of private deprivation turns the Court's balancing of interests into a bright-line test for which there is no precedent") id. at 677; Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990) (holding that Nollan requires more than a showing of rational relation between water moratorium and state concern over a water shortage — it requires that the state prove the existence of a water shortage to support invasion of property rights); Consolidated Gas Co. of Fla. v. City Gas Co., 912 F.2d 1262 (11th Cir. 1990); Pinewood Estates v. Barnegat Township, 898 F.2d 347, 351 (3d Cir. 1990) (holding that allowing tenants to remain in mobile homes without paying rent stripped landlords of valuable possessory property right); Richardson v. Honolulu, 759 F. Supp. 1477, 1496 (D. Haw. 1991) (extensive discussion of the Nollan approach and concluding that the particular rent control ordinance does not reduce costs while providing a reasonable return for landlords).
State courts have split along lines similar to the federal circuit courts. In some cases, state courts have fully recognized and applied a heightened standard of review. In other state cases, courts have recognized that *Nollan* may apply but have not found that heightened review results in a finding that plaintiffs' property has been taken by regulation. *Nollan* has been applied by one Illinois appellate court to invalidate a permit condition requiring the owner to agree that improvements made would not increase the value of the right of access to the property.

Arguably, the Supreme Court has now sent the message that it will apply a heightened standard of legitimacy review to regulatory takings cases. In *Yee v. City of Escondido, California*, the Court considered whether a state statute in combination with a local rent control ordinance constituted a per se taking of mobile park owners' property because the laws had the effect of transferring ownership rights to tenants. Although the Court decided the single issue, whether the rent control ordinance was a physical taking by the city, against the plaintiff, the majority opinion does suggest that the same facts may give rise to a regulatory taking. Noting that the ordinance

337. See Giffin Homes v. Superior Court, 280 Cal. Rptr. 792, 798 (Cal. Ct. App. 1991) (invalidating exaction required by building permit as bearing no relation to the benefit exacted); State v. Putman, 552 A.2d 1247, 1253 (Del. Super. Ct. 1988) (holding that police power does not include right to impose a servitude on private land for a public purpose); Electro-Tech, Inc. v. H.F. Campbell Co., 445 N.W.2d 61, 67 (Mich. 1989) (holding that *Nollan* was dispositive of the case because the condition imposed was not related to building permit).


339. Department of Transp. v. Amoco Oil Co., 528 N.E.2d 1018, 1024 (Ill. Ct. App. 1988) (extensively considering *Nollan* and holding that purpose was not served by conditioning access permit on agreement to depress property values).


341. Id. at 1527.

342. Id. at 1531.

343. Id. at 1529.

Petitioners are correct in citing the existence of this premium [increased value of tenants' mobile homes] as a difference between the alleged effect of the
was a regulation and not a per se taking, the Court analyzed whether the regulatory taking claim was in the correct procedural posture to be addressed by the Court.\textsuperscript{344} The Court stated that the regulatory taking claim was important, but the Court believed that its Rule 14.1(a) prevented consideration of that issue.\textsuperscript{345} The extensive discussion of regulatory takings analysis, an issue not technically before the Court, in the majority opinion suggests that the decision could be considered instructive for purposes of clarifying the Court's position on the standard of legitimacy review.\textsuperscript{346}

C. ADVERSE ECONOMIC IMPACT OF A SITING DENIAL

The final inquiry in the regulatory takings doctrine is the extent of the economic impact. Recall that the tests for determining whether a regulation effects a taking based upon economic impact appear in several different Court opinions.\textsuperscript{347} Relevant to the present discussion is the \textit{Keystone} Court's analysis of the method property owners must

\begin{quote}
Escondido ordinance and that of an ordinary apartment rent control statute. . . . By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. \textit{Id.} at 1530 (citing \textit{Nollan}).
\end{quote}

\textsuperscript{344} \textit{Id.} at 1532.

\textsuperscript{345} \textit{Id.} at 1523 (holding that the issues were related but that the regulatory taking claim was not "fairly included therein," within the physical occupation claim).

\textsuperscript{346} Seven justices joined all aspects of the majority opinion. Justices Blackmun and Souter concurred but wrote separately to criticize the majority's focus on the regulatory takings claim raised by the facts. They found the regulatory takings issue less important or not relevant. \textit{Id.} at 1534-35. Thus, this author maintains that \textit{Yee} can be useful to the practitioner who pursues a regulatory takings claim because at least seven justices have implied that they would apply a heightened legitimacy review to land-use regulations based upon the \textit{Nollan} decision.

As predicted, the Court has sent a clear message that \textit{Nollan} requires application of a heightened level of scrutiny to state land-use regulations in its recent \textit{Lucas} decision.

We emphasize that to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as \textit{sic utere tuo ut alienum non laedas}. . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.


\textsuperscript{347} See \textit{supra} notes 279-83 and accompanying text.
use to demonstrate that a regulation has so burdened a property interest that a taking has occurred. In *Keystone*, the plaintiff alleged that the Pennsylvania act deprived it of a distinct property interest recognized under state law — the support estate. The posture of the case as merely a facial challenge posed a real difficulty for the plaintiff because the facts had not been developed to show an economic impact or interference with investment-backed expectations. Moreover, the Court rejected the landowner's attempt to show that it had lost all value in its separate support estate, as a recognized property interest in Pennsylvania, by holding that the appropriate inquiry is based on the economic loss to the property as a whole unit.

The Court's consideration of units of property undermines what seemed like a favorable test for property owners in *Penn Central*. The petitioners contended that the relevant property unit was the entire support estate while the Court characterized the support estate as a small strand in the bundle of property rights. Thus, in future cases it will be incumbent upon property owners to show that all economically viable uses of their property have been denied. This burden will be difficult to meet.

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349. *Id.* at 496-501.

350. By emphasizing the property owner's investment in his property, the Court favors the property owner's rather than government interests. This tilt is especially important because the Court, since a landmark 1922 case, has seldom held a regulation of property to be a taking. Because this tilt in the expectations taking factor is favorable to property owners, it may increase the number of cases in which courts find a taking. For example, the mere purchase of land, with an expectation that it will be developed for a use disallowed by a land use regulation, could create an investment-backed expectation protected by the taking clause.

351. *Keystone*, 480 U.S. at 496-97. "When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property." *Id.* at 499.

352. After *Keystone*, commercial waste site developers will be required to provide evidence that the site chosen has no other economically viable uses. This standard may prove less difficult for those developers who are seeking a renewal of their operating permits because the prior use may render the land in question unsuitable for other uses. Thus, there is a stronger case for Illinois waste management companies
Under *Keystone*, waste developers and processors may find it difficult to overcome a court’s deference to the local government’s asserted purpose in protecting public health and the environment in order to assert that a taking has occurred by the denial of a development permit. However, the decision is instructive regarding the evidence necessary to prove economic impact on the property as a whole or frustration of investment-backed expectations.353

Not only must waste disposal developers overcome the nuisance exception when litigating takings claims from permit denials, they must also be prepared to demonstrate that the alleged taking has frustrated a distinct investment-backed expectation.354 This second prong of the *Keystone* test has been used extensively by lower courts to deny plaintiffs’ claims.355 If an owner retains any economically viable use of the property, the federal courts have been reluctant to find a Fifth Amendment taking.356 Similarly, this argument has prevailed in the state courts following *Keystone*.357 Illinois courts also apply the strin-

who seek expansions or modifications of their permit under this prong because there will probably be a government restriction on future use for the property or there will be no market.

353. See *supra* notes 127-35 and accompanying text for an example of how a distinct investment-backed expectation might be frustrated by environmental regulation.

354. See *supra* note 349.

355. See *infra* notes 356-58.

356. See Esposito v. South Carolina Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991) (finding that plaintiffs’ lack of change in existing use after enactment of beachfront protection measures was evidence that the statute had not gone too far in regulating their property); Gilbert v. City of Cambridge, 932 F.2d 51, 56-57 (1st Cir. 1991) (holding that landlord retained economically useful property under rent control ordinance because the ordinance facially assured landlords “entitlement to receive a ‘fair net operating income’”); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988) (remanded for determination of comparative unit of business affected by anti-billboard ordinance and noting that this factual inquiry is complex but necessary under current Supreme Court tests); Lake Nacimiento Ranch v. San Luis Obispo County, 830 F.2d 977, 981-82 (9th Cir. 1987) (noting that property owner has the burden of proof on the denial of economic viability for all permissible uses of property); see also Ciampitti v. United States, 22 Cl. Ct. 310, 318-21 (1991) (listing several factors considered to answer whether all use had been denied and holding the reasonableness of investment given advance knowledge of regulation is central to court’s inquiry). *But see* Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 170 (1990) (utilizing comparison of value before government action and value after the action, but not requiring plaintiff to prove the negative proposition of absence of any value in the property).

357. See Hornstein v. Barry, 560 A.2d 530, 537 (D.C. 1988) (holding that rent control laws did not deprive owner of all economically viable uses and establishing
Keystone's progeny are instructive for practitioners who must fight waste development permit denials in Illinois. The cases show that courts are reluctant to find a taking, even under facts favorable to developers. They illustrate the various factors courts use to determine both whether distinct investment-backed expectations of developers are reasonable and whether owners have been denied all use of their property. However, they also indicate that the law is evolving and that a developer may prevail on a takings claim if the factual foundation is strong. Moreover, practitioners should note that the Supreme Court has not reviewed the factors being used in the lower courts and has instead relied upon an *ad hoc* formula.\(^{359}\) Strong arguments continue to be made that the economic viability and investment-backed expectations tests are being misapplied by some lower courts.\(^{360}\)

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358. St. Lucas Ass'n v. City of Chicago, 571 N.E.2d 865, 875-76 (Ill. App. Ct. 1991) (holding that zoning change denial did not go "too far" because a long list of potential uses was available to landowner); Old Ben Coal v. Department of Mines, 562 N.E.2d 1202, 1209 (Ill. App. Ct. 1991) (reviewing facts similar to those in *Keystone* and holding that plaintiff had failed to demonstrate that subsidence regulation prevented all economic uses).

359. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986) ("we have eschewed the development of any set formula for identifying a "taking" forbidden by the 5th Amendment . . . .").

It remains to be seen how the Court will view the nuisance exception and the investment-backed expectation factor in future cases because change in the composition of the Court may again tilt the analysis in favor of property owners. The Yee Court cited Penn Central for the proposition that regulatory takings analysis "necessarily entails complex factual assessments of the purposes and economic effects of government action." The emphasis on Penn Central indicates that the Court will continue to balance governmental purpose of the regulation against the proportionate economic burden on property owners who are singled out by the regulation.

In the third case of the trilogy, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, the Supreme Court distinguished a long line of takings decisions to reach the question of whether a temporary regulatory taking was compensable. Without

Legislators and administrators undoubtedly often face the choice between purchasing a property right or regulating it away. In these days of deficits, it must be tempting to choose the costless regulatory route. Perhaps the Framers would have ensured more efficient government by permitting thievery of private property for public uses. However, they sacrificed the expedience of this approach in favor of a system that requires a proposed public use be one for which the public is willing to foot the bill. South Carolina now admits that its longstanding land use policies were ill-advised. Good government occasionally requires such admissions; history is a lesson, not a straightjacket. However, a governmental error is a collective error, and the burden of rectifying it should be borne by all, not just by those who unfortunately, but reasonably, relied on it.

Id. at 173-74.

The Supreme Court recently acknowledged the inconsistent results engendered by the Penn Central, Keystone and Mahon opinions. In Lucas, the Court did not find it necessary to apply the "'deprivation of all economically feasible use' rule" because the loss of the estate in property alleged by Lucas is clearly protected. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992). The Court noted that "'[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property ...." Id. Moreover, the Court presumably rejected the formula advanced in Penn Central as "unsupportable" so that landowners will not now have to bear the strenuous burden of proving loss of value in comparison to the entire worth of the property. Rather, it appears as though the proper consideration will be loss of a particular subestate in property as shaped by reasonable expectations of gain in that estate. Id.


362. Id. at 1529. Arguably, because the regulatory takings issue was not properly before the Court, much of what was written about regulatory takings could be considered dicta. However, Yee offers practitioners a preview of the Court's focus for the next regulatory takings case.


deciding whether a taking had occurred, the Court affirmed the hypothetical right of property owners to be compensated under the Fifth Amendment. The remedy limitations in Agins v. City of Tiburon were overruled in favor of monetary compensation for plaintiffs. That a compensatory remedy was also allowed for a temporary taking was made clear in the following statement by the Court: “[W]here the government’s activities have already worked a taking of all use of the property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”

Although property owners denied use of their property, even on a temporary basis, can now rest assured that a monetary remedy will follow, they cannot be certain whether a regulatory taking has in fact occurred. If local officials fear that environmental regulations may result in a mandatory payment of damages, two outcomes are possible. First, local lawmakers may weaken regulations to the point of detriment to public health. Waste facility developers may easily coerce local officials to disregard necessary regulations which impede the siting of a facility. Second, the decision may force local officials to carefully tailor their regulations to balance the public interest in preserving health and safety with the individual interest in owning private property free from burdensome government regulation.

365. The peculiar procedural posture of First English allowed the Supreme Court to review this case without a prior state determination that the church’s property had in fact been taken, which was precisely the issue that had prevented the Court from deciding the remedy question in previous decisions. Since the California Court of Appeals construed the church’s complaint as stating a claim in inverse condemnation for a regulatory taking, previously rejected by the California Supreme Court in Agins v. Tiburon, it prevented the church from proceeding with its federal claims under the fifth amendment property clause, thus providing the United States Supreme Court with the requisite finality.

Bozung & McRoberts, supra note 325, at 902 (footnotes omitted). The case was remanded for determination of whether a taking had, in fact, occurred. The California Court of Appeals held that no taking of the Church’s property had occurred. See First English Evang. Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989).


367. First English, 482 U.S. at 321.

368. In a thorough review of First English, Susan Looper-Friedman points out that lower courts will still have to grapple with what facts will engender a regulatory taking. She examines the history of the criteria necessary to prove a taking, criticizes the interpretation placed on the remedy, and concludes that the decision must have “created a property interest in the constitutional right to substantive due process.” See Looper-Friedman, supra note 265, at 34-39 (1990).
In the dissenting opinion of *First English*, Justice Stevens made the following prediction:

The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area. Were this result mandated by the Constitution, these serious implications would have to be ignored. But the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.369

The takings trilogy has engendered a "litigation explosion" in the federal and state courts. In four brief years, the trilogy decisions have been cited hundreds of times in the lower courts.370 The initial wave of decisions following the Court's pronouncements in the trilogy cases involved an effort on the part of litigants to have courts rehear their claims in light of those decisions. Most of those efforts were to no avail.371 When courts did consider the holdings in the trilogy cases, they often held that the cases had no effect on their takings analysis so that they felt free to continue to balance the parties' rights.372 Just as the Supreme Court often does not reach the merits of a takings case because of procedural prematurity, the Federal Circuit Courts of

370. Statement supported by this author's review of cases citing the Supreme Court's trilogy of takings cases.
372. See McDougal v. County of Imperial, 942 F.2d 668, 676 (9th Cir. 1991) ("We read the Supreme Court as requiring us to balance the strength of the public interest against the severity of the private deprivation."); Samaad v. City of Dallas, 940 F.2d 925, 938 (5th Cir. 1991) (exclaiming that the factor test does not exist and that the recent opinions have not "automatically invoked" the three-part test); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388 (1988) (balancing the owner of wetland property with government interest in protecting the wetland as a public benefit).
WASTE FACILITY SITING

Appeal often reject consideration of cases where the litigant has not received a final decision from the regulating authority or has not exhausted state procedures.\(^{373}\)

Of the three trilogy cases, *First English* has been cited most frequently by the lower courts. Perhaps this occurred both because *First English* represented an obvious departure from former regulatory takings jurisprudence and because the decision opened the door to a remedy for the numerous governmental delays experienced by property owners.\(^{374}\) Although it has been widely asserted by plaintiffs and discussed extensively by federal and state courts,\(^{375}\) the decision has

\(^{373}\) For cases holding that claims were not ripe for review, see Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1551-52 (11th Cir. 1991); Southern Pacific Transp. Co. v. City of Los Angeles, 922 F.2d 498, 506 (9th Cir. 1990); Erie v. Sarasota County, 908 F.2d 716, 726-27 (11th Cir. 1990); Estate of Himelstein v. Fort Wayne, 898 F.2d 573, 576 (7th Cir. 1990); Neighborhood Ass’n v. Planning & Zoning Comm’n, 888 F.2d 1573, 1575-76 (11th Cir. 1989); Tenoco Oil Company, Inc. v. Department of Consumer Affairs, 876 F.2d 1013, 1028 (1st Cir. 1989); Smith v. City of Brenham, 865 F.2d 662, 664 (5th Cir. 1989); Hammond v. Baldwin, 866 F.2d 172 (6th Cir. 1989); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463-64 (7th Cir. 1988); see also Meredith v. Talbot County, 828 F.2d 228 (4th Cir. 1987) (applying Burford abstention doctrine and failing to reach the merits of the underlying takings claim because the zoning regulation was comprehensive and peculiar to the state). *But cf.* Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 955 (9th Cir. 1991) (holding that claimants were not required to pursue additional state remedies for takings claim where those efforts would be futile given state position on the claim); Del Monte Dunes v. City of Monterey, 920 F.2d 1496, 1509 (10th Cir. 1990) (landowner’s challenge to city regulations designed to protect the “Smiths Blue Butterfly” met the ripeness requirements); Beacon Hill Farm Assoc. v. Loudoun County, 875 F.2d 1081, 1084-85 (4th Cir. 1989); Hoehne v. County of San Benito, 870 F.2d 529, 533-34 (9th Cir. 1989).

\(^{374}\) See supra notes 366-67 and accompanying text.

rarely formed the basis for a court to grant plaintiffs a monetary remedy.376

Practitioners who consider alleging a temporary taking due to a permit denial for a waste site should note two important issues which may stand in the way of a monetary recovery. First, similar to the test for denial of all economic viability in *Keystone, First English* requires that “all use” be denied during the alleged taking period.377 Illinois courts have been persuaded to deny recovery for temporary takings on this basis.378 Second, the court will not allow recovery for delays in permitting or licensing which are ordinary and reasonable.379

Thus, the arguments presented for consideration by practitioners under this part illustrate the promises and pitfalls of bringing a just compensation action against the government in the case of either a temporary taking or a permanent permit denial. The success or failure of a regulatory takings claim directed against the Illinois siting statute will depend both on the correct procedural posturing and on proper framing of the legitimacy review and denial of investment-backed expectations issues. While there is no guarantee that such a claim against the Illinois statute will be successful given the divergent interpretation of takings analysis, permit applicants denied at the local level should find that the heightened legitimacy review and compelling evidence of denial of investment-backed expectations380 strengthen their


379. Bello v. Walker, 840 F.2d 1124, 1131 (3d Cir. 1988) (recognizing that *First English* does not afford a remedy for normal delays in permitting or appealing decisions); accord Friel v. Triangle Oil Co., 543 A.2d 863, 867 (Md. Ct. App. 1988) (stating that nine-month moratorium may be a normal delay); Standard Indus., Inc. v. Department of Transp., 454 N.W.2d 417, 419 (Mich. Ct. App. 1990) (holding that delay experienced by plaintiff in developing property was not unreasonable).

380. For example, several counties charge waste site developers an application
case significantly. And while a takings claim may not result in the siting of a facility, a few just compensation awards to waste developers may lead the Illinois legislature and Illinois courts to rethink their position on the siting statute.

**CONCLUSION**

The Illinois legislature has gone too far in placing the burden of waste management, a burden that should be carried by all, on waste site developers and industrial generators. By transferring decision-making authority from the state to the local level, the legislature acted expeditiously in the political sense but created waste management problems which may plague the state in the future. As a matter of policy, Illinois should strive to promote the location of technologically sound, state-of-the-art waste facilities if it is to prevent a waste capacity shortfall. The siting statute as presently drafted, interpreted, and implemented precludes efficient siting because the NIMBY syndrome has found its way into every county-board hearing. While meaningful public participation in the siting process is a worthy goal, public opposition that is blind to technical realities has no place in a regulatory scheme that must promote safe and adequate disposal sites.

A state siting scheme that grants local governments near veto power over permit applicants conflicts, in an obvious way, with a national goal to increase capacity through new waste management facilities. As Congress begins to recognize that waste disposal capacity is a truly national problem, it is likely to enact legislation which will provide attorneys with a clear basis for a preemption argument. Practitioners would be well-advised to monitor developments in federal legislation or regulation concerning RCRA and CERCLA.

Because recent developments in the Supreme Court's takings analysis indicate a shift favoring landowners and developers, the attorney whose client is faced with an adverse siting decision should consider a Fifth Amendment challenge to the siting statute. Although the state will surely defend the statute as a proper exercise of its police power, close analysis of the statute suggests that it may not survive the legitimacy prong of the current takings analysis. As applied, the statute does not exhibit a close fit between the stated goals of insuring safe and adequate disposal and the means which emphasize public

fee of two-hundred and fifty thousand dollars ($250,000). IEPA SITING REPORT, supra note 15, at Appendix B. One could argue that expensive application fees may alone supply evidence of a distinct investment-backed expectation. See also Stotts, supra note 17.
participation to the exclusion of other factors. Moreover, reasonable investment-backed expectations of permit applicants are being frustrated by local denials and may provide an independent basis for an award of just compensation.

For over a decade, waste facility developers and generators who treat on-site have had their efforts to advance environmentally-sound disposal techniques curbed or foreclosed by the current regulatory scheme. Widespread public opposition has become a primary demonstrable criterion, if not the sole one, for county boards to consider. Because Illinois courts have been unreceptive to general claims that the process is unfair, environmental and land-use practitioners should consider the two constitutional arguments, offered in this comment, as responses to local, adverse siting decisions. Ironically, freeing waste management companies from their undesirable position, between the rock and the hard place, may be the only way for Illinois to escape its "legacy of contaminated sites" and to preserve the health and safety of its citizens.

TARA FETHERLING

381. A recent compilation of twenty case studies on contaminated sites is indicative of the state’s improper management of waste disposal. DIVISION OF LAND POLLUTION CONTROL, ILL. ENVTL. PROTECTION AGENCY, CLEANING ILLINOIS (1990). The report gives an inventory of current and projected contaminated sites as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Sites</th>
</tr>
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<tbody>
<tr>
<td>1984</td>
<td>544</td>
</tr>
<tr>
<td>1990</td>
<td>1348</td>
</tr>
<tr>
<td>2000</td>
<td>2200</td>
</tr>
</tbody>
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Id. at 41-42.