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Rights of New Mexico Municipalities regarding the Siting and Operation of Privately Owned Landfills

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RIGHTS OF NEW MEXICO MUNICIPALITIES REGARDING THE SITING AND OPERATION OF PRIVATELY OWNED LANDFILLS

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New Mexicans were shocked when an out-of-state developer announced a plan to open a 25,000 acre solid waste landfill outside Lordsburg, New Mexico in 1989. The spectre of private companies opening landfills in New Mexico because of serious landfill space shortages in other states led to a move for greater regulation of solid waste disposal and ultimately to passage of the New Mexico Solid Waste Act[1] in March, 1990.

This article addresses legal approaches for local government responses to private solid and hazardous waste disposal facilities with an emphasis on private solid waste landfills. In particular, the article provides an overview of the ability of New Mexico municipalities to prevent a private developer from opening a solid or hazardous waste landfill in a municipality, to influence the landfill's location, or to take legal action with respect to an existing private landfill which is being operated unlawfully.[2]

I. MUNICIPAL REGULATION OF LANDFILL SITING AND OPERATION

A. Siting Considerations

The first question a municipality facing a planned private landfill must address is how to influence the landfill's location. There are a number of available approaches, including the use of federal regulatory law, state regulatory law, and local zoning authority.

First, the federal Resource Conservation and Recovery Act of 1976 ("RCRA")[3] may be helpful in a municipality's challenge to a proposed landfill's unsafe location or poor design. The RCRA is a broad and extremely technical regulatory statute usually referred to as a "cradle to grave" regulatory structure for the treatment, transportation, storage and disposal of hazardous waste. An RCRA permit is required for the construction or operation of a facility which treats, stores or disposes of hazardous waste.[4] The RCRA contains provisions designed to encourage

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1. N.M. STAT. ANN. §§ 74-9-1 to -42 (Repl. Pamp. 1989).

2. This article addresses the rights of non-home rule municipalities, a group which usually does not include counties. However, the rights of each group are frequently similar, and sometimes identical. Even when the New Mexico statutes address the groups separately, the statutory provisions are often analogous.

3. 42 U.S.C. §§ 6901-92 (1988).

4. *Id.* § 6925 (Supp. 1991).

states to regulate solid waste, but it generally does not impose regulatory requirements on non-hazardous waste facilities.[5]

Under a special RCRA exception, a local government may file a lawsuit in federal court to challenge the siting of a solid or hazardous waste treatment, storage, or disposal facility, or to request the court to enjoin the issuance of an RCRA permit for a hazardous waste disposal facility.[6] The applicable standard is whether the proposed facility presents an imminent and substantial endangerment to health or the environment.[7] Because the RCRA is designed to regulate but not to prohibit hazardous waste facilities, it is unlikely that a reasonably designed and planned hazardous waste disposal facility will be considered to pose an imminent and substantial endangerment. However, the necessary level of endangerment could arise where the developer proposes to site the landfill in a uniquely inappropriate area, such as within close proximity to drinking water sources. Consequently, this lawsuit may be most effective in requiring the developer to improve the facility design and location.

Second, state law may be used when challenging facility locations. A municipality may participate in the course of the developer's attempt to obtain a state permit under the New Mexico Solid Waste Act or the Hazardous Waste Act.[8] These statutes permit any person "adversely affected" to appeal a permit decision,[9] such as an agency decision, to issue a permit for a disposal facility. The New Mexico courts have not ruled on the meaning of "adversely affected" in these two statutes.[10] One could reasonably argue that a municipality may appeal an agency decision to issue a permit for a landfill planned within or near the

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5. Regulations issued on October 9, 1991 by the United States Environmental Protection Agency ("EPA") now apply stringent RCRA regulations to all solid waste facilities (other than land application units, surface impoundments, injection wells and waste piles) which accept household hazardous waste. 56 Fed. Reg. 50,977 (1991) (to be codified at 40 C.F.R pt. 258). These regulations apply to publicly and privately owned facilities. 40 C.F.R. pt. 258.2. This article was drafted prior to the issuance of the regulations.

6. 42 U.S.C. § 6972(b)(2)(D) (Supp. 1991). This action is not available for solid waste facilities because such facilities are not required to obtain an RCRA permit. The distinction between hazardous and solid waste landfills should lessen when the states comply with § 4005(c) of RCRA, 42 U.S.C. § 6945(c) (Supp. 1991). This provision requires states to implement a permit program by November 8, 1987 for solid waste management facilities which may receive hazardous household waste (a large group of facilities).

7. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (Supp. 1991).

8. Solid Waste Act, N.M. STAT. ANN. §§ 74-9-1 to -42 (Repl. Pamp. 1990); Hazardous Waste Act, N.M. STAT. ANN. § 74-4-1 (Repl. Pamp. 1990).

9. Solid Waste Act, N.M. STAT. ANN. § 74-9-30(A) (Repl. Pamp. 1990); Hazardous Waste Act, N.M. STAT. ANN. § 74-4-4.2(G) (Repl. Pamp. 1990).

10. The term "adversely affected" is not used in earlier New Mexico environmental statutes, such as the Water Quality Act, which grants the right to appeal a permit decision only to the permit applicant. N.M. STAT. ANN. § 74-6-5(N) (Repl. Pamp. 1990). The Clean Water Act citizen suit, discussed later in this article, provides standing to sue to all citizens "adversely affected." Clean Water Act § 505(a), (g), 33 U.S.C. § 1365(a), (g) (1988). This term was intended to establish standing as broadly as constitutionally permitted. Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984). Thus, past usage of the term "adversely affected" in environmental statutes suggests that its use in the Solid Waste Act and the Hazardous Waste Act is intended to establish broad standing to appeal permit decisions. *Cf.* City of Coatesville v. Delaware Container Co., 29 Env't Rep. Cas. (BNA) 1745 (3d Cir. Apr. 24, 1989) (city permitted to bring RCRA citizen suit against hazardous waste facility located outside the city limits).

municipal boundary. Should the courts take a restrictive view on this issue, however, these two environmental statutes would lose much of their value to municipalities in this context.

Under the above two approaches, the municipality must maneuver within requirements established by federal or state statute or law. A municipality may want to take a position that is more strict than the state or federal governments or simply fill in the gaps in state and federal regulation. Within reasonable limits, municipalities in New Mexico actually possess a great deal of authority to regulate landfills.

Siting issues usually will be governed by zoning ordinances. Municipalities have broad zoning authority under state statute. In order to promote "health, safety, morals or the general welfare," a county or municipality may "regulate or restrict within its jurisdiction" a number of matters, including the "location and use of buildings, structures and land for trade, industry, residence or other purposes."[11] This authority has been broadly interpreted and includes, for example, the authority to zone for aesthetic interests[12] and historical preservation.[13] Zoning in connection with solid waste landfills, and the serious concerns for health and the environment which they pose, ought to be included within the scope of this grant of authority. In addition, municipalities are granted specific statutory authority over solid waste matters. For example, municipalities have the statutory authority to prohibit the deposit of refuse on either public or private property.[14]

Several types of traditional zoning ordinance regulation can be effective in addressing the location of landfills within a municipality. First, the use of buffer zones or setback requirements allows a municipality to ensure that no landfills are situated in proximity to residential areas or water sources. This type of zoning ordinance is generally upheld. An ordinance prohibiting operation of a hazardous waste landfill within 500 yards of existing dwellings has been found acceptable.[15] An ordinance limiting the acreage available in a town for use as a landfill to 300 acres and limiting the size of any landfill has also been upheld against constitutional challenge.[16] Another ordinance requiring that solid waste landfills be set back from cemeteries was struck down only because its adoption was procedurally improper, not because of any question of the municipality's substantive authority to adopt the ordinance.[17] Thus, a zoning ordinance may be highly effective in allowing a municipality with specific concerns a degree of control over a landfill's location.

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11. N.M. STAT. ANN. § 3-21-1(A) (Repl. Pamp. 1985).
12. Temple Baptist Church v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).
13. City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964).
14. N.M. STAT. ANN. § 3-48-2(C) (Repl. Pamp. 1984).
15. Sunny Farms, Ltd. v. North Codorus Township, 81 Pa. Commw. 371, 474 A.2d 56 (1984).
16. Al Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231 (S.D.N.Y. 1982), *aff'd without opinion*, 697 F.2d 287 (1982).
17. Longenecker v. Pine Grove Landfill, Inc., 117 Pa. Commw. 176, 543 A.2d 215 (1988).

Second, a municipality could establish landfills as a conditional or special use requiring a permit and condition approval of the permit on a series of specific factors. Such factors should be reasonably related to the statutory values which may be promoted by zoning ordinances: health, safety, morals or the general welfare. The municipality could require the developer to submit studies relating to the listed factors to provide a basis for municipal review of the conditional or special permit application. For example, the inadequacy of a submittal for a landfill proposed for a site too close to a water supply could provide legally adequate support for denial of the application. Similarly, an ordinance could zone certain areas as unsuitable for landfills under any circumstances and thereby restrict applications to the remaining areas.

Third, a municipality could give zoning approval to a landfill but attach site-specific conditions to the approval. Conditions could include those typically used in non-environmental contexts, such as size and height restrictions and limits on the use of neighboring roads.[18] Other conditions may be specific to the nature of landfills, such as the design requirement that the site be visually screened from nearby dwellings and pedestrians, or a requirement for maintaining liability insurance.[19] Such conditions are likely to be upheld if they are reasonable.

Difficulties may be faced when a municipality adopts a zoning ordinance which prohibits siting of a previously proposed landfill. When this occurs as a single zoning action affecting only the proposed facility, and is not adopted along with other zoning action of a comprehensive scope, it could be challenged as unlawful "spot zoning." On the basis of the rule against spot zoning, a court struck down a zoning ordinance which amended a zoning map. The amendment had drastically reduced the available area in which a "resource recovery" facility could be developed, impeding development of a planned trash to steam refuse disposal plant.[20]

B. Landfill Operation

Municipal authority to regulate through traditional regulatory ordinances is similar to the zoning authority. New Mexico municipalities may adopt ordinances and resolutions not inconsistent with state law for the promotion of safety, health, prosperity, morals, order and comfort and convenience.[21] This is the police power, and it is broadly construed.[22] Municipalities also are authorized to protect property and, within one mile of their boundary, may regulate and prohibit any offensive and

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18. *See Al Turi Landfill, Inc.*, 556 F. Supp. 231; K-S Center Company v. City of Kansas City, 238 Kan. 482, 712 P.2d 1186 (1986).

19. *See K-S Center Company*, 238 Kan. at 482, 712 P.2d at 1186; Southeastern Chester County Refuse Authority v. Board of Supervisors of London Grove Township, 118 Pa. Commw. 392, 545 A.2d 445 (1988).

20. Township of Plymouth v. County of Montgomery, 109 Pa. Commw. 200, 531 A.2d 49 (1987), *cert. denied*, 109 S. Ct. 1748 (1989).

21. N.M. STAT. ANN. § 3-17-1 (Repl. Pamp. 1985).

22. City of Hobbs v. Biswell, 81 N.M. 778, 473 P.2d 917 (Ct. App.), *cert. denied*, 81 N.M. 772, 473 P.2d 911 (1970).

unwholesome business or establishment.[23] Thus, there is ample authority for municipalities to impose regulatory requirements on landfills.

In other states, local regulation of landfill operation has been permitted when not preempted by state or federal statutes. Groundwater monitoring, for example, has been upheld in California as a proper exercise of the police power.[24] This is a significant type of regulation because monitoring results can notify the municipality of the occurrence of violations of state and federal law and provide the basis for a successful enforcement action. Regulations regarding hours of operation, noise and odor restrictions, control of blowing refuse, groundwater protection, the type of waste accepted, and the prevention of illegal dumping have been upheld as valid exercises of the police power.[25] Courts also have upheld operational regulations imposed through zoning ordinances, a practice termed "performance zoning." Performance zoning uses descriptive or numerical standards in place of the typical use-related standards of traditional zoning.[26]

An unusual approach to regulating landfills is for the municipality to adopt an ordinance which defines a nuisance and provides the municipality authority to sue for abatement of any nuisance.[27] This approach would enable the municipality to establish a definition of nuisance tailored to its specific concerns, such as dangers posed by landfills. Interestingly, a West Virginia municipality passed an ordinance, which survived legal challenge, defining all hazardous waste landfills as nuisances, and used this ordinance not to oversee the operation of landfills, but to actually ban hazardous waste landfills from the municipality.[28]

C. Limits on Local Zoning and Regulatory Authority

1. Preemption by the RCRA

RCRA regulatory requirements generally apply to hazardous, not solid, waste. Therefore, there currently is no RCRA preemption of local regulation of siting or operation of a landfill which handles only solid waste.[29] However, a landfill which accepts hazardous waste is subject to RCRA regulation, and any attempt by a municipality to regulate the

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23. N.M. STAT. ANN. §§ 3-18-1, -13 (Repl. Pamp. 1985).

24. Casmalia Resources, Ltd. v. County of Santa Barbara, 195 Cal. App. 3d 827, 240 Cal. Rptr. 903 (1987). *Cf.* IT Corp. v. Solano County Bd. of Supervisors, 230 Cal. App. 3d 911, 272 Cal Rptr. 574, *appeal pending*, 274 Cal. Rptr. 849 (1990).

25. K-S Center Co. v. City of Kansas City, 238 Kan. 244, 712 P.2d 1186 (1986).

26. 1 RATHKOPF, THE LAW OF ZONING AND PLANNING § 7A.05(2) (1990).

27. N.M. STAT. ANN. § 3-18-17 (Supp. 1988).

28. Sharon Steel Corp. v. Fairmont, 175 W. Va. 476, 334 S.E.2d 616 (1985), *appeal dismissed*, 474 U.S. 1098 (1985).

29. The status of RCRA preemption of local regulation of solid waste facilities should change as a result of the EPA's October 4, 1991 issuance of a final rule adding 40 C.F.R. 257 pt. 258, because the new rule imposes regulatory requirements on many solid waste facilities. RCRA preemption of local regulation of solid waste facilities should now become closer in scope to preemption of local regulation of hazardous waste facilities.

siting or operation of such facilities must address the problem of potential RCRA preemption.

Section 3009 of RCRA addresses the retention of state and political subdivision authority. This section provides in part that nothing in RCRA "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" RCRA regulations.[30] On its face, this language provides municipalities free rein to regulate the siting of hazardous waste facilities. Local regulation of site selection more stringent than that of the RCRA is explicitly authorized. Moreover, cases hold that local disposal and siting regulation of hazardous waste facilities is not preempted by the RCRA.[31]

The courts have begun to test the limits of this rule and how far municipalities can go under the rubric of imposing "more stringent" regulation. In *Ogden Environmental Services v. City of San Diego*, a federal court ruled that a locality could require an RCRA facility to obtain a conditional use permit under its zoning regulation. The court added that this authority may not be used to completely ban such facilities from the locality.[32] Such a ban would conflict with public policy under the RCRA and therefore would be "sham and subterfuge," not "more stringent" regulation.[33] The court held that short of such an outright ban, a municipality may consider health and environment issues in the regulation of hazardous waste facilities. Consequently, short of a total ban, municipal regulation of the siting of hazardous waste facilities should not be interfered with by the RCRA.

2. Preemption by the Hazardous Waste Act

The New Mexico Hazardous Waste Act does not explicitly address preemption of local regulation of hazardous waste related activity. In some states, courts analyzing whether a state environmental statute preempts local regulation will determine whether the state legislature intended to impose a uniform and comprehensive regulatory regime. When that intent is found, the court will conclude that any local regulation more restrictive than the state regulation is preempted.[34] Under New Mexico statute, local governments are prohibited from adopting regulatory ordinances which are in conflict with state law.[35] Case law holds that a local law which is more stringent than state law is not necessarily preempted by the state law.[36] Instead, the local regulation may be considered

30. 42 U.S.C.S. § 6929 (Supp. 1991) (emphasis added).

31. North Haven Planning and Zoning Comm'n v. Upjohn Co., 921 F.2d 27 (2d Cir. 1990); Willey v. Cass County, 689 S.W.2d 654 (Mo. App. 1985).

32. Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988).

33. *Id.* at 1446 (quoting Rollins Envtl. v. Parish of St. James, 775 F.2d 627, 637 (5th Cir. 1985)).

34. Envirosafe Serv. of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987).

35. N.M. STAT. ANN. § 3-17-1 (Supp. 1988).

36. City of Hobbs v. City of Biswell, 81 N.M. 778, 473 P.2d 917 (1970).

to merely complement the state law.[37] This is a liberal standard, and it suggests that the reasonable local regulation of hazardous waste facilities is not preempted by the Hazardous Waste Act.[38]

3. Preemption by the Solid Waste Act

Like the RCRA, the New Mexico Solid Waste Act contains a provision directly addressing the issue of its preemption of local regulation. Section 42 of the Act provides that: (1) nothing in the Act limits or is intended to limit the authority of any county or municipality "to adopt and enforce solid waste management requirements more stringent than those in the Solid Waste Act"; and (2) nothing in the Act modifies or limits, or is intended to limit, "the authority of any county or municipality to exercise planning and zoning authority."[39] Under the Act, municipalities retain all existing statutory authority to engage in regulation of siting proposals through zoning mechanisms and to use ordinances to regulate the operation of landfills. If RCRA case law is applied by analogy, however, provisions as broad as the preemption provision of the New Mexico Solid Waste Act could be read to allow the exercise of local regulation unless they either explicitly ban solid waste landfills from the municipal area or have the effect of such a ban. Short of a ban, reasonable regulation should be permitted.

4. Exclusionary Zoning

If the New Mexico courts rule that a zoning ordinance which completely excludes landfills from the municipality's jurisdiction is not preempted by the Solid Waste Act, the question arises as to whether there are other difficulties with the legality of such exclusionary zoning. The cases in this area are divided.

Exclusionary zoning has been upheld by New Mexico courts. In *Barber's Super Markets, Inc. v. City of Grants*,[40] the city used an ordinance which made incineration of "rubbish" unlawful to deny the plaintiff permission to construct and operate an incinerator. Without discussion, the New Mexico Supreme Court noted that the party challenging the ordinance did not dispute that the city had the authority to adopt the ordinance. Consequently, the court addressed the issue of whether the ordinance sufficiently promoted the public health, safety and welfare. The court found that it did and accordingly upheld the ordinance.

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37. *Id.*

38. The statutory authorization for zoning ordinances, unlike the authorization for regulatory ordinances, does not explicitly provide that ordinances in conflict with state law are prohibited. This absence could lead New Mexico courts to adopt the law of other states, which would more likely prohibit stricter local regulation. In the event of a conflict between a zoning ordinance and another law, the regulation which imposes higher standards shall apply. N.M. STAT. ANN. § 3-21-11 (Supp. 1990).

39. Solid Waste Act, N.M. STAT. ANN. § 74-9-42 (Repl. Pamp. 1990)

40. 80 N.M. 533, 458 P.2d 785 (1969).

A Pennsylvania court, however, found that the total exclusion of waste disposal facilities was an unreasonable exercise of the police power.[41] The court placed the burden of proof on the municipality to prove the ordinance's validity. This was an application of the frequently used rule in exlusionary zoning cases that total exclusion justifies reversal of the traditional rule, which places the burden upon the party challenging the ordinance.[42] The court noted that the existence of a state system regulating the facility suggested that the municipality's forwarded concerns for health, safety and welfare were misplaced. The court concluded that even the possibility that detrimental effects would result from the activities of the disposal facility did not justify a total *prima facie* exclusion.

Other states have allowed the total exclusion of solid waste landfills on the basis of concerns for health and safety.[43] In one case, the Connecticut Supreme Court held that bans are lawful if supported by concerns for health and safety.[44] The court imposed the burden of proof upon the applicant, a reversal of the special burden of proof rule often used in exclusionary zoning cases. The court applied the rule to uphold a prohibition on the siting of a bulky waste disposal area anywhere in the municipality solely because the applicant failed to meet the burden of proof.

Courts also have upheld ordinances allowing only the municipality to operate landfills. In Pennsylvania, where a total ban earlier had been struck down, a court upheld an ordinance limiting solid waste landfill operation to the municipality, effecting a total ban on privately operated landfills.[45] The trend toward upholding such total bans may reverse if the courts come to recognize the need for more landfill space. If the trend toward upholding bans continues in the East Coast states, however, there will be more pressure on New Mexico municipalities, particularly financial pressures, to accept East Coast solid waste.

5. Due Process Limitations

In New Mexico, the primary limitations on municipal zoning authority over solid waste landfills are the traditional limitations, rather than limits peculiar to environmental regulation. Zoning regulation must be reasonably related to the promotion of a legitimate public purpose and must not be arbitrary and capricious.[46] Zoning decisions must comply with the legal criteria established by statute and the zoning ordinance and must

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41. General Battery Corp. v. Zoning Hearing Bd., 29 Pa. Commw. 498, 501, 371 A.2d 1030, 1033 (Commw. Ct. 1977).

42. 2 ANDERSON, AMERICAN LAW OF ZONING § 9.16 (1986).

43. Moran v. Village of Philmont, 47 A.D.2d 230, 542 N.Y.S.2d 873 (Sup. Ct. App. Div. 1989); Town of LaGrange v. Giovenetti Enters., 123 A.D.2d 688, 507 N.Y.S.2d 54 (Sup. Ct. App. Div. 1986).

44. Town of Beacon Falls v. Posick, 212 Conn. 570, 577, 563 A.2d 285, 292 (1989).

45. Kavanagh v. London Grove Township, 486 Pa. 133, 134, 404 A.2d 393, 394 (1979), *appeal dismissed*, 444 U.S. 1041 (1980).

46. RATHKOPF, *supra* note 26, at § 2.02.

be supported by substantial evidence.[47] Regulatory ordinances must be reasonable, and not oppressive, arbitrary or capricious.[48]

In addition, an ordinance which precludes a property owner from making any beneficial use of his or her property will be invalid as an unlawful taking of property.[49] This result should be unlikely in the landfill siting context because precluding the owner from using property for a landfill does not also preclude use of the property for another beneficial use, such as for residential purposes. Limitations on landfill operations, so long as they do not require a shutdown of a reasonably operated facility, also should not create a takings problem.

D. The Lordsburg Experience

In late January 1989, representatives of the Driggs Corporation of Capitol Heights, Maryland submitted an application to the New Mexico Environmental Improvement Division ("EID") to establish a 25,000 acre landfill in Hidalgo County just outside Lordsburg.[50] At that time, the Solid Waste Act was not in effect, and Hidalgo County did not have in place any type of zoning or regulatory ordinance which it could use in addressing the proposal. The county responded by drafting a comprehensive zoning ordinance governing, among other things, the location and operation of solid and hazardous waste landfills. The mere commencement of this activity, in conjunction with efforts at the state level to pass what would become the Solid Waste Act, seemed to result in the Driggs Corporation's withdrawal of its application, and the immediate threat ended. Perhaps the spectre of this regulation made Driggs realize that New Mexico intended to put itself on an equal footing with other states by having strict environmental regulation and refused to serve as a dumping ground for out-of-state waste.

Although it may be that nothing more than local opposition and local efforts toward adopting landfill regulation led Driggs to withdraw its EID application, it is worthwhile to review the substance of the Hidalgo County draft zoning ordinance.[51] The draft ordinance establishes solid waste landfills as a permissive use in rural and heavy industrial zones. Hazardous waste landfills are a conditional use in heavy industrial zones and are excluded from all other zones. For either type of landfill, a substantial amount of information regarding plans and design must be submitted. If approved, the landfill is subject to performance standards. Each landfill is classified according to three factors: depth from the

47. Singleterry v. City of Albuquerque, 96 N.M. 468, 632 P.2d 345 (1981).

48. 6 McQUILLEN, MUNICIPAL CORPORATIONS § 18.04 (1989).

49. Niagara Recycling, Inc. v. Niagara, 83 A.D.2d 316, 443 N.Y.S.2d 939 (Sup. Ct. App. Div. 1981).

50. Anita P. Miller has written a report which addresses the Lordsburg matter in detail, and which includes a discussion of Hidalgo County's draft zoning and enforcement ordinances. *See* A. MILLER, RURAL LAND USE REGULATION, REPORT OF THE LAND USE COMMITTEE OF THE SECTION OF URBAN, STATE AND LOCAL GOVERNMENT OF THE AMERICAN BAR ASSOCIATION (1990).

51. *See* Hidalgo County draft zoning ordinance dated April 20, 1990.

bottom of the landfill to the water table, tons of waste accepted daily, and proximity to water wells. Each landfill classification is subject to a set of performance requirements tailored to the extent of the danger posed by the landfill class. In addition, there are several standards applicable to all landfills. Under the draft, for example, landfills may not exceed 100 feet in height or have an area of exposure greater than 100 square yards. They must be set back at least 125 feet from any street or property boundary, and they may operate only during daylight hours.

The draft ordinance imposes significant regulation on landfills. The application process would require developers to study their proposal in depth and allow Hidalgo County to reject a proposal which does not comply with its standards. If a landfill receives approval, numerous regulatory requirements would apply. Should any of those requirements be violated, the county could commence enforcement action without having to rely on the EID or the EPA.

Several aspects of the approach taken by the draft ordinance are conservative. By approaching the problem with a comprehensive ordinance governing much more than just landfills, the county likely avoids charges of unlawful spot zoning. By regulating but not totally excluding landfills, the county likely avoids legal challenges based on preemption and exclusionary zoning theories. Yet, the regulation imposed by the draft ordinance is formidable. Hidalgo County's approach highlights the potential limitations on local regulation of landfills while also demonstrating that significant regulation is possible within those constraints.

II. ENFORCEMENT

A. Enforcement of Municipal Ordinances in New Mexico

Municipalities may provide for penalties for violations of their regulatory ordinances. Penalties of up to $500 in fines and up to 90 days in prison, or both, may be imposed.[52] Municipalities may establish the same penalties for violations of their zoning ordinances.[53] In addition, a zoning authority may bring a lawsuit to restrain, correct or abate a violation.[54] Municipalities also are entitled to define a nuisance through the ordinance and to provide for the enforcement of the ordinance through abatement of the nuisance and the imposition of penalties upon any person who has created the nuisance or allowed it to exist.[55]

B. Federal Environmental Citizen Suit Enforcement Actions

An improperly operated landfill may be subject to a citizen suit for enforcement under federal environmental statutes. Statutes with citizen

52. N.M. STAT. ANN. § 3-17-1 (Supp. 1988).
53. *Id.* § 3-21-10 (Supp. 1990).
54. *Id.*
55. *Id.* § 3-18-17 (Supp. 1988).

suits that are most likely to be effective in the context of landfills include the RCRA and the Clean Water Act.[56]

1. The RCRA Citizen Suit

There are three varieties of RCRA citizen suits, two of which are relevant here. These two types of citizens suits authorize courts to issue injunctive relief and impose civil penalties against RCRA violators and against those causing imminently and substantially dangerous conditions. Under the first type of suit, any person may bring suit where the landfill is not in compliance with its RCRA permit or is not in compliance with any RCRA standard, regulation, condition, prohibition, or order.[57] Suit must be brought in the federal district court for the district in which the alleged violation occurred. The court is authorized to enforce the permit, standard, regulation, prohibition, requirement or order violated.[58] This suit should be used against a hazardous waste facility to require the facility to obtain a permit or to comply with the conditions of the permit, such as conditions designed to prevent groundwater contamination.[59]

The second type of RCRA citizen suit allows an action against any person who has contributed or is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.[60] Appropriate defendants include, but are not limited to, any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility.[61] Suit must be brought in federal district court in the district in which the endangerment has occurred, and the court may either issue a restraining order or it may order the defendant to take "such other action as may be necessary," or both.[62] A municipality's chief interest in enforcement may be to use this suit, for example, to require a landfill to shut down altogether until the dangerous condition has ended. An advantage to this suit, as compared with the first RCRA suit, is its explicit applicability to dangerous conditions caused by solid waste in addition to those caused by hazardous waste.

There are several technical requirements which must be met in order to bring an RCRA citizen suit. For suits addressing RCRA violations, no suit may be brought until sixty days after notice is provided to the

56. 33 U.S.C. § 1251 (1988).
57. 42 U.S.C. § 6972(a)(1)(A) (Supp. 1991).
58. *Id.* § 6972(a).
59. This type of citizen suit may be used against solid waste facilities which are considered open dumps. *Id.* § 6945. In addition, it potentially could be used against more solid waste disposal facilities now that the EPA has issued its final rule, 40 C.F.R. pt. 258, because that rule has imposed RCRA standards upon many facilities for the first time.
60. 42 U.S.C. § 6972(a)(1)(B) (Supp. 1991).
61. *Id.*
62. *Id.* § 6972(a).

EPA, the state and the violator.[63] In addition, the suit may not be brought if the EPA or a state has commenced and is diligently prosecuting a civil or criminal action in court to require compliance.[64] For RCRA suits addressing imminent and substantial endangerments, ninety days prior notice must be provided.[65] No such suit may be brought at all if the EPA or a state has initiated a similar type of suit or has initiated activity toward a Superfund cleanup.[66] For both suits, however, the lawsuit may be filed immediately after the prior notice is provided if the suit addresses violations of RCRA hazardous waste requirements.[67] For both types, if a suit may not be brought because of the enforcement activity of the EPA or a state, citizens often have a right to intervene in the enforcement action.[68]

A unique advantage of citizen suit actions generally, including RCRA citizen actions, is the broad standing to sue—one need not be an immediate neighbor of the landfill or own land contaminated by the landfill to sue. Any person who is adversely affected may sue, and an adverse effect is often easy to show. Thus, in *City of Coatesville v. Delaware Container Co.*,[69] a city and others sued a hazardous waste treatment facility operater regarding a facility located near, but not in, the city. A municipality probably has standing to file an RCRA suit regarding any landfill in or near its boundaries.[70]

Another advantage to many citizen suits, including these two RCRA suits, is that the prevailing or substantially prevailing party may be awarded litigation costs, including attorneys' fees and expert witness fees.[71] Consequently, a municipality with a meritorious position may achieve the protection of the health and safety of its citizens through litigation without spending a small fortune.

2. The Clean Water Act Citizen Suit

The Clean Water Act regulates the discharge of pollutants into navigable water when the discharge comes from a point source.[72] Navigable water

63. *Id.* § 6972(b)(1)(A).
64. *Id.* § 6972(b)(1)(B).
65. *Id.* § 6972(b)(2)(A).
66. *Id.* § 6972(b)(2); *see also* Werlein v. United States, 746 F. Supp. 887 (D. Minn. 1990) (court applied Superfund, 42 U.S.C.A. § 9613(h), dismissing RCRA citizen suit without prejudice because facility which was subject of RCRA claims was also subject of Superfund removal activity).
67. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074 (1st Cir. 1986). One court has ruled that a citizen suit addressing both hazardous and non-hazardous waste may be filed immediately after prior notice is provided. Dague v. Burlington, 31 Env't Rep. Cas. (BNA) 1346 (D. Vt. 1990).
68. 42 U.S.C. § 6972(b) (Supp. 1991).
69. 29 Env't Rep. Cas. (BNA) 1745 (3d Cir. Apr. 24 1989).
70. The United States Supreme Court reduced the ease with which one may demonstrate an adverse effect by requiring the plaintiff to be "actually affected." This rule was applied to reject standing in a public lands case because the plaintiffs' affidavits of adverse interest stated they enjoyed the use of public land in the vicinity of the public land in dispute, and did not allege use of the precise land involved. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). This ruling may pose a greater difficulty for plaintiffs in the public lands context than under statutes such as RCRA because RCRA plaintiffs typically have a more direct interest at stake.
71. 42 U.S.C. § 6972(e) (1988).
72. Clean Water Act of 1977, 33 U.S.C. §§ 1311(a), 1362(12) (1988).

is broadly defined under the Act to include many bodies of water in New Mexico, such as lakes and rivers, as well as normally dry arroyos, if the water will end up in public waters such as rivers or their tributaries.[73] The discharge of pollutants to groundwater is not covered by the Clean Water Act[74] but is addressed by state environmental statute.[75] A point source is defined as a discrete conveyance, such as a pipe or channel.[76] In certain situations, landfills could discharge pollutants from a point source, rendering them subject to Clean Water Act regulation. This is most likely to occur where the landfill borders navigable water, such as an arroyo, and where the waste could overflow during heavy rains.

A permit system is the central means by which the Clean Water Act regulates discharges. Any discharge of a pollutant is illegal unless authorized by a permit.[77] Typically, permits set discharge limits for certain pollutants and require the permittee to conduct monitoring of the discharge or effluent. Therefore, a landfill subject to the Clean Water Act must have a permit, and the permit is likely to have both discharge limitations and monitoring requirements.

Any citizen, including a municipality, who is adversely affected may commence a Clean Water Act citizen suit against any person who is in violation of an effluent standard or limitation or an order issued by the EPA.[78] Generally speaking, a violation of an effluent standard or limitation refers to a permit violation or a discharge without a permit.[79] Suit must be brought in federal district court.[80] A violation must be occurring at the time the complaint is filed, or the plaintiff must make a good-faith allegation of continuing or intermittent violations.[81] Besides imposing civil penalties, the court may enforce the effluent standard or limitation or prohibit operation until a Clean Water Act permit is obtained.[82]

In many instances, the Clean Water Act citizen suit is easy to use. If a landfill subject to Clean Water Act regulation does not have a permit, it is in violation of the Act and the citizen suit should be successful. If the landfill has a permit and is discharging pollutants in excess of the permit limits, the landfill's own permit-required monitoring reports, which must be to submitted to the EPA, should demonstrate limit violations. Numerous cases have held that the submission of monitoring reports

73. *Id.* § 1362(7); United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975).
74. United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975).
75. N.M. STAT. ANN. §§ 74-6-5(A), -2(G) (Repl. Pamp. 1990).
76. Clean Water Act, 33 U.S.C. § 1362(14) (Supp. 1990).
77. *Id.* § 1342.
78. *Id.* § 1365(a)(1).
79. *Id.* § 1365(f).
80. *Id.* § 1365(a).
81. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).
82. Clean Water Act, 33 U.S.C. § 1365(a) (1988).

showing permit limitation violations establish Clean Water Act violations entitling the plaintiff to win the citizen suit without the need for a trial.[83] As with the RCRA citizen suit, the prevailing party may be awarded litigation costs, including attorneys' fees and expert witness fees.[84]

The requirements for bringing a Clean Water Act citizen suit are analogous to the RCRA citizen suit requirements. The plaintiff must provide sixty days prior notice to the EPA, the state and the alleged violator of its intent to file the suit.[85] No suit may be brought if the EPA or a state is diligently prosecuting a civil or criminal action to require the statutory compliance sought by the citizen suit.[86] Citizens may intervene as a matter of right in government enforcement actions.[87]

C. *Public Nuisance Lawsuits*

Under New Mexico statute, any public officer may bring an action to abate a public nuisance.[88] A public nuisance is a crime defined as

> knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: A. injurious to public health, safety, morals or welfare; or B. interferes with the exercise and enjoyment of public rights, including the right to use public property.[89]

A landfill which is being improperly operated may well be creating a nuisance. For example, the statute expressly provides that polluting any public body of water, defined as "knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use," is a public nuisance.[90] If a landfill pollutes public water, it is subject to the statute. As with citizen suits under the federal environmental statutes, attorneys' fees are available.[91]

III. COST RECOVERY ACTIONS

In situations where improper landfill operation has contaminated property, a municipality's chief interest may be cleaning up the contaminated area and obtaining reimbursement for the cleanup costs from those responsible for the contamination. State and federal statutes authorize the recovery of such costs through lawsuits typically referred to as "cost recovery" actions. Recovery for the cleanup of hazardous waste may be

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83. Student Pub. Interest Group of N.J., Inc. v. P.D. Oil & Chemical Storage, Inc., 627 F. Supp. 1074 (D.N.J. 1986); Student Pub. Interest Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528 (D.N.J. 1984), *aff'd and remanded*, 759 F.2d 1131 (3rd Cir. 1985).
84. Clean Water Act, 33 U.S.C. § 1365(d) (1988).
85. *Id.* § 1365(b)(1)(a).
86. *Id.* § 1365(b)(1)(B).
87. *Id.*
88. N.M. STAT. ANN. § 30-8-8(B) (Repl. Pamp. 1984).
89. *Id.* § 30-8-1 (Supp. 1990).
90. *Id.* § 30-8-2 (Repl. Pamp. 1984).
91. *Id.* § 30-8-8(C).

pursued under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") or "Superfund."[92] An RCRA citizen suit may be available to require the responsible party to conduct a cleanup of either solid or hazardous waste at its own expense. Recovery of costs expended by municipalities in the cleanup of solid waste contamination may also be obtained under the Solid Waste Act.[93]

A. Superfund Cost Recovery Actions

A Superfund cost recovery action may be used to recover cleanup, or "response," costs which are incurred as a result of a release or threatened release of hazardous substances. Recoverable response costs include costs of cleanup or removal of the hazardous substances[94] and remedial costs, such as costs for actions taken to prevent or minimize the release of hazardous substances through neutralization, containment or similar procedures.[95]

The person who incurs the costs may recover the costs from responsible parties. There are four categories of responsible parties. First, any person who presently owns or operates a site or facility may be held liable whether or not they had anything to do with the contamination.[96] Second, any person who owned or operated the facility at the time of the disposal of hazardous substances at the facility is liable.[97] Third, any person who arranged for disposal or treatment of hazardous substances which they owned or possessed may be held liable for contamination at the site to which the wastes were transported.[98] This category is generally considered to include individuals or entities that actually generated the hazardous waste. Finally, any person who accepts hazardous substances for transport to a disposal or treatment facility or to a site selected by that person may be held liable.[99]

Consequently, the plaintiff in such cases has a number of potential defendants from which to obtain recovery of costs. Besides the obvious target, the present owner or operator of the landfill, the plaintiff may seek compensation from certain past owners and operators, from anyone who generated waste which ended up at the landfill, and from anyone who transported waste to the landfill. Because liability under Superfund is joint and several in cases of indivisible harm, the typical situation, the plaintiff often may obtain full compensation from a single defendant even if that defendant is responsible for only a small portion of the contamination.[100]

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92. 42 U.S.C. §§ 9601-75 (1988).
93. Solid Waste Act, N.M. STAT. ANN. §§ 74-9-1 to -42 (Repl. Pamp. 1990).
94. Superfund, 42 U.S.C. § 9601(23) (Supp. 1991).
95. *Id.* § 9601(24) (1988).
96. *Id.* § 9607(a)(1) (Supp. 1991).
97. *Id.* § 9607(a)(2).
98. *Id.* § 9607(a)(3).
99. *Id.* § 9607(a)(4).
100. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

Only three defenses are available by statute: the release or threatened release of the hazardous substance was caused solely by (1) an act of God, (2) an act of war, or (3) an act or omission by a third party unrelated to the defendant and the defendant exercised due care and took reasonable precautions against foreseeable acts or omissions of third parties.[101] The third defense includes the "innocent landowner" defense available to a landowner (1) who purchased after disposal of the hazardous substances, (2) did not know the substances had been disposed of at the property, and (3) made appropriate inquiry into the prior uses of the property consistent with good commercial or customary practice.[102]

Judicially created rules have eased the plaintiff's burden in proving liability under Superfund. For example, the majority rule in Superfund cases is that liability is strict, joint and several,[103] that the corporate veil is not a defense for corporate officers, directors and shareholders involved with hazardous waste operations,[104] and that costs incurred prior to Superfund's enactment or resulting from acts performed prior to enactment are recoverable.[105]

Municipalities are entitled to bring a standard Superfund cost recovery action. Section 107 authorizes the recovery of response costs incurred by any "person," and persons are defined to include municipalities and political subdivisions of a state.[106] An example of a municipality bringing suit occurred in *City of Philadelphia v. Stepan*,[107] in which Philadelphia sued for damages for the cleanup of hazardous waste illegally dumped in the city's landfill. In addition, several court decisions have held that municipalities, along with states and the United States, may sue responsible parties for damage to, destruction of or loss of natural resources. Damages recovered under this type of suit must be used to restore or replace the natural resource, or to acquire its "equivalent."[108]

Despite its plaintiff-oriented rule, there are disadvantages to bringing a Superfund cost recovery action. First, there is no statutory entitlement to attorneys' fees or expert witness fees for the prevailing party.[109] Second, because the action is in the nature of restitution, the plaintiff is expected to spend the money on cleanup first, and then seek the recovery of the costs incurred. Obviously, the plaintiff must be able to pay for the

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101. Superfund, 42 U.S.C. § 9607(b) (Supp. 1991).

102. 42 U.S.C. § 9601(35) (1988).

103. *Monsanto*, 858 F.2d at 160.

104. United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

105. *Id.*; *Monsanto*, 858 F.2d at 160.

106. Superfund, 42 U.S.C. § 9601(21) (1988).

107. City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982).

108. New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986); Mayor & Bd. of Aldermen v. Drew Chemical Corp., 621 F. Supp. 663 (D.N.J. 1985). *But see* Bedford v. Raytheon Co., 32 Env't Rep. Cas. (BNA) 1548 (D. Mass. 1991) (court declined to read Superfund statute as authorizing municipalities to sue for natural resource damages).

109. T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696 (D.N.J. 1988). *But see* General Elec. Co. v. Litton Business Systems, 920 F.2d 1415 (8th Cir. 1990) (affirming award of attorneys' fees as a recoverable response cost).

cleanup on its own and take the risk of not succeeding in the cost recovery action. One way to partially sidestep this problem is for the plaintiff to seek a declaration of liability after a small amount of cleanup costs are incurred. Then, if the plaintiff obtains a declaration that the defendant is liable, the remainder of the cleanup can be conducted with the knowledge that the defendant must pay for reasonably incurred costs.

B. The RCRA Citizen Suit

Another suit which may be useful for requiring responsible parties to remedy contamination is the second of the two RCRA citizen suits discussed earlier. A municipality may bring an RCRA citizen suit against a person who has contributed or is contributing to an imminent and substantial endangerment to health or the environment by the handling, storage, treatment, transportation or disposal of solid or hazardous waste.[110] Where the court finds the existence of such an imminent and substantial endangerment, it may order the responsible person to take action "as may be necessary."[111] The cases emphasize the federal courts' broad power to order appropriate equitable relief to remedy the danger and suggest that the courts are authorized to order the waste cleaned up.[112] Whether a court may go so far as requiring a full scale cleanup on the order of a Superfund cleanup is unclear. The decisions tend to rule on liability through summary judgment motions and do not reach the issue of the appropriate remedy. The statutory language, however, supports the view that such broad relief is available. Therefore, in the presence of the right factual circumstances, such relief should be ordered.

Assuming a cleanup may be ordered, there are several advantages to this suit. First, it applies in the context of both solid and hazardous waste. Second, it does not require the plaintiff to produce the funds for cleanup before obtaining the desired relief, as is necessary in Superfund cost recovery actions. Cleanup by the responsible party in an RCRA citizen suit may be ordered without the plaintiff spending a penny on cleanup. Third, unlike Superfund actions, attorneys' fees and expert witness costs may be awarded to the prevailing party.[113] A drawback to this suit is that it is only available when an "imminent and substantial endangerment" can be shown, which is a high standard of proof.

C. The Solid Waste Act Cost Recovery Action

The Solid Waste Act contains a cost recovery action for the cleanup of contamination caused by solid waste. The action is obviously modeled on the Superfund cost recovery action. In both, the plaintiff may obtain compensation for costs incurred as a result of a release or threatened

110. 42 U.S.C. § 6972(a)(1)(B) (Supp. 1991).
111. *Id.* § 6972(a).
112. Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988).
113. 42 U.S.C. § 6972(e) (1988).

release of contaminants.[114] Both apply a rule of strict liability to owners, operators, transporters and generators, and both statutes provide similar defenses.[115]

A key difference between the two statutes is that the only costs which may be recovered under the Solid Waste Act are costs incurred by the State of New Mexico, its counties or municipalities.[116] This means that municipal bodies may recover costs they have incurred while at the same time remaining free from being targeted by private party suits. Municipalities are, of course, subject to suit by the state, by a county or by another municipality.[117] Under no circumstances, however, may a state agency or political subdivision be held liable for costs or damages as a result of its actions taken in response to an emergency created by the release or threatened release from a solid waste facility owned by another person.[118] This provision has the effect of protecting a municipality from suit for contamination resulting from an emergency at a landfill it operates so long as the landfill is not owned by the municipality.

IV. CONCLUSION

Numerous avenues are available to a municipality which chooses to take an active role regarding the disposal of waste within or near its community by private companies. In many instances, municipalities are free to impose their own form of regulation on the siting and operation of landfills. In addition, whether or not they have adopted ordinances addressing landfills, municipalities have significant options available to enforce laws which apply to landfills or to remedy environmental damage with the aid of cost recovery actions. Many of these proceedings have been specifically designed to facilitate involvement by citizens, including municipalities, thus allowing municipalities to take an active role in many aspects of landfill issues.

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114. Superfund, 42 U.S.C. § 9607(a) (Supp. 1991); Solid Waste Act, N.M. STAT. ANN. §§ 74-9-1 to -42, 74-9-72 to -73 (Repl. Pamp. 1990).

115. Superfund, 42 U.S.C. § 9607(b) (Supp. 1991); Solid Waste Act, N.M. STAT. ANN. § 74-9-34(C) (Repl. Pamp. 1990).

116. Solid Waste Act, N.M. STAT. ANN. § 74-9-34(A)(3) (Repl. Pamp. 1990).

117. *Id.*

118. *Id.* § 74-9-34(F).