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## COMPENSATED SITING PROPOSALS: IS IT TIME TO PAY ATTENTION?

Vicki Been†

Many proposals to overcome the difficulty of siting locally undesirable land uses ("LULUs") fairly and efficiently suggest that the problem could be resolved if victims of the siting were adequately compensated for the burdens the LULU imposes.<sup>1</sup> Neither environmental justice advocates nor academics focusing on environmental justice issues have thoroughly studied compensation proposals.<sup>2</sup> Some advocates dismiss the proposals out-of-hand as

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1. See, e.g., MICHAEL O'HARE ET AL., FACILITY SITING AND PUBLIC OPPOSITION 67-87 (1983); Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 275-76 (1982); Alan L. Farkas, *Overcoming Public Opposition to the Establishment of New Hazardous Waste Disposal Sites*, 9 CAP. U. L. REV. 451, 458-59 (1980); Bernard Holzmagel, *Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting*, 13 B.C. ENVTL. AFF. L. REV. 329, 355 (1986); Roger E. Kasperson et al., *Confronting Equity in Radioactive Waste Management: Modest Proposals for a Socially Just and Acceptable Program*, in EQUITY ISSUES IN RADIOACTIVE WASTE MANAGEMENT 331, 348-49 (Roger E. Kasperson ed., 1983); Paul R. Kleindorfer, *Compensation and Negotiation in the Siting of Hazardous-Waste Facilities*, 51 SCI. TOTAL ENV'T 197, 198 (1986); Howard Kunreuther et al., *A Compensation Mechanism for Siting Noxious Facilities: Theory and Experimental Design*, 14 J. ENVTL. ECON. & MGMT. 371 (1987); Bradford C. Mank, *The Two-Headed Dragon and Siting and Cleaning Up of Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?*, 19 B.C. ENVTL. AFF. L. REV. 239, 241 (1991); Michael O'Hare, "Not on My Block You Don't" *Facility Siting and the Strategic Importance of Compensation*, 25 PUB. POL'Y 407, 428-30 (1977) [hereinafter O'Hare, *Not on My Block*]; Arthur M. Sullivan, *Siting Noxious Facilities: A Siting Lottery with Victim Compensation*, 31 J. URB. ECON. 360 (1992) [hereinafter Sullivan, *Siting Noxious Facilities*]; Arthur M. Sullivan, *Victim Compensation Revisited: Efficiency Versus Equity in the Siting of Noxious Facilities*, 41 J. PUB. ECON. 211 (1990) [hereinafter Sullivan, *Victim Compensation*]; see generally Daniel Mazmanian & David Morell, *The "NIMBY" Syndrome: Facility Siting and the Failure of Democratic Discourse*, in ENVIRONMENTAL POLICY IN THE 1990s TOWARD A NEW AGENDA 125, 137-38 (Norman J. Vig & Michael E. Kraft eds., 1990).

2. Exceptions include MARY R. ENGLISH, SITING LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITIES: THE PUBLIC POLICY DILEMMA 98 (1992); Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1040-46 (1993) [hereinafter Been, *What's Fairness Got To Do With It?*]; Michael B. Gerrard, *Fear and Loathing in the*

immoral.<sup>3</sup> Others summarily conclude that compensation programs are bound to fail because "safety is not usually a negotiable issue."<sup>4</sup> Some have simply ignored the proposals because they believe that addressing them would undermine the environmental justice movement's goal of pollution prevention.

This Article seeks to spur greater attention to the difficult moral and political issues compensation proposals raise by showing that compensation programs are widespread in actual siting practice. It argues that the success of compensation programs, while limited, has been sufficient to ensure that such proposals will continue to be a significant feature of siting programs. It urges those interested in environmental justice to devote greater attention to compensation proposals, and to begin either to articulate an intellectually rigorous critique of the proposals or to develop a strategy for shaping a compensation practice that is beneficial to the movement's constituency.

Part I of this Article briefly reviews the basic theory of the compensation proposals, and provides a simple typology of the various proposals. Part II examines results of surveys that provide some theoretical evidence regarding whether compensation is likely to succeed in persuading communities to accept LULUs. Part III analyzes siting programs that have attempted to use compensation to induce communities to accept various kinds of LULUs. It describes each program and assesses the programs' failures and successes. Finally, Part IV offers an agenda for study of the moral and practical implications of compensation proposals.

## I. Compensated Siting Proposals

### A. The Theories Underlying Compensation Proposals

The siting of LULUs—which include public "improvements" such as highways and airports, social service facilities such as

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*Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047 (1994); see also Vicki Been, *Neighbors Without Redress: Inconsistencies in the Theory of Compensated Siting of Locally Undesirable Land Uses* (1994) (unpublished manuscript, on file with the author) [hereinafter Been, *Neighbors Without Redress*] (arguing that compensation programs may underprotect the immediate neighbors of a LULU because acceptance of the compensation is often based upon consent of the majority of the political jurisdiction, rather than the majority of those most seriously burdened by the LULU).

3. See, e.g., ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 91 (1990) (questioning the morality of "pay[ing] those who are less fortunate to accept risks that others can afford to escape").

4. Mank, *supra* note 1, at 275; see also Gerrard, *supra* note 2.

homeless shelters and group homes, and waste facilities ranging from municipal landfills to high level nuclear waste storage facilities—has become an extraordinarily difficult public policy challenge.<sup>5</sup> Siting controversies have erupted in community after community, sometimes violently.<sup>6</sup> Industries and social service agencies claim that problems in siting facilities have made it increasingly difficult to manufacture their products or to deliver their services.<sup>7</sup> Dissatisfaction over the disparate abilities of communities to block the siting of LULUs has contributed to the rise of the environmental justice movement.<sup>8</sup> In short, siting has become a major source of frustration for government, industry, and social service agencies on the one hand, and for the communities targeted for facilities on the other.

A primary, although by no means the only, explanation for the vehemence with which communities protest proposed sites is that the benefits of LULUs are spread diffusely over an entire community, region, state, or nation,<sup>9</sup> while their costs<sup>10</sup> are concentrated

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5. Gerrard, *supra* note 2; Mank, *supra* note 1, at 272.

6. For reports of violence arising from siting controversies, see Gerrard, *supra* note 2 (surveying literature); Herbert Inhaber, *Of LULUs, NIMBYs, and NIMTOOs*, 107 PUB. INTEREST 52 (1992).

7. See, e.g., *Lack of LLW Disposal Could Trigger Cutbacks in Health Care, Research*, NUCLEAR WASTE NEWS, Nov. 4, 1993, at 121; Paul Hoversten, *Wanted: Permanent Home for Nuclear Wastes*, USA TODAY, May 11, 1993, at 12A. The difficulty of siting new facilities also is alleged to increase illegal disposal of hazardous waste and illegal trade in waste with third world countries. See, e.g., Kleindorfer, *supra* note 1, at 201. For a critical analysis of that claim, see Gerrard, *supra* note 2.

8. Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 71-74 (1991).

9. Some LULUs do benefit the host community. For example, a host community may see an influx of new jobs, increased tax revenues, and an increase in local purchases. These benefits, however, often are insufficient to outweigh the costs that the LULU imposes locally. Bacow & Milkey, *supra* note 1, at 275; Gail Bingham & Daniel S. Miller, *Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation*, 17 NAT. RESOURCES LAW. 473, 474, 478 (1984); A. Dan Tarlock, *Siting New or Expanded Treatment, Storage, or Disposal Facilities: The Pigs in the Parlors of the 1980s*, 17 NAT. RESOURCES LAW. 429, 433 (1984).

10. The costs depend upon the nature of the LULU. Noxious LULUs such as hazardous waste dumps, nuclear power plants, and polluting factories may pose health risks to those living nearby, and may decrease neighboring property values, increase noise, odors, pollution and congestion, and stigmatize the community. MICHAEL R. EDELSTEIN, *CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE* 17-117 (1988); Bacow & Milkey, *supra* note 1, at 268; James M. Melius et al., *Facility Siting and Health Questions: The Burden of Health Risk Uncertainty*, 17 NAT. RESOURCES LAW. 467 (1984); David Morell, *Siting and the Politics of Equity*, in *RESOLVING LOCATIONAL CONFLICT* 117, 120-21 (Robert W. Lake ed., 1987). Neighbors fear that social service LULUs

upon the host neighborhood.<sup>11</sup> Industry associations,<sup>12</sup> academics,<sup>13</sup> and public policy makers<sup>14</sup> have responded with a seemingly simple solution: compensate host communities for the harms the LULU causes.<sup>15</sup> Proponents advance several justifications for compensation programs. First, they argue that if a LULU's benefits to the community outweigh its costs, the community will have no reason to oppose the project, and indeed may welcome it.<sup>16</sup>

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may decrease neighboring property values, pose risks to neighbors' personal safety, cause current residents to leave, and threaten the neighborhood's character and quality of life. MICHAEL J. DEAR & S. MARTIN TAYLOR, *NOT ON OUR STREET* 22 (1982); Richard Balukas & Joan Wald Baken, *Community Resistance to Development of Group Homes for People with Mental Retardation*, 46 *REHABILITATION LITERATURE* 194, 196 (1985); Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 *AM. PLAN. ASS'N J.* 288, 290-91 (1992); Paul Maxim & Darryl Plecas, *Prisons and Their Perceived Impact on the Local Community: A Case Study*, 13 *SOC. INDICATORS RES.* 39, 49 (1983); Phyllis Solomon, *Analyzing Opposition to Community Residential Facilities for Troubled Adolescents*, 62 *CHILD WELFARE* 361, 363 (1983); Donald E. Weber, *Neighborhood Entry in Group Home Development*, 57 *CHILD WELFARE* 627, 634 (1978).

11. Bacow & Milkey, *supra* note 1, at 268-69; Holznagel, *supra* note 1, at 355; Robert C. Mitchell & Richard T. Carson, *Property Rights, Protest, and the Siting of Hazardous Waste Facilities*, 76 *AM. ECON. ASS'N PAPERS & PROC.* 285, 287 (1986); Kunreuther et al., *supra* note 1, at 372; Sullivan, *Victim Compensation*, *supra* note 1, at 211.

12. See, e.g., Nat'l Solid Waste Management Ass'n, *NSWMA Position Statement on Siting of Waste Management Facilities* (Nov. 1979).

13. See sources cited *supra* note 1.

14. Many consultants to state and federal governments have recommended compensation programs to ease the difficulty of siting LULUs. See, e.g., ERM-NEW ENGLAND, INC. & ERM-NORTHEAST, *FINAL REPORT: ASSISTANCE TO LOCALITIES AFFECTED BY HAZARDOUS WASTE FACILITIES* (1988) (report prepared for New York State Dep't of Environmental Conservation); see also Farkas, *supra* note 1, at 459 (citing several reports from consultants suggesting compensation programs to state and federal agencies). Some governmental associations also have endorsed the concept of compensation. See, e.g., Nat'l Governors' Ass'n, *Policy D-17, Hazardous Waste Management § 17.5.3* (1991-92) ("As a critical element of siting laws and practice, states should legitimize and encourage compensation and mitigation.").

15. Compensation in this sense is analogous to development exactions, which are sometimes used to counter or "buy off" opposition to a particular development project. Elizabeth Deakin, *The Politics of Exactions*, 10 *N.Y. AFF.* 96, 100-01 (1988).

16. Bacow & Milkey, *supra* note 1, at 275; Bingham & Miller, *supra* note 9, at 478-79; Morell, *supra* note 10, at 120-21; Anthony J. Mumphy & Julian Wolpert, *Equity Considerations and Concessions in the Siting of Public Facilities*, 49 *ECON. GEOGRAPHY* 109 (1973); Kent E. Portney, *The Role of Economic Factors in Lay Perceptions of Risk*, in *DIMENSIONS OF HAZARDOUS WASTE POLICY* 53, 54 (Charles E. Davis & James P. Lester eds., 1988); Ronald Pushchak & Ian Burton, *Risk and Prior Compensation in Siting Low-Level Nuclear Waste Facilities: Dealing with the NIMBY Syndrome*, 23 *PLAN CANADA* 68, 71-72 (1983).

Next, proponents justify compensation programs as an equitable solution to the siting problem.<sup>17</sup> Many people recognize that imposing the costs of a particular LULU upon one community, while the benefits of the LULU are spread over a much larger number of people, is unjust. Compensation schemes are advanced to redress that injustice in situations where it would be impractical to equitably distribute risks physically or spatially.<sup>18</sup> It may be unwise, for example, to site a radioactive or hazardous waste facility in every community that produces such waste, because a few large centralized facilities generally are considered safer, more environmentally sound, and more efficient than many small facilities.<sup>19</sup> Those communities that must serve as host to the larger centralized facilities should be compensated, however, for bearing the burden by those who enjoy the benefits.<sup>20</sup>

A third major justification for compensation proposals is that compensation can help to make siting decisions more efficient. Compensation forces the facility's developer to internalize the costs of the facility, and therefore helps to ensure that only those facilities that are efficient will be built.<sup>21</sup> In addition, liability for the costs of the facility gives the facility's developer a strong incentive to take precautions to avoid or reduce those costs.<sup>22</sup> Moreover, a community's participation in negotiations over the facility may make the public more willing to accept the risks associated with its operation.<sup>23</sup> Studies show that risks a community assumes voluntarily are more likely to be accepted than those foisted upon a community.<sup>24</sup>

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17. See, e.g., O'HARE ET AL., *supra* note 1, at 70, 76-81; Farkas, *supra* note 1, at 458; Kasperson et al., *supra* note 1, at 346-52.

18. For discussion of how compensation may be seen as a means of achieving a fair distribution of the burdens of LULUs, see Been, *What's Fairness Got To Do With It*, *supra* note 2, at 1028-31, 1040-46.

19. For discussion of the problem of physically sharing the risks of wastes, see THE NOT-IN-MY-BACKYARD SYNDROME 173-74 (Audrey Armour ed., 1984); Kasperson et al., *supra* note 1, at 349-52.

20. THE NOT-IN-MY-BACKYARD SYNDROME, *supra* note 19, at 173-74; Farkas, *supra* note 1, at 458; Mitchell & Carson, *supra* note 11, at 289.

21. O'HARE ET AL., *supra* note 1, at 70, 86; Bacow & Milkey, *supra* note 1, at 275-76 & n. 63; Bingham & Miller, *supra* note 9, at 479; Kleindorfer, *supra* note 1, at 205.

22. O'HARE ET AL., *supra* note 1, at 85-86; Kerry E. Rodgers, Negotiated Compensation and Hazardous Waste Facility Siting: Ten Years in Massachusetts 10-11 (1990) (unpublished paper on file with author).

23. See THE NOT-IN-MY-BACKYARD SYNDROME, *supra* note 19, at 154 (statement of Chris Haussmann); ENGLISH, *supra* note 2, at 135-36.

24. THE NOT-IN-MY-BACKYARD SYNDROME, *supra* note 19, at 181; Richard J. Bord, *Problems in Siting Low Level Radioactive Wastes: A Focus on Public Participation in MANAGEMENT OF RADIOACTIVE MATERIALS AND WASTES: ISSUES AND PRO-*

## B. Differences in Compensation Proposals

While the basic theoretical justifications for compensation tend to be relatively constant among proponents, the details of the proposals vary in several significant ways. This section offers a rough typology of the different types of proposals.<sup>25</sup>

### 1. Remedial Nature of the Compensation

Compensation may serve as a remedy, a preventative measure, or a reward.<sup>26</sup> As a remedy, compensation seeks to make a community whole for damages it will suffer as a result of the facility.<sup>27</sup> Agreements to pay neighboring property owners for any decrease in the market value of their homes caused by the facility are an example of remedial compensation.<sup>28</sup> Alternatively, compensation may seek to prevent or reduce the harm the facility will cause.<sup>29</sup> Such compensation measures are often referred to as "mitigation." The provision of buffer zones between a facility and its residential neighbors is an example of mitigation. Finally, compensation may serve to reward the community for accepting the facility by providing funds or benefits in excess of those required to remedy any harms caused by the facility.<sup>30</sup> Such measures are sometimes called "incentives" rather than compensation.

### 2. Method of Compensation Proposed

Compensation either may be *ex ante* (before the facility is constructed or causes any harm to the community), *on-going*, or *ex*

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GRESS 189, 191 (Shyamal K. Majumdar & E. Willard Miller eds., 1985); Charles Davis, Public Involvement in Hazardous Waste Siting Decisions, 19 *Polity* 296, 297 (1986); Baruch Fischhoff et al., *How Safe is Safe Enough? A Psychometric Study of Attitudes Toward Technological Risks and Benefits*, 9 *Policy Sciences* 127 (1978).

25. In addition to the differences discussed in the text, compensation programs and proposals differ regarding the source of the compensation. Most programs now in effect require the facility developer to provide the compensation, but many academic proposals explore schemes in which the compensation is financed through taxes on residents of nonhost communities or other forms of taxation. See, e.g., Sullivan, *Victim Compensation*, *supra* note 1, at 217-23.

26. DAVID MORELL & CHRISTOPHER MAGORIAN, *SITING HAZARDOUS WASTE FACILITIES LOCAL OPPOSITION AND THE MYTH OF PREEMPTION* 164-75 (1982); Gerrard, *supra* note 2.

27. Gerrard, *supra* note 2.

28. Remedial compensation often takes the form of monetary payments, but can also take the form of in-kind compensation. If a facility takes land the community had used for recreational purposes, for example, the developer may compensate for the loss by providing other land. Holznagel, *supra* note 1, at 356.

29. Gerrard, *supra* note 2.

30. *Id.*

post (after the facility causes some harm).<sup>31</sup> Ex ante compensation often takes the form of grants, which allow the host community to hire its own experts to evaluate the proposed facility.<sup>32</sup> Ex ante compensation also may involve community participation in the design of the facility, selection of alternative facility operating procedures, or selection of the facility operator.<sup>33</sup> Finally, ex ante compensation may consist of "risk substitution" rather than money, amenities, or rights of participation. Several academics have proposed, for example, that developers of waste disposal facilities offer to clean up all or some of a community's existing toxic waste sites in exchange for approval of the new facility.<sup>34</sup>

On-going compensation often takes the form of special taxes or fees the facility regularly pays to the community, or services the facility regularly provides the community.<sup>35</sup> In addition, on-going benefits may include mitigation measures to reduce the negative impacts that the facility or its construction will have on the community,<sup>36</sup> to minimize the dangers the facility poses,<sup>37</sup> or to improve response to any dangerous conditions that develop.<sup>38</sup> On-going benefits may also include boosts to the local economy, such as jobs for local residents, purchases from local businesses, or contributions to local charities.<sup>39</sup>

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31. Kleindorfer, *supra* note 1, at 198; Kunreuther et al., *supra* note 1, at 381.

32. These forms of compensation most often are provided by the facility's developer. The county, state, or federal government also can provide such grants to the proposed host community. Celeste P. Duffy, *State Hazardous Waste Facility Siting: Easing the Process Through Local Cooperation and Preemption*, 11 B.C. ENVTL. AFF. L. REV. 755, 787 (1984).

33. Bord, *supra* note 25, at 197-98; Duffy, *supra* note 32, at 784.

34. KENT E. PORTNEY, SITING HAZARDOUS WASTE TREATMENT FACILITIES: THE NIMBY SYNDROME 137-59 (1991); Mank, *supra* note 1, at 273, 282.

35. Duffy, *supra* note 32, at 785; Sullivan, *Victim Compensation*, *supra* note 1, at 223 (facilities provide such services as free pesticide disposal for local farmers and free snow plowing to the host city).

36. ERM-NEW ENGLAND, INC. & ERM-NORTHEAST, *supra* note 14, at 7-11; Duffy, *supra* note 32, at 784 n. 213; Patrick G. Marshall, *Not In My Back Yard!*, EDITORIAL RES. REP., June 9, 1989, at 306, 315.

37. The developer can agree to install monitoring equipment or leakage barriers beyond that required by law, for example. Mank, *supra* note 1, at 276.

38. For example, the developer may provide buffer zones around the facility to help counter any fires, explosions, or leaks. In addition, the developer could donate emergency equipment, or improve the roads or bridges that emergency equipment would have to use in the event of an accident. MICHAEL R. GREENBERG & RICHARD F. ANDERSON, HAZARDOUS WASTE SITES: THE CREDIBILITY GAP 260-61 (1984); Mank, *supra* note 1, at 276.

39. Duffy, *supra* note 32, at 786-87; Robin Gregory et al., *Incentives Policies to Site Hazardous Facilities*, 11 RISK ANALYSIS 667 (1991); Mank, *supra* note 1, at 276.



In addition, on-going benefits may take the form of continuing opportunities for community participation in the management of the facility. Local community representatives may be guaranteed a role in site monitoring, or be allowed to have an independent third party serve as a monitor, or be given funds to buy monitoring equipment, for example.<sup>40</sup> Moreover, the community may be given some role in decisions about whether to close a facility down in the event of an emergency, or about other emergency response questions.<sup>41</sup> Finally, the community may be given representation on the facility's governing board.<sup>42</sup>

Ex post compensation may include commitments to pay for, or insure against, future damages. Such commitments take the form of property value guarantees,<sup>43</sup> local product price guarantees, agreements to indemnify local governments, or funds to compensate victims in the event of an accident.<sup>44</sup>

### 3. *Determining the Compensation Package*

Compensation proposals also differ in how the terms of the compensation package are determined. One approach is for the governing statute to establish the level of compensation applicable to all communities.<sup>45</sup> Alternatively, the statute can authorize a regulatory agency to determine the compensation package on a case by case basis.<sup>46</sup> Another technique is to allow the facility developer

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40. Bord, *supra* note 24, at 197; Duffy, *supra* note 32, at 785.

41. THE NOT-IN-MY-BACKYARD SYNDROME, *supra* note 19, at 178.

42. *Id.* at 173-74.

43. See, e.g., LeAnn Spencer, *Dump Owner to Guarantee Home Values*, CHICAGO TRIB., May 21, 1993, § Lake, at 1.

44. ERM-NEW ENGLAND, INC. & ERM-NORTHEAST, *supra* note 14, at 12-14; Bord, *supra* note 24, at 195-96. Similarly, state and federal governments can ensure ex post compensation through special laws or procedures giving any member of the host community harmed by the facility legal redress against the facility's developer. Duffy, *supra* note 32, at 787-88; see, e.g., UTAH CODE ANN. § 26-14a-7 (1989) (establishing a cause of action against the facility operator for "devaluation of" or "interfere[nce] with" property rights).

45. See, e.g., IND. CODE ANN. §§ 6-6-6.6-2 & 6-6-6.6-3 (West 1989 & Supp. 1993) (commercial hazardous waste facilities taxed at a rate of \$11.50 per ton, 25% of which goes to the host county); KY. REV. STAT. ANN. § 68.178(3) (Michie/Bobbs-Merrill Supp. 1992) (county may levy up to 5% of gross receipts of hazardous waste facility); ME. REV. STAT. ANN. tit. 38, § 1319-R(4) (West Supp. 1993) (host municipality may levy up to 2% of a commercial hazardous waste facility's annual billings).

46. See, e.g., IND. CODE ANN. § 13-7-8.6-11 (West 1990) (administrative body may assess fee to hazardous waste facility if it determines that facility creates a need to educate and train local officials and employees regarding emergency response measures); N.J. STAT. ANN. § 13:1E-80 (West Supp. 1993) (host municipality may levy up to 5% of receipts of hazardous waste facility, but amount may be increased or decreased by administrative agency); N.C. GEN. STAT. § 153A-152.1 (1991) (host county

and the community to negotiate a mutually satisfactory package.<sup>47</sup> A fourth approach is to auction the facility to the community willing to accept the least compensation.<sup>48</sup> Herbert Inhaber has proposed a "reverse auction" system for siting LULUs. Under his scheme, the siting authority announces the facility it wishes to site, the environmental and safety criteria it will use to determine appropriate sites, and its initial bid for the site. Any community that believes it has an appropriate site and wishes to accept the siting authority's bid may offer the site for consideration. If no community steps forward, the siting authority raises its bid. The siting authority continues to raise its bid until the facility would no longer be cost-effective or until a community steps forward, whichever comes first. If a community accepts the bid, some percentage of the compensation is transferred to a trust fund for the community, where it is held until the proffered site is approved on environmental and safety grounds. If the site is disapproved, the money is returned and the auction continues.<sup>49</sup>

Finally, a fifth method of determining compensation is through the use of a lottery.<sup>50</sup> Under a lottery scheme, the siting government asks all citizens in a region to be subject to the results of a lottery to pick the site for the facility, with the understanding that those who live in the areas spared the facility will be taxed to compensate those who live in the host community.<sup>51</sup> The compensation to be paid is the amount that the government must promise its voters in order to secure unanimous consent for the lottery.<sup>52</sup>

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may levy tax on hazardous waste facility to compensate for additional costs it incurs as a result of facility, but facility may appeal to administrative body and to courts); N.C. GEN. STAT. § 160A-211.1 (1987) (host city may levy tax on hazardous waste facility to compensate for additional costs it incurs as a result of facility, but facility may appeal to administrative body and to courts).

47. See, e.g., CONN. GEN. STAT. ANN. § 22A-128 (West 1985); MICH. COMP. LAWS ANN. § 299.520(6) (West Supp. 1993); MINN. STAT. ANN. § 115A.191(5) (West Supp. 1993); R.I. GEN. LAWS § 23-19.7-8 (1989); VA. CODE ANN. § 10.1-1442 (Michie 1989); WIS. STAT. ANN. § 144.445(8) (West 1989).

48. See, e.g., Herbert Inhaber, *A Market-Based Solution to the Problem of Nuclear and Toxic Waste Disposal*, 41 J. AIR & WASTE MGMT. ASS'N 808 (1991); Kunreuther et al., *supra* note 1, at 375; Howard Kunreuther & Paul R. Kleindorfer, *A Sealed-Bid Mechanism for Siting Noxious Facilities*, 76 AM. ECON. REV. PAP. & PROC. 295 (1986); O'Hare, *Not on My Block*, *supra* note 1, at 438-39.

49. Inhaber, *supra* note 6, at 60-62; Inhaber, *supra* note 48, at 811-13.

50. Sullivan, *Siting Noxious Facilities*, *supra* note 1, at 360-61.

51. *Id.*

52. *Id.* at 363-66. Sullivan offers an economic model to show that the compensation necessary to secure unanimous consent to the lottery will be lower than the compensation required to site facilities through negotiation. *Id.*

#### 4. *Triggering a Community's Involvement*

Most compensation proposals allow communities to step forward and reveal their interest in exploring the possibility of hosting a facility.<sup>53</sup> Some proposals and programs, however, allow facility developers to select the community in which they would like to locate the facility, and to initiate discussions with that community.<sup>54</sup>

#### 5. *Ensuring Efficiency*

Finally, the proposals differ in the mechanisms they use to ensure that negotiations produce an efficient level of compensation.<sup>55</sup> If all communities are fully informed about the costs of a facility, and all enjoy equal bargaining power, a siting will be most efficient if the facility is placed in the community that is willing to accept the facility for the lowest price (assuming that the price covers all the costs the facility imposes).<sup>56</sup> To promote such efficiency, some proposals attempt to create a competitive market for agreements between facility developers and communities.<sup>57</sup>

## II. Theoretical Tests Of The Proposals

Several scholars have attempted to test the likelihood that compensation programs will succeed through surveys asking people whether they would be willing to accept a facility in their community in exchange for some form of compensation. The surveys' results show that a relatively small number of people are willing to

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53. See, e.g., *Inhaber*, *supra* note 6, at 61-62.

54. This feature has been a major source of criticism in the Massachusetts program, which allows developers to target particular communities, then requires those communities to negotiate a compensation agreement. See *infra* text accompanying notes 170-95 & 219-24.

55. Howard Kunreuther's compensation proposals, for example, seek to prevent communities from strategically under-representing their willingness to accept the facility by demanding more compensation than they actually are willing to accept. Under his proposal, every community that could host the facility would submit under seal its "bid"—the lowest amount it would accept as compensation for hosting the facility. The lowest bid would be accepted, and all other communities would then be required to contribute towards the compensation payment an amount based upon its own bid. See Kunreuther et al., *supra* note 1, at 374-78; Kunreuther & Kleindorfer, *supra* note 48, at 296.

56. For explorations of the efficiency aspects of compensation mechanisms, see, e.g., Gerald R. Faulhaber & Daniel E. Ingberman, *Markets vs. Governments: The Political Economy of NIMBY* (1993) (unpublished working paper, on file with author); Mumphrey & Wolpert, *supra* note 16, at 117; James Richardson, *Nash-Efficient Siting of Hazardous Facilities*, 26 SOCIO-ECON. PLAN. SCI. 191 (1992).

57. Kleindorfer, *supra* note 1, at 204-05.

change their mind about a facility in exchange for compensation. The studies are reported here with those finding the greatest change in opinion listed first.

A survey of a sample of Wyoming voters about their willingness to accept a hazardous waste facility in or near their community revealed that 51% initially expressed a willingness to host the facility, 32% initially were opposed, and the remaining 17% initially were undecided.<sup>58</sup> Of those initially opposed, 10% indicated a willingness to accept the facility upon provision of additional state funds to the community. Moreover, 40% indicated a willingness to accept the facility if negotiations between community officials and site developers included citizen representatives, or if residents were provided more information about safety measures.<sup>59</sup> Of the 17% who initially were undecided, 31% indicated a willingness to host the facility in exchange for additional state funds, and 76% and 80% were willing to accept the facility in exchange for citizen representation or more information, respectively.<sup>60</sup> Thus, 7% of all respondents were more accepting of the facility if additional state funds were made available to the community, and 15% and 16% were more accepting if citizen representation or more safety information, respectively, were provided.<sup>61</sup> The survey concluded that incentives could serve to sway many undecided voters and a minority of those initially opposed to the facility.<sup>62</sup>

Similarly, a sample of Wisconsin residents were surveyed about whether they would oppose a radioactive waste repository, then were asked whether various incentives, including mitigation, compensation, and enhanced community control would change their minds. Incentives that guaranteed community control, such as independent monitoring and representation on the facility's board, changed the percentage of people supporting the facility from 26% to 41%.<sup>63</sup>

Professor Rae Zimmerman surveyed a sample of New York City residents regarding their attitudes towards New York City's proposed "sludge management plan." Although respondents did not

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58. Charles Davis, *Public Involvement in Hazardous Waste Siting Decisions*, 19 POL'Y 296, 300-01 (1986). The Wyoming sample resulted in an unusually high percentage of people initially indicating a willingness to accept the facility. *Id.* at 301.

59. *Id.* at 302.

60. *Id.*

61. *Id.* at 302-03.

62. *Id.* at 303.

63. S.A. Carnes et al., *Incentives and Nuclear Waste Siting: Prospects and Constraints*, 7 ENERGY SYS. & POL'Y 324, 335 (1983).

state whether they would oppose the siting of a sludge facility such as a landfill or incinerator in their neighborhoods, 55% stated that they thought it was very likely that a landfill would cause negative health effects, 57% believed it would lower the neighborhood's quality of life, and 64% believed it would cause a decline in neighborhood property values. When asked if various forms of compensation would "help . . . to get the activity approved," 41% of the respondents stated that the provision of neighborhood benefits, such as recreation facilities, would "help a lot" to get the facility approved, and another 30% thought such benefits would "help somewhat."<sup>64</sup>

Professor Kent Portney reported on a survey of a random sample of residents of five Massachusetts communities and a sample of 500 people across the nation. In Massachusetts, 61.9% of the respondents were "opposed" or "mostly opposed" to siting a hazardous waste facility in their community.<sup>65</sup> Nationwide, 54.6% were similarly opposed.<sup>66</sup> Opponents of a siting were asked whether they would feel differently if they were offered various incentives, such as a \$50 payment to each family in town, property value guarantees, an annual fee to the town, improved fire protection, and regular safety inspections by public officials and local citizens. In the Massachusetts survey, 43.9% of those initially opposed to the siting changed their minds when offered at least one form of compensation.<sup>67</sup> In the nationwide survey, the percentage of opponents who changed their minds was 33.6%.<sup>68</sup> In both surveys, the offer of regular safety inspections by public officials and local citizens swayed the most opinions.<sup>69</sup>

Patricia Freeman surveyed a random sample of adults in Tennessee and found, like Portney, that offering to allow a local committee to monitor the facility's safety was most likely to sway people's willingness to host a hazardous facility: 51% of those questioned said they would view a proposal more favorably if it contained that

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64. RAE ZIMMERMAN ET AL., SURVEY OF PUBLIC PERCEPTIONS OF ENVIRONMENTAL RISK, NEW YORK CITY SLUDGE MANAGEMENT PLAN 14-15, 18-19 (1991). The question is somewhat ambiguous, because it does not ask a respondent whether he or she would be more receptive to the proposal if compensation was offered. It is possible that respondents believed that the offer of compensation would make the proposal more acceptable to politicians or to other citizens, even though the individual respondent would not change her mind as a result of the compensation.

65. PORTNEY, *supra* note 34, at 13.

66. *Id.*

67. *Id.* at 31.

68. *Id.*

69. *Id.* at 34-35.

offer.<sup>70</sup> In contrast, only 28% indicated they would view a proposal more favorably if it would mean lower county taxes, and only 34% reported they were more willing to accept a facility if it provided 1,000 new jobs (a very high number for such facilities).<sup>71</sup> In addition, 5% to 6% of those surveyed indicated that offers of compensation would negatively impact their view of the proposal.<sup>72</sup>

Daniel Swartzman surveyed members of eight groups in a rural community near major transportation routes. The community was typical of the type of town selected as a host community, but had never been involved in a siting controversy.<sup>73</sup> Respondents were asked whether they would be willing to live within a mile of a hazardous waste landfill under various scenarios. In the first scenario, only 3.8% of the respondents indicated that they were willing to live within one mile of the landfill if the facility resulted in no property tax decreases. However, respondent willingness increased to 6.9, 10.7, and 13.7% if the facility resulted in a 25, 50, and 75% reduction in property taxes, respectively.<sup>74</sup> Under another scenario, only 4.1% of the respondents were willing to live within a mile of the facility if no annual user fee was paid to the community. Willingness increased to 9.1, 14.3, and 17.3% if the facility paid \$50,000, \$200,000, and \$500,000 in annual user fees.<sup>75</sup> Only 3.2% of the respondents were willing to live within one mile of the facility if the safety of the facility were monitored by the facility's operator. This number more than tripled if the state, private consultants, or local community members were involved in the monitoring.<sup>76</sup> Under the final scenario, 6% of the respondents were willing to live within one mile of the facility if the safety monitoring were performed quarterly. That number jumped, respectively, to 7%, 16%, and 20% if the monitoring were performed monthly, weekly, or daily.<sup>77</sup>

Howard Kunreuther surveyed a national sample of households and a sample of Nevada residents about their willingness to host a

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70. Patricia K. Freeman et al., *Legislative Representation on a Technical Policy Issue: Hazardous Waste in Tennessee*, 26 Soc. Sci. J. 455, 460 (1989).

71. *Id.*

72. *Id.*

73. Daniel Swartzman et al., *Reducing Aversion to Living Near Hazardous Waste Facilities Through Compensation and Risk Reduction*, 20 J. ENVTL. MGMT. 43, 47 (1985).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

high-level nuclear waste repository.<sup>78</sup> When asked how important a measure was in gaining support for the facility, "large grants for community facilities" were rated as very important by 47.9% of the Nevada sample and 42.4% of the national sample; property value guarantees were rated very important by 60.1% of the Nevada sample (the question was not asked of the national sample); and empowering a local committee to advise the facility's management on safety issues was viewed as very important by 69.8% of the Nevada sample and 67.8% of the national sample.<sup>79</sup>

Some of these studies can be criticized as inconclusive because they fail to specify the precise level of compensation that would be paid, or set ridiculously low compensation levels.<sup>80</sup> All can be criticized on the grounds that answers to hypothetical questions may not accurately reflect what people actually will do when confronted with a compensation proposal for a real facility.

Nevertheless, the studies provide substantial evidence that at least those compensation measures that guarantee local monitoring and control may sway a significant number of people to accept a facility. The studies also suggest that while compensation measures may not be sufficient to secure acceptance, they nevertheless may be necessary to gain sufficient support for the facility.

### III. Compensated Siting In The Real World

#### A. Compensated Siting and the Low-Level Radioactive Waste Policy Act

The Low-Level Radioactive Waste Policy Act of 1980 ("LLRWPA" or "the Act") required every state to "provide[ ] for the availability of [disposal] capacity" for low-level radioactive waste generated within the state.<sup>81</sup> The Act made clear, however, that it did not require each state to have its own disposal facility; instead, states were allowed to form interstate compacts whereby one state within the compact would host a regional facility.<sup>82</sup> As of January 1994, ten interstate compacts have been formed; five

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78. Howard Kunreuther et al., *Public Attitudes Toward Siting a High-Level Nuclear Waste Repository in Nevada*, 10 RISK ANALYSIS 469 (1990).

79. Douglas V. Easterling, *Siting Strategies to Instill Legitimacy: The Case of High-Level Nuclear Waste 154* (1993) (unpublished Ph.D. dissertation, University of Pennsylvania).

80. Inhaber, *supra* note 48, at 814.

81. 42 U.S.C. § 2021d (1988).

82. *Id.*

states, the District of Columbia and Puerto Rico are unaffiliated with any compact.<sup>83</sup>

The Low-Level Radioactive Waste Policy Act Amendments of 1985 allowed states and compacts to collect surcharges to "mitigate the impact of low-level radioactive waste disposal facilities on the host [s]tate."<sup>84</sup> The selection of the initial host state was an issue in four of the ten compacts.<sup>85</sup> Each of those four compacts employed a voluntary compensated siting program to identify the host state. All those efforts failed.<sup>86</sup>

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83. Nine compacts have received all necessary approvals. ENGLISH, *supra* note 2, at 7-16, 161; *Wyoming Switches Radioactive Waste Compacts*, 23 *Envtl. Rep. (BNA)* No. 9, at 711 (June 26, 1992); *Midwest Compact Decides to Oust Michigan, Says State Stalled Site-Selection Process*, 22 *Envtl. Rep. (BNA)* No. 14, at 835 (Aug. 2, 1991). Texas, Vermont, and Maine have formed a tenth compact. That compact will not be official until it is approved by the Vermont legislature, then by Congress. *Maine Votes to Send Waste to Texas*, HOUSTON CHRON., Nov. 4, 1993, at A25; Gary Enos, *High-Level Trouble; Radioactive-Waste Compacts Stalled*, CITY & STATE, Nov. 8, 1993, at 1; *Texas Agrees to Host Disposal Site in Low-Level Compact with Vermont, Maine*, 24 *Envtl. Rep. (BNA)* No. 7, at 323 (June 18, 1993); see also 42 U.S.C. § 2021d(c) & (d) (1988). Massachusetts, Michigan, New Hampshire, New York, and Rhode Island have not joined a compact. Hoversten, *supra* note 7, at 12A.

84. 42 U.S.C. § 2021e(d)(2)(E)(i) (1988).

85. Of the ten compacts, six had no need to induce states to volunteer to host the regional facility. The Northwest Compact was built around an existing facility in Hanford, Washington, and had no need to identify another host site. Joanne Omang, *States Are Juggling A-Waste Disposal Like Hot, ah, Potato*, WASH. POST, Mar. 2, 1983, at A3. The Rocky Mountain Compact contracted with the Northwest Compact to send its waste to the Hanford site, and consequently had no need to identify a host site. In four of the remaining compacts, a state that produced large amounts of waste agreed to host a regional site for a few other states that produce little waste, in order to secure the advantages of compact membership. ENGLISH, *supra* note 2, at 128; Marshall Ingwerson, *State Officials Eye Nuclear Waste Decision*, CHRISTIAN SCI. MONITOR, Sept. 12, 1986, at 3. Thus, the Central Midwest Compact was a marriage of convenience between Illinois, the biggest producer of LLRW in the midwest, and Kentucky, a low volume producing state. The Appalachian Compact was based on the understanding that Pennsylvania, one of the country's largest producers of LLRW, would host the regional site for Maryland, Delaware, and West Virginia, all low volume producing states. Matthew L. Wald, *Jersey and Connecticut Set Back on Atom Dump*, N.Y. TIMES, Jan. 4, 1985, at B3; Katherine Roberts & Carlyle C. Cougla, *States Change Partners on Nuclear Waste*, N.Y. TIMES, Jan. 6, 1985, § 4, at 7. The Southwestern Compact, in which California agreed to host a regional facility for Arizona and the Dakotas, was similarly motivated. Jerry Gillam, *Capitol Political Bombshell Fused by Nuclear Dump*, L.A. TIMES, May 20, 1985, § 1, at 3. The so-called "surf & turf" compact between Texas, Vermont, and Maine was formed after Texas sought low-volume states as partners in its compact. Paul Marks, *State Finding Few Takers for its Low-Level Nuclear Waste*, HARTFORD COURANT, May 24, 1992, at A1.

86. Some of the five states that eschewed regional compacts also have tried to attract volunteer host communities through compensation proposals, but none has yet been successful. See *infra* text accompanying notes 133-36.



The Midwest Compact Commission (originally composed of Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin) mailed a brochure to every county in the compact, offering \$2 million in annual benefits to a host community.<sup>87</sup> The benefit package included \$800,000 in unrestricted revenue, \$400,000 in wages, and \$800,000 in spending by the facility and its employees.<sup>88</sup> The host state would receive an additional \$600,000 annually.<sup>89</sup> Although some communities expressed interest, their states declined to volunteer.<sup>90</sup> Due to the absence of volunteers, Michigan was selected as the host state on the basis of the quantity of waste it generated.<sup>91</sup> Michigan eventually was ousted from the Midwest Compact after extended disputes over the funding and criteria for selecting a host community; Ohio replaced Michigan as the host state.<sup>92</sup>

Similarly, the Southeast Compact asked each of its member states (Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia) to consider the compensation and conditions it would require to host the compact's facility. No state volunteered,<sup>93</sup> and North Carolina eventually was selected as the host state.<sup>94</sup> The Central Compact (Arkansas, Kansas, Louisiana, Oklahoma, and Nebraska) also unsuccessfully sought a volunteer host state.<sup>95</sup> The Northeast Compact, composed of New Jersey and Connecticut, discussed how each might compensate the other for hosting a regional facility, but neither

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87. Howard Witt, *Seven States "Bid" for Toxic Waste Facility*, CHICAGO TRIB., Aug. 21, 1986, at 3.

88. *Seven States to Offer Incentives for Atomic Waste Disposal Site*, WASH. POST, Aug. 7, 1986, at A16.

89. *Washington Department Gives Tacoma Grant to Construct Waste-to-Electric Energy Plant*, 17 *Envtl. Rep. (BNA)* No. 19, at 674 (Sept. 5, 1986); cf. ENGLISH, *supra* note 2, at 32 (describing the incentive package as \$500,000 annually to the host state and \$800,000 annually to the host community).

90. ENGLISH, *supra* note 2, at 32; *Michigan Chosen from Midwest Compact as Site for Low-Level Waste Repository*, 18 *Envtl. Rep. (BNA)* No. 10, at 750 (July 3, 1987).

91. *Michigan Chosen from Midwest Compact as Site for Low-Level Waste Repository*, 18 *Envtl. Rep. (BNA)* No. 10, at 750 (July 3, 1987).

92. *Midwest Compact Decides to Oust Michigan, Says State Stalled Site-Selection Process*, 22 *Envtl. Rep. (BNA)* No. 14, at 835 (Aug. 2, 1991).

93. ENGLISH, *supra* note 2, at 119-20.

94. *Choice of North Carolina as Host for Facility Triggers Debate in State on Available Options*, 17 *Envtl. Rep. (BNA)* No. 22, at 794 (Sept. 26, 1986).

95. ENGLISH, *supra* note 2, at 131.

would agree to the arrangement.<sup>96</sup> Eventually, the two states agreed that each would site their own facility.<sup>97</sup>

Once each of the compacts had designated a host state, the host states and their compacts often used compensation to try to induce communities within the host state to volunteer to be the host community. Again, such attempts met with little success.

For example, in the Central Midwest Compact (consisting of Illinois and Kentucky) the small town of Martinsville in Clark County, Illinois,<sup>98</sup> initially indicated an interest in accepting the facility.<sup>99</sup> Martinsville received \$1.2 million in unrestricted funds during the site review process, and was promised approximately \$1 million in annual user fees and an influx of 100 jobs if the facility were located in the town.<sup>100</sup> In a referendum conducted in November 1988, 68% of the Martinsville voters, but only 41% of the Clark County voters, favored the facility.<sup>101</sup> In November 1990, a second referendum revealed that 56% of the Martinsville voters and only 26% of the Clark County voters continued to favor the project.<sup>102</sup> In January 1991, Martinsville adopted a resolution in favor of hosting the site as long as its officials were involved "in all aspects of the process, including the selection of the [facility] contractor . . . , negotiations regarding compensation and incentive measures, local oversight procedures, and other matters of local concern . . . ."<sup>103</sup> After extensive hearings, however, the state's siting commission rejected the site in 1992.<sup>104</sup> Illinois recently revamped its siting pro-

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96. Bob Narus, *Radioactive Waste Talks Set*, N.Y. TIMES, Nov. 22, 1987, § 11, at 4; see also E. Michael Blake, *Twenty Nagging Questions and Not-Necessarily-Satisfying Answers about LLW Management in the United States*, NUCLEAR NEWS, Dec. 1993, at 42 (describing the history of the Northeast Compact).

97. ENGLISH, *supra* note 2, at 128; Blake, *supra* note 96.

98. Wayne County, Illinois also expressed interest but its board of supervisors eventually voted against hosting the facility. See Thomas W. Lippman, *Possibility of Nuclear Dump Leaves Illinois County Bitterly Divided*, WASH. POST, Jan. 23, 1990, at A3 (describing payment of \$950,000 to Wayne County for the right to test the area for geological and soil suitability).

99. ENGLISH, *supra* note 2, at 55-65.

100. Chad Carlton, *No Takers for State's Nuclear Dump*, CHICAGO TRIB., Feb. 3, 1988, at 9.

101. ENGLISH, *supra* note 2, at 57.

102. *Id.* at 65.

103. *Id.* (quoting Resolution of the Martinsville City Council (Jan. 9, 1991), as reported in *The Reporter* (Martinsville, Ill.), January 10, 1991)).

104. *Rejection of Illinois Site as Low-Level Dump Could Raise Midwest Industries' Disposal Costs*, 23 *Env'tl. Rep.* (BNA) No. 26, at 1640 (Oct. 23, 1992).

cess to require the identification of potential host sites through scientific and technical screening, in addition to volunteerism.<sup>105</sup>

In the Southwestern Compact (California, Arizona, North Dakota, and South Dakota), three communities in California were "not only willing, but eager for the jobs and revenue promised by a new industry."<sup>106</sup> One of these three was selected for the site. Continued opposition to the site from a wide variety of interests, however, has stalled the siting process.<sup>107</sup>

In the Southeast compact,<sup>108</sup> North Carolina initially sought volunteers from among its local governments by offering the host community 2.5% of the facility's annual gross receipts, an annual "privilege license tax," and other benefits.<sup>109</sup> Northampton County volunteered to host the facility, which promised to provide the county between 150 and 300 new jobs and \$3.5 million annually.<sup>110</sup> The site was dropped from consideration, however, after thousands of county residents protested the proposal.<sup>111</sup> Siting officials then turned their attention to sites in Richmond and Wake Counties.<sup>112</sup>

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105. Under the new siting scheme, siting authorities will select at least ten potential sites on the basis of water and geological surveys. In addition, sites volunteered by landowners or local governments will be considered. The siting authority will then select an appropriate site on the basis of technical and scientific merit. Blake, *supra* note 96; *Illinois Low-Level Waste Siting Law Approved - Almost*, NUCLEAR WASTE NEWS, Feb. 11, 1993, available in LEXIS, Envirn Library, BNAENV File.

106. Shawn Hubler, *Only California is on Track for Nuclear Dump*, L.A. TIMES, May 20, 1991, at A1; see also Richard C. Paddock, *Accord Reached on Pact on Radioactive Dumping*, L.A. TIMES, Apr. 28, 1987, § 1, at 3.

107. See Dale Vargas, *Nuke Waste Piles Up as Dump Fight Rages*, SACRAMENTO BEE, Mar. 29, 1993, at A1; Abraham Kwok & Pamela Manson, *Nuclear Waste Dump Opposed Foes Call It Threat to Colorado River*, ARIZ. REPUBLIC, Jan. 18, 1993, at B1.

108. Because of the jobs and economic benefits the facility brings to the surrounding community, residents of Barnwell County, South Carolina, where the Southeast Compact's current facility is located, are fighting to keep the Barnwell facility open. Paul Marks, *Two States Poles Apart*, HARTFORD COURANT, June 21, 1991, at A1; Daniel P. Jones, *Waste-Disposal Costs Jump as State Misses Deadline*, HARTFORD COURANT, Jan. 3, 1992, at A1.

109. ENGLISH, *supra* note 2, at 131. In 1991, North Carolina's siting authority recommended that the host community's share of the gross receipts be increased to 6%, or about \$2.5 million annually. *Id.*

110. Joe Drape, *Officials' Pursuit of Waste Burner Inflames N.C. County*, ATLANTA J. & CONST., Feb. 23, 1991, at A2; *County Torn Over Hazardous Waste Facility As North Carolina Searches State for Location*, 21 ENVTL. REP. (BNA) No. 42, at 1839-40 (Feb. 15, 1991). But see ENGLISH, *supra* note 2, at 125 (more than two years after North Carolina sought a volunteer host, no community had volunteered).

111. Drape, *supra* note 110, at A2.

112. *'Carrot-Stick Approach' taken by Authority to Spur Contractor to Meet S.E. Compact Goals*, 23 ENVTL. REP. (BNA) No. 27, at 1712 (Nov. 6, 1992).

Those counties objected to the proposed facility.<sup>113</sup> On December 8, 1993, North Carolina's Low-Level Radioactive Waste Management Authority designated the Wake County site as the "preferred site," and has begun the license review process.<sup>114</sup>

Nebraska, which was chosen by the Central States Compact (Arkansas, Kansas, Louisiana, Nebraska, and Oklahoma) to host the regional facility, has offered \$1 million per year to the community that agrees to accept the facility.<sup>115</sup> However, no community has volunteered to accept the site. In April 1993, dissatisfied over Nebraska's lack of progress in siting a facility, the Southeast Compact Commission voted to close their regional facility in Barnwell, South Carolina to shipments of waste from states in the Central Compact.<sup>116</sup>

Connecticut, which along with New Jersey forms the Northeast Compact, also offered compensation to induce communities to step forward and volunteer for the facility.<sup>117</sup> Connecticut's offer originally included about \$750,000 per year in taxes and money for roads, as well as property value guarantees for neighboring prop-

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113. The counties sued to prevent further consideration of their sites, but the North Carolina Supreme Court held that the counties' claims were not yet justiciable. *Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth.*, 436 S.E.2d 113 (N.C. 1993).

114. *North Carolina Picks Wake County Site for Low-Level Radwaste Disposal Facility*, Hazardous Waste Bus., Dec. 15, 1993, at 4.

115. Nebraska's offer inspired "Talkin' Rad Waste Blues," a song that includes the following stanza in its lyrics:

I said, say, mister, where you from?  
You must think I'm pretty dumb.  
That stuff you're peddlin's nuclear trash.  
And we don't want your cold, hard cash.

Robert Dvorchak, *States Gird to Take Their Nuclear Waste as U.S. Bows Out*, L.A. TIMES, Mar. 26, 1989, at 8.

116. The LLRWPA Amendments authorize the Southeast Compact to refuse waste from states or compacts that are not meeting deadlines for the development of their own facilities. *Southeast Compact Closes Barnwell to Five States in Central Compact*, 23 Env'tl. Rep. (BNA) No. 52, at 3202 (April 23, 1993). In October 1993, the Southeast Compact voted to allow the Central Compact to resume using the Barnwell site until June 30, 1994, apparently satisfied that Nebraska was making progress toward site selection. *Southeastern Compact Commission Renews Disposal Contract with Five Central States*, 24 Env'tl. Rep. (BNA) No. 25, at 1177 (Oct. 22, 1993). For descriptions of the site selection process in Nebraska, see Blake, *supra* note 96; Richard R. Zuercher, *Nelson Renews Boyd County Fight After Generators Win LLW Access*, NUCLEONICS WEEK, Nov. 11, 1993, at 1.

117. Although Connecticut offered Texas \$100 million for the opportunity to send its waste to Texas, Texas refused. Kevin Mayhood, *Be the First to Volunteer and Keep a Dump Away*, N.Y. TIMES, Apr. 4, 1993, § 13CN, at 6; *Texas Compact: Likely Yes to Me., Vt., No to Conn.*, NUCLEAR NEWS, June 1993, at 70.

erty owners.<sup>118</sup> According to a spokesperson for the research company hired to select a site, the initial effort to find a volunteer community yielded "some response."<sup>119</sup> Nevertheless, the three communities identified as the leading potential sites were vehemently opposed to the siting.<sup>120</sup> Consequently, the state abandoned the proposed sitings, and is focusing again on providing sufficient incentives to motivate a community to volunteer. Connecticut's current incentives include \$350,000 for the first town to volunteer to be studied for a site, another \$250,000 for completing negotiations regarding the facility, an additional \$1 million for voting to approve the negotiated agreement and accept the facility, and \$1 million annually for hosting the facility.<sup>121</sup> In April 1993, Connecticut's Hazardous Waste Management Service announced that it would not receive proposals from volunteers until late 1993 or early 1994.<sup>122</sup> Accordingly, no conclusions can yet be drawn about the likely success of the new incentives. The other half of the Northeast Compact, New Jersey, adopted a "volunteer process" to find a host site in late 1993.<sup>123</sup> Again, it is too soon to assess the program's success.

In the Midwest Compact, little progress has been made toward the selection of a site since Ohio was designated as the host state. Indeed, Ohio has yet to agree upon a site selection procedure, although the leading proposals for a siting process include compensating the host community.<sup>124</sup>

In the Appalachian Compact, Pennsylvania is using financial incentives to urge communities to host a facility.<sup>125</sup> Several communities have expressed interest, but the contractor hired to recommend a site has chosen to complete a three stage state-wide site screening process before examining those communities' propos-

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118. Jennifer Kaylin, *Nuclear Dump Needs a Home; Communities Can't Say No*, N.Y. TIMES, Feb. 17, 1991, § 12CN, at 1.

119. *Id.*

120. Luz Villarreal, *Ten Years Ago, Radioactive Dump Passive Issue*, HARTFORD COURANT, July 13, 1991, at D1.

121. Mayhood, *supra* note 117, at 6.

122. Daniel P. Jones, *No Offers to Serve as Dump Site*, HARTFORD COURANT, Apr. 8, 1993, at C11.

123. Blake, *supra* note 96, at 42.

124. T.C. Brown, *Nuclear Waste Panels Hand In Reports Set up Independent Authority, Plan For 500 Years, One Says*, THE PLAIN DEALER, Sept. 3, 1993, at 3B; T.C. Brown, *Areas Seen As Unlikely for Waste Site*, THE PLAIN DEALER, Aug. 14, 1993, at 5B; T.C. Brown, *Nuclear Waste Site Issue Needs PR: Advisors Suggest Educating Public*, THE PLAIN DEALER, June 18, 1993, at 3B.

125. *Northeast: Clean Air Tops the List of Regional Issues*, GREENWIRE, Oct. 18, 1993, available in LEXIS, Envirn Library, BNAENV File.

als.<sup>126</sup> The first two stages of the process have been completed, and have disqualified about 46% of the state's land from further consideration.<sup>127</sup> The screening process is not expected to identify any potential sites until early 1995.<sup>128</sup>

In the tentative compact between Texas, Maine, and Vermont, Texas chose a site in Hudspeth County, near the Mexican border.<sup>129</sup> Because the county was not asked to vote on the facility, there is some dispute over whether Hudspeth County is a "volunteer" host.<sup>130</sup> The siting agreement provides that the county will receive a total of \$5 million from Maine and Vermont in exchange for hosting the site, plus 10% of the facility's annual gross receipts.<sup>131</sup>

New York, which chose not to join a regional compact,<sup>132</sup> also sought to induce communities to step forward by offering a significant incentive package. One town, West Valley, reportedly negotiated an incentive package totalling \$4.2 million in benefits ranging from a new town park to college scholarships for local teenagers, as well as \$1.5 million annually in new taxes and fees.<sup>133</sup> Residents of the town voted in a nonbinding referendum to reject the facility, but town officials nevertheless voted to accept it.<sup>134</sup> Under existing state law, however, the town is prohibited from taking low-level radioactive waste because it already hosts an inactive high-level ra-

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126. Richard R. Zuercher, *Audit, Complex Siting Issues Delay LLW Site Selection in Pennsylvania*, NUCLEONICS WEEK, Jan. 28, 1993, at 7.

127. *Nearly Half of Pa. Land Nixed in Site Screening*, NUCLEAR NEWS, Apr. 1993, at 69.

128. Enos, *supra* note 83, at 1.

129. TEX. HEALTH & SAFETY CODE ANN. § 402.0921 (West 1992).

130. For a description of the events leading to the selection of the site, see Roy Bragg, *Waste Not, Want Not; Nuclear Site Sparks Furor in W. Texas*, HOUSTON CHRON., Feb. 16, 1992, § State, at 1.

131. TEX. HEALTH & SAFETY CODE ANN. § 403.006 section 2.01(13) (West Supp. 1994).

132. Several other states that decided to remain outside compacts have made no progress toward siting a facility. See Enos, *supra* note 83, at 1 (New Hampshire has yet to even announce a siting policy); Scott Allen, *Landfill Closing May Create Crisis for Nuclear Industries*, BOSTON GLOBE, Oct. 29, 1993, at 41 (Massachusetts will not even decide whether to search for an in-state site until 1994).

133. Sam H. Verhovek, *Anxious Town Might Say Yes to a Nuclear Waste Dump*, N.Y. TIMES, June 28, 1991, at B1.

134. Sam H. Verhovek, *Despite Voters' 'No,' Board Allows Dump for Nuclear Waste*, N.Y. TIMES, July 11, 1991, at A1.

dioactive waste facility.<sup>135</sup> To date, the New York legislature has not acted to lift that ban.<sup>136</sup>

In sum, although most of the compacts and selected host states have used compensation to encourage host site volunteers, only California, North Carolina, and Texas have designated a community to host their facilities.<sup>137</sup> The host designated by North Carolina opposes the designation<sup>138</sup> and it is questionable that the host Texas selected actually volunteered for the site.<sup>139</sup> Even in California, where the designated host did volunteer, opposition to the facility from outside the host community may very well stall efforts to begin construction.<sup>140</sup> Accordingly, compensation proposals can hardly be seen as a success in the low level radioactive waste context.

## B. Nuclear Waste Policy Act

Both the Nuclear Waste Policy Act of 1982<sup>141</sup> ("NWP" or "the 1982 Act") and its 1987 Amendments ("the Amendments") rely in part upon compensation to induce volunteers for facilities to store high level radioactive waste ("HLRW")<sup>142</sup> and to mollify those communities selected as host sites when there are no suitable volunteers. The 1982 Act authorized compensation for host communities to replace taxes the county and state would have received had the facility been privately owned.<sup>143</sup> Moreover, it authorized "impact assistance" to host communities to compensate for any

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135. Verhovek, *supra* note 133, at B1.

136. Blake, *supra* note 96; see also N.Y. A.B. 7701, 215th Gen. Ass., 1st Sess. (1993) (authorizing study of the site); Jon R. Sorensen, *West Valley Eyed as N-Waste Site*, THE BUFFALO NEWS, Apr. 7, 1993 (reporting efforts to lift the ban).

137. Hoversten, *supra* note 7, at 12A; *North Carolina Authority Selects Site for Southeast's Next Low-Level Facility*, 24 Env't Rep. (BNA) No. 32, at 1497 (Dec. 10, 1993).

138. See *supra* text accompanying note 113.

139. See *supra* text accompanying note 130.

140. See, e.g., Robert Reinhold, *A Test Case for Nuclear Disposal*, N.Y. TIMES, Jan. 24, 1994, at A8 (California's site is stalled because the federal government has not yet agreed to transfer title to the land to the state; at least two lawsuits are pending that also could delay the project); *USGS Scientists Raise Concerns Over Ward Valley*, 24 Env't Rep. (BNA) No. 33, at 1531 (Dec. 17, 1993) (federal land transfer halted until lawsuits are resolved); *Indian Tribe, Citizen Groups Sue Over Licensing of Waste Site in California*, 24 Env't Rep. (BNA) No. 27, at 1239 (Nov. 5, 1993) (describing suit filed to overturn the licensing of California's site).

141. 42 U.S.C. §§ 10101-10226 (1983).

142. High-level radioactive waste is defined as highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste and other highly radioactive material. See 42 U.S.C. § 10101(12) (1988).

143. *Id.* § 10136(c)(3)(A).

negative impacts the facility imposed.<sup>144</sup> The 1982 Act failed, however, to make any progress toward siting HLRW facilities.<sup>145</sup> One community—Oak Ridge, Tennessee—agreed to host an interim storage facility, or monitored retrievable storage (“MRS”)<sup>146</sup> in exchange for a package of compensation. Tennessee refused, however, to support the agreement.<sup>147</sup>

The Amendments used additional promises of compensation to encourage progress toward siting.<sup>148</sup> First, the Amendments focused on siting a “permanent” repository for HLRW at Yucca Mountain, Nevada.<sup>149</sup> The Amendments authorized annual payments to Nevada of \$10 million during the siting and construction phase of the project and \$20 million after the facility opened.<sup>150</sup> Next, the Amendments offered additional incentives for communities and states to volunteer for MRS facilities. The Amendments established an Office of the Nuclear Waste Negotiator (“the Negotiator”)<sup>151</sup> and authorized the Negotiator to enter into “reasonable and appropriate” financial and institutional arrangements with states or Native American tribes willing to host an MRS.<sup>152</sup> The Amendments specified that such financial arrangements would include a minimum of \$5 million annually to the host state or tribe for every year prior to shipment of the waste, and \$10 million annually while the facility was in operation.<sup>153</sup>

The compensation offered to Nevada has not altered the views of the majority of Nevada residents and public officials who are adamantly opposed to the Yucca Mountain site.<sup>154</sup> The compensation offered to induce volunteers for MRS facilities, however, has been more successful. To date, the compensation has been in the

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144. *Id.* § 10136(c)(2)(A)(1).

145. For analyses of the failure of the 1982 Act, see, e.g., Easterling, *supra* note 79, at 43-55; Richard H. Bryan, *The Politics and Promises of Nuclear Waste Disposal: The View from Nevada*, 29 ENV'T., Oct. 1987, at 14.

146. Monitored retrievable storage facilities would serve as central receiving stations for high level radioactive waste and spent nuclear fuel and would prepare the waste for storage in a permanent geologic repository. See 42 U.S.C. § 10161-10169 (1988); see also Nicholas K. Brown, *Monitored Retrievable Storage Within the Context of the Nuclear Waste Policy Act of 1982*, 52 TENN. L. REV. 730 (1985).

147. Easterling, *supra* note 79, at 169.

148. *Id.* at 168-69.

149. 42 U.S.C. § 10172(a) (1988).

150. *Id.* § 10173a.

151. *Id.* § 10242.

152. *Id.* § 10243(b). Such agreements would be subject to Congressional approval. *Id.* § 10243(d).

153. *Id.* § 10173a.

154. See Bryan, *supra* note 145, at 33, 36; Easterling, *supra* note 79, at 170-75.



form of study grants, which tribes, states, counties, and other local governments may use to explore the feasibility of hosting an MRS.<sup>155</sup> There are three types of grants. Phase I grants provide up to \$100,000 to a potential host to perform virtually any kind of study.<sup>156</sup> As of January 1994, twelve counties and Native American tribes had been awarded Phase I grants.<sup>157</sup> Phase II-A grants provide up to \$200,000 for undertaking more focused environmental and technological studies of potential sites.<sup>158</sup> Nine tribes applied for Phase II-A grants; four were awarded.<sup>159</sup> Finally, Phase II-B grants involve amounts of up to \$2.8 million, but carry with them the expectation that the community will begin serious discussions with the Negotiator.<sup>160</sup> Two tribes have applied for a Phase II-B grants.<sup>161</sup>

Given the no-strings-attached nature of Phase I and Phase II-A grants it is difficult to draw any definitive conclusions as to the ultimate success of the compensation program. Moreover, the fact that only Native American tribes (many of which have significant unemployment and poverty<sup>162</sup>) applied for Phase II-A grants, may suggest that compensation proposals are attractive, if at all, only to the most desperate of communities. Finally, the states have undermined the compensation program by stepping in to prevent potential volunteer communities (and a number of Indian tribes) from applying for grants.<sup>163</sup> Accordingly, even if compensation can make facilities more attractive to host communities, it may be insufficient to persuade counties or states to acquiesce in the community's desire to host a facility.<sup>164</sup>

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155. Easterling, *supra* note 79, at 345.

156. *Id.*

157. Office of the Nuclear Waste Negotiator, Status of Department of Energy MRS Grants (1994) (unpublished paper on file with author).

158. Easterling, *supra* note 79, at 345.

159. *Id.* at 346 n.20; Office of the Nuclear Waste Negotiator, *supra* note 157.

160. Easterling, *supra* note 79, at 345.

161. Office of the Nuclear Waste Negotiator, *supra* note 157.

162. Easterling, *supra* note 79, at 357. For discussions of the charge that the waste industry has targeted Native American reservations for waste facilities because of the tribes' poverty, see Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. REG. 229, 231, 251-53, 258, 262 (1993).

163. Easterling, *supra* note 79, at 362.

164. In efforts to site a low level radioactive waste facilities, communities interested in preferred compensation also were prevented from hosting a facility by their county or state. See, e.g., *supra* text accompanying notes 90, 101-04, 147.

### C. State Negotiated Compensation Siting Programs for Hazardous Waste Facilities

Several states<sup>165</sup> have adopted compensated siting as part of their hazardous waste siting programs.<sup>166</sup> This Section describes in detail the experience of two state programs—Massachusetts and Wisconsin. The Massachusetts program is highlighted because the Massachusetts Hazardous Waste Facility Siting Act<sup>167</sup> (“the Massachusetts Act”) was hailed as a major advance in siting policy by both industry and environmentalists.<sup>168</sup> Moreover, it has served as a model for other states interested in compensated siting.<sup>169</sup> Wisconsin is discussed because its program has enjoyed the greatest success of any compensated siting program.

#### 1. Massachusetts

Under the Massachusetts Act, any developer proposing to construct a hazardous waste facility must notify the chief executive officers of the proposed host community and of all adjoining communities of its plan.<sup>170</sup> The developer is then prohibited from constructing the facility until the “local assessment committee” of

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165. Although the focus of this Article is on compensation programs in the United States, it should be noted that some Canadian provinces and several European countries also have used compensation in siting programs. Gary Davis & William Colglazier, *Siting Hazardous Waste Facilities: Asking the Right Questions in AMERICAN'S FUTURE IN TOXIC WASTE MANAGEMENT* 167, 172, 174 (Bruce W. Piasecki & Gary A. Davis eds., 1987); Inhaber, *supra* note 1, at 811 (discussing compensation programs in France and Japan); Barry G. Rabe, *Beyond the NIMBY Syndrome in Hazardous Waste Facility Siting: The Albertan Breakthrough and the Prospects for Cooperation in Canada and the United States*, 4 *GOVERNANCE* 184 (1991) (discussing compensation in the siting of a hazardous waste facility in Canada).

166. This section addresses only those states that have siting statutes requiring the facility developer to negotiate a compensation agreement with the host community. See, e.g., statutes cited *supra* note 47. Many other states mandate the provision of compensation to host communities independent of agreements reached between the developer and the host community. In those states, compensation is typically fixed at a lump sum amount or tied to the facility's gross receipts or tons of waste processed, or set by an administrative agency. See, e.g., statutes cited *supra* notes 45-46.

167. MASS. GEN. LAWS ANN. ch. 21D, §§ 1-19 (West 1981).

168. Jerry Ackerman, *IT Withdrawal Sparks Debate Over Siting Law on Hazardous Waste Facilities*, BOSTON GLOBE, June 16, 1984, available in Westlaw, Bostglobe Database; Andrew Blake, *IT - Other States and Other Troubles*, BOSTON GLOBE, Aug. 2, 1982, available in Westlaw, Bostglobe Database.

169. Ackerman, *supra* note 168.

170. MASS. GEN. LAWS ANN. ch. 21D, § 7. Notice of intent also must be given to the Hazardous Waste Facility Site Safety Council, the Department of Environmental Management, the Department of Environmental Quality Engineering, any regional planning agency of which the host community is a member, and the persons owning or controlling the land on which the developer proposes to construct the facility.

the host community has accepted a "site agreement" for the facility.<sup>171</sup>

Although the Massachusetts Act's siting agreement requirement affords potential host communities some protection against unwanted facilities, it also limits four significant tools that communities previously had used in excluding hazardous waste facilities from their neighborhoods.<sup>172</sup> First, it prohibits a municipality from imposing upon a facility any requirements for licenses or permits that were not imposed prior to the effective date of the Massachusetts Act.<sup>173</sup> Second, it requires local boards of health to issue a "site assignment permit" for the proposed site if the facility will impose "no significantly greater danger to the public health or public safety . . . than the dangers that currently exist in the conduct and operation of other industrial and commercial enterprises . . . not engaged in the treatment, processing or disposal of hazardous waste, but utilizing processes which are comparable."<sup>174</sup> Next, it prohibits a municipality from adopting zoning law changes to exclude a proposed facility.<sup>175</sup> Finally, it allows a facility to be constructed as of right on any industrially zoned site, provided that the facility has received the applicable permits and the developer and the municipality have entered into a site agreement.<sup>176</sup>

The notice of intent that triggers the siting agreement negotiation process must include a description of the following: the proposed facility; the type of wastes it would accept; the processes that would be used for the treatment or disposal of the wastes; the developer's prior experience in the construction and operation of hazardous waste facilities; and the developer's plans for financing the project.<sup>177</sup> In addition, the notice of intent may either name a specific proposed site, or describe the characteristics of a theoretically ideal site and ask for possible candidates.<sup>178</sup>

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171. *Id.* § 12.

172. *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102, 110 (Mass. 1984); Holzmagel, *supra* note 1, at 354-55.

173. MASS. GEN. LAWS ANN. ch. 21D, § 16.

174. MASS. GEN. LAWS ANN. ch. 111, § 150B (West 1983 & Supp. 1993).

175. MASS. GEN. LAWS ANN. ch. 40a, § 9 (West Supp. 1993).

176. *Id.* A municipality's zoning officials thus could not block a facility that the municipality's local assessment committee had approved.

177. MASS. GEN. LAWS ANN. ch. 21D, § 7; MASS. REGS. CODE tit. 990, § 4.02(3) (1982).

178. MASS. GEN. LAWS ANN. ch. 21D, §§ 7, 9; MASS. REGS. CODE tit. 990, §§ 4.02-4.03 (1982). If the developer seeks suggestions regarding available sites, the Department of Environmental Management is required to accept suggestions for a site for a period of 50 days. If no suggestions are proffered during that period, the Department is required to extend the period for suggestions for another 30 days, and is authorized

Once a notice of intent has been filed, the Hazardous Waste Facility Site Safety Council ("the Council") is required to determine whether it is "complete."<sup>179</sup> If the notice is deemed complete, the Council must review the proposed project within 15 days to determine if it is "feasible and deserving of state assistance."<sup>180</sup> Following a successful review,<sup>181</sup> the developer and the proposed host community's local assessment committee then begin negotiating the terms under which the proposed host community would agree to accept the facility.<sup>182</sup> The local assessment committee consists of the chief executive officer and representatives of the proposed host community's board of health, conservation commission, planning board, and fire department.<sup>183</sup> The committee members then elect four residents of the municipality to serve on the committee; three of the four must be residents of the area within the municipality most immediately affected by the proposed facility.<sup>184</sup> In addition, the chief executive officer may appoint up to four additional mem-

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to suggest sites within the proposed host community that it reasonably believes might be "readily available" for the facility. At the conclusion of the suggestion period and any extension of that period, the Department is required to reduce the number of suggested sites to three, and to give notice to the community in which such a site is located, abutting communities, and the owners of the land at issue. MASS. GEN. LAWS ANN. ch. 21D, § 9; MASS. REGS. CODE tit. 990, §§ 7.02-7.04.

179. MASS. REGS CODE tit. 990, §§ 4.05-4.06 (1982). The Council may make the completeness determination only after providing the public a 45 day period to comment on the notice of intent. *Id.*

180. MASS. GEN. LAWS ANN. ch. 21D, § 7; MASS. REGS. CODE tit. 990, § 5.01 (1982). The Council must make its review in consultation with the department of environmental quality engineering. The Council's determination has been interpreted to be a "rough preliminary review" that focuses on whether there are "readily ascertainable and clearly dispositive" problems with the proposal that could reasonable be expected to prevent the project from obtaining necessary state and local approvals later in the process. Preamble to MASS. REGS. CODE tit. 990, §§ 1.00-16.00 (1987); *see also* tit. 990 §§ 5.02-5.04.

181. Within 30 days of the Council's determination that the proposal is feasible and deserving of state assistance, the Council is required to begin to conduct "briefing sessions" for the public regarding the proposed project. MASS. ANN. LAWS ch. 21D, § 8.

182. MASS. REGS. CODE tit. 990, § 11.01(1) (1982). Once the Council makes its feasibility determination, the developer is required to prepare a "preliminary project impact report" consisting of an environmental impact statement and a "social economic appendix." MASS. GEN. LAWS ANN. ch. 21D, § 10; MASS. REGS. CODE tit. 990, § 10.01-10.02. Although the developer and the community may begin negotiations before that report is completed, many do not. The negotiations must begin, however, once the developer submits a draft social economic appendix that the Council determines to be adequate. MASS. REGS. CODE tit. 990, § 11.01(2).

183. MASS. GEN. LAWS ANN. ch. 21D, § 5; MASS. REGS. CODE tit. 990, §§ 8.01-8.03 (1982).

184. MASS. GEN. LAWS ANN. ch. 21D, § 5.

bers, whose appointments must be approved by the municipality's legislative body.<sup>185</sup>

The local assessment committee is charged with representing the "best interests of the host community" by negotiating with the developer "to protect the public health, the public safety, and the environment of the host community, as well as to promote the fiscal welfare of said community through special benefits and compensation."<sup>186</sup> The local assessment committee is authorized to negotiate over the facility's design, construction, maintenance, operating procedures, and monitoring practices. In addition, the committee may negotiate regarding the services the host community will provide the developer and the compensation, services, and special benefits that the developer will provide the host community.<sup>187</sup> The negotiations accordingly should culminate in a siting agreement that sets forth the steps the developer will take to minimize and mitigate the harms the facility will impose on the community, as well as the measures the developer will take to compensate the community for unavoidable harms.<sup>188</sup>

If the negotiations fail<sup>189</sup> the Council may declare an impasse and require the parties to submit the disputed issues to arbitration.<sup>190</sup> The arbitrator or arbitration panel then determines the terms of the siting agreement, taking into account the interests of

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185. MASS. GEN. LAWS ANN. ch. 21D, § 5; MASS. REGS. CODE tit. 990, § 8.02 (1982). The four additional members appointed by the chief executive officer may include representatives of abutting communities, provided that those representatives have been approved by the legislative body of the abutting community. MASS. GEN. LAWS ANN. ch. 21D, § 5.

186. MASS. GEN. LAWS ANN. ch. 21D, §§ 5(1), 5(2); MASS. REGS. CODE tit. 990, § 8.06 (1982). The local assessment committee may seek "technical assistance grants" from the Council to aid the committee in assessing the impacts the facility will have on the community. These grants also may cover the costs the community incurs in participating in the site selection process. MASS. GEN. LAWS ANN. ch. 21D, § 11. The initial grant is not to exceed \$15,000, but a community may request an additional grant, and no limit on the amount of the additional grant is specified. *Id.* § 4(5).

187. *Id.* § 12.

188. Bacow & Milkey, *supra* note 1, at 280. A siting agreement must be approved by the majority of the committee. MASS. GEN. LAWS ANN. ch. 21D, § 13.

189. Even if the negotiations have not reached an impasse, the Council may require the developer and the committee to utilize a mediator if it finds that the negotiations are not proceeding satisfactorily within 45 days of the Council's determination that the developer has submitted an adequate draft socio-economic appendix. MASS. REGS. CODE tit. 990, § 11.02 (1982).

190. If the developer and the committee agree, a single arbitrator may be used. MASS. GEN. LAWS ANN. ch. 21D, § 15. Otherwise, the arbitration award will be determined by majority vote of a panel of three arbitrators, one selected by the developer, one by the committee, and one by agreement of the developer and the committee. *Id.*; MASS. REGS. CODE tit. 990, § 13.02 (1982).

the host community, the developer, and abutting communities.<sup>191</sup> The arbitrator or arbitration panel's determination is binding upon the parties,<sup>192</sup> and is subject to judicial review only on a very narrow range of nonsubstantive issues.<sup>193</sup>

Once the parties have entered into a siting agreement, or the arbitrator or arbitration panel has determined the terms of a siting agreement, the Council is required to review and approve the agreement.<sup>194</sup> Only after the siting agreement is entered into does the project begin the licensing and permitting processes designed to ensure that the project is environmentally and technologically sound.<sup>195</sup>

Since the Massachusetts Act was passed in 1980, it has been unsuccessful in encouraging communities to accept hazardous waste facilities.<sup>196</sup> Although six different developers have attempted to site facilities under the terms of the Massachusetts Act, no facility has been sited. The first developer, Cyclotech Corporation, proposed a recycling facility for the town of Gardner, which responded with substantial opposition. The developer agreed to be subject to

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191. MASS. REGS. CODE tit. 990, § 13.05 (1982).

192. The arbitration award is binding in the sense that it defines the terms under which the facility can be constructed and operated if the developer succeeds in obtaining the necessary permits and licenses. The award does not preclude the municipality from denying the site assignment permit that is required from the host community's board of health, from opposing the grant of permits and licenses by state agencies, or from challenging the award of a permit or license by those agencies. See Bacow & Milkey, *supra* note 1, at 289.

193. MASS. GEN. LAWS ANN. ch. 21D, § 15 makes the arbitration subject to the provisions of MASS. GEN. LAWS ANN. ch. 251, § 12(a) (West 1988), which allows courts to vacate an arbitration award only if the arbitrator committed fraud, showed demonstrable partiality, or exceeded his or her powers. For a discussion of the reviewability of the arbitration award, see Bacow & Milkey, *supra* note 1, at 297-301.

194. MASS. GEN. LAWS ANN. ch. 21D, § 10; MASS. REGS. CODE tit. 990, § 14.02 (1982). For a discussion of the Massachusetts Act's ambiguities regarding the nature of the Council's review of siting agreements, see Bacow & Milkey, *supra* note 1, at 292-93.

195. For a description of the provisions of the Massachusetts Act that do not pertain to the compensation and negotiation processes and thus are not discussed here, see Bacow & Milkey, *supra* note 1, at 284-86; Holznagel, *supra* note 1, at 366-68; Denise Provost, *The Massachusetts Hazardous Waste Facility Siting Act: What Impact on Municipal Power to Exclude and Regulate*, 10 B.C. ENVTL. AFF. L. REV. 715, 734-35 (1983); Note, *The Hazardous Waste Facility Siting Controversy: the Massachusetts Experience*, 12 AM. J.L. & MED. 131, 137-38 (1987) [hereinafter "Massachusetts Experience"].

196. See James L. Franklin, *State May Lose \$50M in Waste Cleanup Funds*, BOSTON GLOBE, Mar. 31, 1991, at 24; Massachusetts Hazardous Waste Site Safety Council, Summary and Explanation of Bill to Establish a New Process for Siting Hazardous Waste Facilities in Massachusetts 1 (May 22, 1992) (unpublished memorandum, on file with author).

the results of a referendum on the facility, which it lost by a nearly three to one vote.<sup>197</sup>

Next, Solv. Incorporated proposed that a solvent recovery facility be located in the town of Haverhill. Although the Council determined that the project met "the feasible and deserving of state assistance" threshold, the project met intense resistance, especially after a fire destroyed a similiar plant that the developer operated in New Jersey.<sup>198</sup> The project stalled when Haverhill sought judicial review of the Council's feasibility determination.<sup>199</sup> Solv. Incorporated eventually withdrew its proposal.<sup>200</sup>

A third facility was proposed by Envirite (which was named Liqwacon when the facility was first proposed). Although Envirite's notice of intent did not specify a proposed site, local landowners volunteered five sites. Freetown, in which two of these sites were located, initially expressed an interest in the facility.<sup>201</sup> That community eventually rejected the proposal, however, by a vote of 1575 to 471, with 58% of those registered voting.<sup>202</sup> Envirite then withdrew the proposal.<sup>203</sup>

Fourth, IT Corporation, proposed a multipurpose waste process facility for the town of Warren.<sup>204</sup> The town responded by bringing a declaratory judgment action challenging the constitutionality of the Massachusetts Act.<sup>205</sup> It also passed several by-law amendments meant to prevent the construction of the proposed facility. The first by-law amendment prohibited hazardous waste facilities within the town's borders except to store, treat, or dispose of wastes generated within the town<sup>206</sup>—a tactic not expressly fore-

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197. Bacow & Milkey, *supra* note 1, at 302.

198. Andrew Blake, *Panel Due to Act Tomorrow on Sites for Waste Facility*, BOSTON GLOBE, Dec. 9, 1981, available in Westlaw, Bostglobe Database; Susan Garland, *New England Braces for its First Toxic Waste Landfill Site*, CHRISTIAN SCI. MONITOR, Nov. 10, 1981, at 6.

199. Bacow & Milkey, *supra* note 1, at 303.

200. *Massachusetts Experience*, *supra* note 195, at 139.

201. Stephen Zisson, *5 Mass. Sites Offered for Toxic Waste Plant*, BOSTON GLOBE, Dec. 12, 1981, available in Westlaw, Bostglobe Database.

202. *Freetown Voters Reject Proposed Treatment Plant*, BOSTON GLOBE, Mar. 8, 1983, available in Westlaw, Bostglobe Database.

203. Ackerman, *Firm Cancels Plans for Waste Plant*, BOSTON GLOBE, Sept. 17, 1983, available in Westlaw, Bostglobe Database.

204. IT's original notice of intent did not specify a site for the proposed plant, but by the end of 1981, IT had narrowed its focus to two sites within the town of Warren. *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102, 107 (1984).

205. *Id.*

206. *Id.* at 107; see also *Massachusetts Experience*, *supra* note 195, at 140.

closed by the Massachusetts Act.<sup>207</sup> The second by-law amendment prohibited hazardous waste facilities within 500 feet of certain water resources.<sup>208</sup> The Massachusetts Superior Court dismissed the town's action, and declared the by-law amendments to have been preempted by the Massachusetts Act.<sup>209</sup> Although the Massachusetts Supreme Judicial Court affirmed the Superior Court's decision,<sup>210</sup> IT Corporation dropped its proposal shortly after the court's decision was announced, citing the high cost and uncertainty of going forward.<sup>211</sup>

A fifth proposal by Clean Harbors, Incorporated, sought to locate a solvent-recovery facility in an industrial park in the town of Taunton. The company withdrew its proposal, however, after neighboring industries objected to the siting.<sup>212</sup> Clean Harbors also proposed to build an incinerator in the town of East Braintree. Following a four year process, the proposal was rejected when the state's Department of Environmental Protection determined that the proposed project posed health and safety problems.<sup>213</sup>

Finally, Recontek proposed to construct a recycling plant, but did not specify a particular site.<sup>214</sup> After several towns competed to host the site, the company selected a site in the town of Or-

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207. Bacow & Milkey, *supra* note 1, at 303.

208. *Town of Warren*, 466 N.E.2d at 107.

209. *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 13 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,466, at 20,470 (Mass. Super Ct. Jan. 5, 1983).

210. *Town of Warren*, 466 N.E.2d, at 102. For a description of the litigation, see *Massachusetts Experience*, *supra* note 195, at 141-43.

211. Ackerman, *supra* note 168; Charles A. Radin, *IT Drops Plan for Waste Plant*, BOSTON GLOBE, June 15, 1984, at 1.

212. Jerry Ackerman, *Hazardous-Waste Hauling Firm Shelves Plan for Taunton Plant*, BOSTON GLOBE, Jan. 16, 1985, § Metro, at 23; James Simon, *State to Try Economic Lure in Search for Chemical-Waste Site*, BOSTON GLOBE, Jan. 20, 1985, § Metro, at 35.

213. James L. Franklin, *Braintree Incinerator Plan Killed*, BOSTON GLOBE, Sept. 20, 1990, § Metro, at 1. Clean Harbors spent between \$14 and \$16 million on its efforts to site the plant, and opponents spent more than \$500,000. See Elsa C. Arnett, *Permit Denial Will be Costly Clean Harbors' Failed Incinerator Bid Leads to \$16M Writeoff*, BOSTON GLOBE, Sept. 21, 1990, § Business, at 53; Patricia Nealon, *For Clean Harbors, New Fight to Keep Old Plant*, BOSTON GLOBE, May 12, 1991, § South Weekly, at 1. For reports of community opposition to the project, see James L. Franklin, *State Studies of Health, Siting Are Incinerator's Next Hurdles*, BOSTON GLOBE, July 29, 1990, § Metro/Region, at 24; Patricia Nealon, *Opponents of Toxins Incinerator Show New Stridency: Fight Over Clean Harbors Plan Escalates*, BOSTON GLOBE, Nov. 5, 1989, § South Weekly, at 1.

214. Ross Gelbspan, *Proposed Orange Waste Plant Gets Boost from Illinois Visit*, BOSTON GLOBE, Dec. 15, 1991, § Metro/Region, at 43.



ange.<sup>215</sup> The developer assured Orange that the facility would provide 180 new jobs, and would pump \$65 million annually into the local economy.<sup>216</sup> In March 1991, the town voted in a nonbinding referendum to continue examining the proposal, but voted 1,036 to 809 against the proposed location of the plant.<sup>217</sup> The proposal floundered in 1992, however, when the Council refused the developer's requests to delay the siting process.<sup>218</sup>

The Massachusetts Act has been the subject of considerable criticism and many calls for change.<sup>219</sup> Most recently, the Council itself proposed amendments to the Act which substantially revamp the siting process.<sup>220</sup> Those revisions primarily seek to ensure that scientific and technical reviews of proposed facilities are completed before the proposed host community is required to negotiate with the developer.<sup>221</sup> In addition, the proposed amendments continue to emphasize the role of mitigation and compensation in securing the host community's acquiescence to the facility.<sup>222</sup> One proposed

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215. John Glass, *Recontek Courts Small Town with Big Promises*, BOSTON BUS. J., July 23, 1990, at 1.

216. James L. Franklin, *Waste Recovery Plant Near Quabbin Wins Initial OK*, BOSTON GLOBE, Nov. 30, 1990, § Metro/Region, at 21.

217. James L. Franklin, *State May Lose \$50M in Waste Cleanup Funds*, BOSTON GLOBE, Mar. 31, 1991, § Metro/Region, at 24.

218. *Massachusetts*, HAZARDOUS WASTE NEWS, Sept. 1 1992, available in LEXIS, Envirn Library, CURNWS File.

219. For thoughtful analyses of the Act's successes and failures, see Rodgers, *supra* note 22, at 27-38.

220. Massachusetts Hazardous Waste Facility Site Safety Council, *supra* note 196. The Council's proposals are adopted in large part, but not in their entirety, in Mass. H.B. 4815, 178th Gen. Ct., 1993 Reg. Sess. The Council's recommendations were based in significant part upon an evaluation of the Act by a blue-ribbon panel of experts. James L. Franklin, *Waste Plant Siting Revamp Is Called for Panel: Promotion, Regulation of Facilities Should Be Separate*, BOSTON GLOBE, Dec. 10, 1990, § Metro, at 15.

221. For example, while the current Act allows a developer to file a notice of intent, and begin negotiations with the host community as soon as the Council has issued a determination that the proposal is feasible and deserving of assistance, see *supra* text accompanying notes 180-83, the proposed amendments would require the developer to obtain a "certificate of qualification" from the state before submitting any site specific proposal for a facility. The certificate of qualification would be a determination that the proposed facility is needed, that the proposed facility is technologically sound, and that the developer is qualified to build and operate the facility. See Mass. H.B. 4815, 178th Gen. Ct., 1993 Reg. Sess.; Massachusetts Hazardous Waste Facility Site Safety Council, *supra* note 196, at 5-6. These changes respond to the persistent argument that a project should be subjected to a much more searching review than the Council's "feasible and deserving" determination before a community is required to begin negotiations. See, e.g., ENGLISH, *supra* note 2, at 42-43; Jonathan Brock, *Mandated Mediation: A Contradiction in Terms*, 2 VILL. ENVTL. L.J. 57, 71-76 (1991).

222. See Massachusetts Hazardous Waste Facility Site Safety Council, *supra* note 196, at 1-2.

amendment, for example, would require the Council to adopt regulations specifying the minimum compensation that could be paid to a host community.<sup>223</sup> Another proposed change would include in the terms of the facility's license any mitigation measures sought by the community.<sup>224</sup>

The tenaciousness of the notion of compensated siting is evidenced by the fact that compensation remains a major part of the siting process despite the Massachusetts Act's failures over the past fourteen years. It is impossible to dismiss the theory of compensation because of the failures in Massachusetts, however, due to the difficulty of pinpointing the causes of those failures. Given that difficulty, and the lack of proven alternatives, it therefore is not surprising that there is little impetus to abandon the emphasis the Massachusetts Act places on compensation.

## 2. *Wisconsin*

The siting process in Wisconsin proceeds on two independent tracks. The first track involves the state licensing process, and the second involves local approval of the facility.<sup>225</sup> The local approval process begins when the developer applies for any permits, licenses, zoning variances, special use permits, or other approvals required by the proposed host community.<sup>226</sup> Within sixty days of such applications, the host community, the host county, and any

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223. The Council's proposed amendments seem to envision that a host community could negotiate for compensation beyond the minimums specified by regulation, and to negotiate for conditions regarding the facility's construction and operation beyond those included in the facility's license. See, Massachusetts Hazardous Waste Facility Site Safety Council, *supra* note 196, at 9-11. H.B. 4815, on the other hand, seems to limit communities to the compensation specified in the minimum schedule, and preclude communities from imposing conditions upon the facility other than those accepted by the Commissioner of the Department of Environmental Protection in the facility licensing procedure. See Mass. H.B. 4815 §§ 9-10, 178th Gen. Ct., 1993 Reg. Sess.

224. See, Massachusetts Hazardous Waste Facility Site Safety Council, *supra* note 196, at 9-11; Mass. H.B. 4815 § 9, 178th Gen. Ct., 1993 Reg. Sess.

225. For a description of the state permitting track, see Arthur J. Harrington, *The Right to a Decent Burial: Hazardous Waste and Its Regulation in Wisconsin*, 66 MARQ. L. REV. 223, 242-52, 266-70 (1983); Mary Beth Arnett, *Down in the Dumps and Wasted: The Need Determination in the Wisconsin Landfill Siting Process*, 1987 WIS. L. REV. 543, 549-56. For discussions of the local negotiating track, see Bingham & Miller, *supra* note 9, at 482-83; Harrington, *supra*, at 259-66.

226. Like the Massachusetts statute, the Wisconsin statute limits the ability of municipalities to block a proposed facility by adopting new permitting processes. Municipalities may require developers to secure only those approvals that were in effect at least 15 months before the developer submitted either an "initial site report" or "feasibility report," the documents that trigger the state permitting process. WIS. STAT. ANN. §§ 144.445(3)(fm), 144.445(5) (West 1989).

other "affected municipality" within 1,200 feet of the proposed facility<sup>227</sup> must elect whether to participate in negotiations with the developer.<sup>228</sup> Those that do not elect to participate in the negotiations waive their right to require the developer to obtain any local permits or other approvals.<sup>229</sup>

If a municipality elects to negotiate, it must pass a "siting resolution" stating its intention to negotiate, and if necessary to arbitrate, an agreement with the developer.<sup>230</sup> The governing body of the municipality also must appoint members to the "local committee" that will conduct the negotiations.<sup>231</sup> The host community may appoint four members, no more than two of whom are elected officials or municipal employees; the host county may appoint two members; and any other affected community may appoint one member.<sup>232</sup>

The developer and the local committee may negotiate any subject except the need for the facility. However, they may not agree to reduce any of the responsibilities the state imposes upon the developer.<sup>233</sup> The parties may agree to use a mediator to facilitate negotiations; the mediator may not compel a settlement, however.<sup>234</sup> If the parties reach a settlement, the terms of the agreement must be approved by the governing body of each host municipality that has participated in the negotiations.<sup>235</sup> The refusal of any governing body to accept the settlement renders the settlement void.<sup>236</sup>

If the local committee and the developer cannot reach a settlement, either or both of the parties may petition the Waste Facility

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227. Communities that do not meet the 1200 feet definition may be added as a party to the negotiations upon agreement of all other parties to the negotiation. *Id.* § 144.445(7n)(a).

228. *Id.* § 144.445(6).

229. *Id.* § 144.445(6)(f). A municipality may change its decision to negotiate by rescinding its siting resolution. It then waives its right to apply any local permitting or approval requirements to the developer. *Id.* § 144.445(6)(d).

230. *Id.* § 144.445(6)(a).

231. *Id.*

232. *Id.* § 144.445(7)(a).

233. *Id.* § 144.445(8)(a). If the parties disagree about whether a proposal concerns a non-negotiable item, they may seek a determination of the Waste Facility Siting Board ("Board"). *Id.* § 144.445(9)(b). If the parties negotiate any terms which affect the developer's responsibilities under the plans submitted to the state in the state licensing process, the Department of Natural Resources (DNR) may review the terms, rejecting any that would make the developer's obligations less stringent than required under those plans. *Id.* § 144.445(9)(f).

234. *Id.* § 144.445(9)(c).

235. *Id.* § 144.445(9)(j).

236. *Id.* § 144.445(9)(k).

Siting Board ("the Board") to submit the matter to arbitration.<sup>237</sup> The Board may order the parties to continue negotiating, or may order the parties to submit their final offers for arbitration.<sup>238</sup> Although the local committee and the developer may negotiate over any subject except the need for the facility or the reduction of the state-imposed responsibilities,<sup>239</sup> the subjects that are arbitrable are more limited.<sup>240</sup> The arbitration award must adopt, without modification, the final offer of either the local committee or the developer.<sup>241</sup>

The Wisconsin siting statute has enjoyed moderate success. By the end of 1993, siting agreements had been entered into for five hazardous waste sites and forty-one solid waste sites.<sup>242</sup> A study of the twenty-one agreements reached before April 1987 revealed that compensation to the municipalities included: start-up payments of between \$75,000 and \$325,000; annual payments of between \$6,000 and \$35,000; free or discounted waste disposal services; road maintenance fees; reimbursement for costs of firefighting; reimbursement for lost revenues due to property tax exemptions; reimbursement of the municipality's cost of negotiating the agreement; and funding of a local advisory or monitoring committee.<sup>243</sup> Compensation to individuals included start-up payments, property

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237. *Id.* § 144.445(10)(a) & (b).

238. *Id.* § 144.445(10)(d) & (f). The Board may delay arbitration until items required under the parallel state permitting track have been submitted. *Id.* § 144.445(10)(e). If the Board orders the parties to submit their final offers, the local committee's final offer must be approved by each participating municipality's governing body before it is submitted. *Id.* § 144.445(10)(l). The final offer can include only items the parties had offered in the prior negotiations. *Id.* § 144.445(10)(i).

239. *Id.* § 144.445(8)(a).

240. The issues that are arbitrable are: compensation to any person for substantial economic impacts which are a direct result of the facility; reimbursement of reasonable costs incurred by the local committee; screening and fencing related to the appearance but not the design of the facility; operational concerns such as noise, dust, odors, and hours of operation (except matters of capacity); traffic flows; uses of the site after the facility is closed; economically feasible methods to recycle or reduce the quantities of waste to the facility; and the applicability of any local approval requirements. *Id.* § 144.445(8)(b).

241. *Id.* § 144.445(10)(p). If the Board fails to issue an arbitration award, the governor must choose between the opposing final offers. *Id.*

242. Wisconsin Waste Facility Siting Board, *Case Log* (Dec. 20, 1993) (on file with author); Wisconsin Waste Facility Siting Board, *Settled Agreements* (undated) (on file with author). In addition to the settled agreements, three solid waste landfills were the subject of arbitrations. *Settled Agreements, supra*. At least three proposals for hazardous waste facilities, and 27 proposals for solid waste facilities are now being negotiated. *Case Log, supra*.

243. Richard G. Schuff, *Compensation in Negotiated Landfill Siting Agreements 5* (undated) (unpublished manuscript, on file with author).

value guarantees, testing of private wells and replacement of damaged water supplies, and crop damage guarantees.<sup>244</sup> Almost half of the agreements called for either no monetary compensation or very modest compensation amounts.<sup>245</sup>

#### D. Solid Waste — Industry compensation programs

The solid waste industry also has turned to compensation in order to secure community acceptance of undesirable land uses such as solid waste landfills and incinerators.<sup>246</sup> The programs have been successful in the sense that few communities now accept such facilities without bargaining for some form of compensation,<sup>247</sup> and some communities do accept LULUs that they almost certainly would have rejected in the absence of compensation.<sup>248</sup> But the compensated siting programs certainly have not been sufficiently successful to have solved the "garbage crisis."<sup>249</sup>

The best example of the limited success the compensated siting programs have enjoyed is the "community partnership" program instituted by Browning-Ferris Industries (BFI). In July 1990, BFI, one of the nation's largest solid waste landfill operators, announced that it was launching a landfill and recyclery siting initia-

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244. *Id.*

245. *Id.* at 4.

246. The hazardous waste industry also has used compensation to induce community acceptance of facilities. For descriptions of successful compensation programs other than those conducted under the auspices of the state hazardous waste siting programs described in part III.C., *supra*, see Benjamin Walter & Malcolm Getz, *Social and Economic Effects of Toxic Waste Disposal*, in *CONTROVERSIES IN ENVIRONMENTAL POLICY* 223, 240-43 (Sheldon Kamieniecki et al. eds., 1986).

247. Jeff Bailey, *Some Big Waste Firms Pay Some Tiny Towns Little for Dump Sites*, *WALL ST. J.*, Dec. 3, 1991, at A1, A6.

248. See, e.g., Pamela A. D'Angelo, *Waste Management Industry Turns to Indian Reservations as States Close Landfills*, 21 *Env'tl. Rep. (BNA)* No. 35, at 1607 (Dec. 28, 1990) (reporting that the solid and hazardous waste industries had approached Native American tribes with 20 different projects; 8 were rejected, 5 were under construction at one time although 2 of those closed because of local opposition, and 5 were in the process of negotiating contracts); Edythe Jenson, *Maricopa Welcomes Landfill*, *ARIZ. REPUBLIC/PHOENIX GAZETTE*, Feb. 12, 1993, § Community Southeast, at 6-1 (landfill welcomed after community was promised a large contribution to a road improvement district, \$150,000 annually in host fees, substantial property tax payments, "lush roadside landscaping" and public athletic fields); Edythe Jenson, *Landfill Siting Panel Wants to Start Over*, *ARIZ. REPUBLIC/PHOENIX GAZETTE*, May 17, 1993, § Chandler/Gilbert Community, at 1 (contrasting rejection of proposed public regional landfill with acceptance of Browning-Ferris landfill).

249. Michael Wiesskopf, *Even Cash for Trash Fails to Slow Landfill Backlash Public Resistance Widens U.S. Garbage Gap*, *WASH. POST*, Feb. 28, 1992, at A1.

tive in New York State.<sup>250</sup> BFI promised the residents and communities of New York that it would not even look for a site in a community until the community had voted to host the landfill and its officials had agreed to a package of "profit sharing" benefits. Prior to the community partnership program, BFI had failed in four different attempts to site a landfill through New York's conventional siting procedures.<sup>251</sup>

The company mailed a package of materials about the program to virtually every community in New York.<sup>252</sup> By the spring of 1993, BFI reported that more than 90 communities had asked to hear more about BFI's compensated siting program.<sup>253</sup> Three communities entertained proposals for a landfill. One small town, Yorkshire, discussed a "partnership" package in which BFI promised the town 100 new jobs, \$1.6 million in yearly fees, \$100 million in construction expenditures, and \$1.15 million in yearly grants to foster the town's long-term economic development.<sup>254</sup> After receiving a petition in which 70% of the town's registered voters expressed opposition to the landfill, the town board voted unanimously to reject the proposed landfill.<sup>255</sup> A second community, the town of Kingston, also turned down the proposed landfill.<sup>256</sup> A third community, Eagle initially voted to turn down the proposal, but then petitioned BFI to resubmit the proposal.<sup>257</sup> BFI's application for a permit is now pending before both the town and the State, but it appears that the town is willing to host the landfill.<sup>258</sup>

#### IV. Conclusion

Compensated siting programs are widespread. They form the basis for much of the siting activity taking place under the LLRWPA and NWPA. They are popular among states trying to site hazardous waste and solid waste facilities, and among the solid and hazardous waste industries.

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250. *BFI Partnership Plan Designed to Offer Economic Benefits for Hosting Landfill Sites*, *Env'tl. Rep. (BNA) No. 13*, at 548 (July 27, 1990) [hereinafter *BFI Partnership Plan*]; 1 *COMMUNITY PARTNERSHIP NEWS* 1 (BFI New York Autumn 1990).

251. Wiesskopf, *supra* note 249.

252. *BFI Partnership Plan*, *supra* note 250.

253. 3 *COMMUNITY PARTNERSHIP NEWS* 1 (BFI New York Spring 1993).

254. Wiesskopf, *supra* note 249.

255. *Id.*

256. Telephone Interview with Robert Raylman, Community Partnership Director, BFI New York Community Partnership Program (Mar. 25, 1994).

257. *Id.*

258. *Id.*

The programs are here to stay for the foreseeable future. No compensated siting program has been a "success" in getting LULUs sited. But neither has any other siting program. The experience so far suggests that while compensation may not be sufficient to resolve siting impasses, it can't hurt, and indeed may be one of several necessary elements of a solution. Until some panacea for siting controversies comes along, the temptation to use compensation to reduce opposition to siting proposals will be too strong to resist without better evidence that it is ineffective or counter-productive. Compensation programs therefore are likely to be a significant feature of siting activities for some time.

Because the programs are here, and here to stay, the environmental justice movement should be prepared to meet them head on. It should begin to formulate a more thoughtful and comprehensive policy about compensated siting programs.

Several lines of questioning should be pursued. Initially, environmental justice advocates should seek to articulate the circumstances under which compensation schemes are morally objectionable, and why. There are at least four major moral questions that require further exploration.<sup>259</sup> First, because the siting of noxious LULUs often involve risks to health and safety, the question arises whether compensation schemes commodify, or subject to the free market, matters that should not be bought and sold.<sup>260</sup> Society has chosen not to allow people to sell their kidneys to the highest bidder; should a similar judgment be made about whether people can sell their freedom from the health risks posed by nearby LULUs?

Second, it is likely that the communities that accept LULUs under compensated siting programs will be our poorest communities, because those communities lack alternative sources of funds. The distributional consequences of compensated siting programs therefore raise fundamental questions about our treatment of the poor and about the voluntariness of any site accepted by the communities.<sup>261</sup>

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259. For further discussion of the moral questions compensation programs raise, see Been, *What's Fairness Got To Do With It?*, *supra* note 2, at 1040-41, and sources cited therein.

260. For discussions about whether certain rights should not be traded on the market, see, e.g., Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1389-90 (1984); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903-37 (1987); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

261. ENGLISH, *supra* note 2, at 136-37.

Third, compensated siting programs allow a community to trade away the rights of future generations, who aren't represented at the bargaining table.<sup>262</sup> That fact raises difficult questions about the nature of our obligations to future generations.<sup>263</sup>

Finally, compensation schemes are likely to be considered immoral unless the community voluntarily enters into the siting agreement.<sup>264</sup> What are the essential elements of a voluntary agreement? Is an agreement voluntary, for example, if communities are, relative to site developers, ignorant about the risks and harms the facilities will impose?

None of these questions is susceptible to easy answers, and each requires a great deal more thought by environmental justice advocates. Once positions on those questions begin to emerge more clearly, there are second generation issues — assuming that at least some forms of compensation are moral in at least some circumstances, how do we structure compensation programs to be most fair? Those issues include, for example, the question of how to ensure that communities and siting officials have relatively equal bargaining power. Some states, such as Wisconsin, provide no money for local communities to do their own health and safety analyses, or even to hire their own consultants to review the industries' studies. Should such grants be required, and under what terms? Similarly, communities are at a severe disadvantage in finding out about what other communities have bargained for. The industry sometimes imposes as a condition of the bargain that the community not reveal the terms of the agreement.<sup>265</sup> Even where communities are free to reveal the terms, there is no centralized mechanism that allows communities to learn from each others' experiences easily. At the same time, there has been little research on how siting agreements have worked out in practice, so communities may find it hard to assess whether they should follow another community's example, even if they can discover the terms that the

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262. *Id.* at 98.

263. For general discussions of how the rights of future decisions might be taken into account in siting decisions, see Guy Kirsch, *Solidarity Between Generations: Intergenerational Distributional Problems in Environmental and Resource Policy*, in *DISTRIBUTIONAL CONFLICTS IN ENVIRONMENTAL-RESOURCE POLICY* 381 (Allan Schnaiberg et al. eds., 1986); Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 *VAND. L. REV.* 289-300 (1993); Roger E. Kasperson, *Social Issues in Radioactive Waste Management: The National Experience*, in *EQUITY ISSUES IN RADIOACTIVE WASTE MANAGEMENT* 24, 50-52 (Roger E. Kasperson ed., 1983).

264. See *ENGLISH supra* note 2, at 136-37.

265. Bailey, *supra* note 247.



other community was able to negotiate.<sup>266</sup> All of those issues require further attention.

Similarly, there are serious issues raised by the forms negotiations take. In many compensated siting programs, the community bargains through its elected officials, or through a committee appointed specifically for the bargaining. The community as a whole may have the power to review the terms of the siting agreement through a referendum. But none of the programs distinguishes between the interests of those who are most affected by the siting and those who are least affected. A community could, therefore, agree to accept a site in exchange for benefits that will advantage the majority of the community, but do little or nothing for those who live right next door to the facility. Should we reshape compensation programs to be more protective of those most affected, and if so how?<sup>267</sup> The converse of that issue is the question of whether people who are remotely affected by the siting should have the right to veto an agreement accepted by a community. If the host community accepts the facility, should the ski resort twenty miles away be able to veto the site because they fear that it might stigmatize the area and thereby reduce tourism? Such questions of how to identify who should have a say, and how to balance the rights of the various interested parties are critical to the design of a compensation program, but have received little attention.

The purpose of this article is to spur better thinking on those issues. The questions are difficult, and proposed answers undoubtedly will spark a great deal of controversy within the environmental justice movement. But compensated siting programs will get harder to change as time goes on, so there is value in joining the debate at the ground floor.

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266. Professor Kent E. Portney, Professor of Political Science at Tufts University, and the TELLUS Institute, a non-profit research organization, currently are analyzing host community agreements and studying how satisfied host communities are with the implementation of the agreements. That research should prove very helpful to communities negotiating compensation agreements in the future. Telephone Interview with James Goldstein, Associate Scientist, TELLUS Institute (May 6, 1994).

267. See *Been, Neighbors Without Redress*, *supra* note 2.