

James S. Lanard, is currently a legislative agent for the New Jersey Environmental Lobby. Mr. Lanard is an attorney in New Jersey, Pennsylvania, and Florida. He received his J.D. Cum Laude at the University of Miami Law School. Mr. Lanard received his B.S. Cum Laude Political Science degree at Boston University. The author's article provides the legal practitioner with an indepth analysis of the Hazardous Waste Facility Siting Act.

THE MAJOR HAZARDOUS WASTE FACILITIES SITING ACT

by James S. Lanard

Automobiles, electric hot air popcorn makers, nylons, and artificial eggs; all of these items have one thing in common. Their manufacture results in the generation of hazardous wastes. In fact, almost every product in the marketplace generates some amount of hazardous waste. All of these wastes must be discarded, treated, or stored in a safe and adequate manner so that public exposure will be minimized. Currently, however, many hazardous wastes are disposed of in an unsafe and health-threatening manner. In fact, the New Jersey Legislature found that "[t]he proper treatment, storage, or disposal of hazardous waste generated in this State is today the exception, rather than the rule, . . . [and] [t]hat the choice of hazardous waste disposal sites is now made, all too frequently, on an indiscriminate and illegal basis; . . ."¹ As a result of these findings, the New Jersey Legislature enacted a comprehensive law, The Major Hazardous Waste Facilities Siting Act,² in an attempt to guarantee the safe disposal of hazardous wastes.

This article will review the Act from four different viewpoints: first, an explanation of the Act; second, a status report concerning its implementation; third, a discussion of its implementation from the perspective of several people involved in its passage, and finally, the author's perspective.

I. *The Major Hazardous Waste Facilities Siting Act*

The goal of the Act is to insure that hazardous wastes³ are treated, stored, or disposed of in a proper manner.⁴ The Act requires that four major activities be completed before construction and operation of a hazardous waste facility⁵ can be approved. These activities are as follows:⁶

¹ N.J. STAT. ANN. § 13:1E-50 (West Supp. 1982-83).

² *Id.* §§ 13:1E-49 to -91 [hereinafter cited as the Act].

³ Hazardous wastes are "any waste[s] . . . which pose a present or potential threat to human health, living organisms or to the environment . . ." N.J. STAT. ANN. § 13:1E-51(k) (West Supp. 1982-83). Radioactive wastes have been specifically excluded from this definition. *Id.*

⁴ N.J. STAT. ANN. § 13:1E-50 (West Supp. 1982-83).

⁵ A hazardous waste facility is "any area, plant or other facility for the treatment, storage or disposal of hazardous waste . . ." N.J. STAT. ANN. § 13:1E-51(1) (West Supp. 1982-83).

⁶ See chart on page 388 which provides an overview of these activities.

1) the development of siting criteria for new major hazardous waste facilities;⁷ 2) the development of the Major Hazardous Waste Facilities Plan;⁸ 3) adoption of site designations for the number and type of new facilities determined to be necessary in the Plan;⁹ and, 4) approval of the registration statement and engineering design applications.¹⁰

Siting Criteria for New Major Hazardous Waste Facilities

The New Jersey Department of Environmental Protection (Department) is required to adopt criteria for the siting of new major hazardous waste facilities¹¹ within one year of the effective date of the Act.¹² The siting criteria must include provisions that prevent significant adverse environmental impact, including surface or ground water contamination, due to the location or operation of a hazardous waste facility.¹³ The Act also specifically prohibits the siting of a facility within two thousand feet of certain populated areas,¹⁴ within flood hazard areas,¹⁵ within wetlands,¹⁶ within any areas where the water table¹⁷ could get too close to the surface,¹⁸ and within an established distance from a nuclear power plant where spent nuclear fuel rods are stored.¹⁹

The Department is obligated to follow an established procedure for the development of the siting criteria so that the public will be provided an opportunity to comment.²⁰ During the preparation of the criteria, the Department must consult with the Hazardous Waste Advisory Council.²¹

⁷ N.J. STAT. ANN. § 13:1E-57 (West Supp. 1982-83).

⁸ *Id.* § 13:1E-58 [hereinafter cited as the Plan].

⁹ *Id.* § 13:1E-59.

¹⁰ *Id.* § 13:1E-60.

¹¹ A major hazardous waste facility is "any commercial hazardous waste facility which has a total capacity . . . of more than 250,000 gallons of hazardous waste . . ." N.J. STAT. ANN. § 13:1E-51(*l*) (West Supp. 1982-83). Certain recycling and rerefining of hazardous wastes are excluded from this definition. *Id.*

¹² N.J. STAT. ANN. § 13:1E-57 (West Supp. 1982-83).

¹³ *Id.* § 13:1E-57(a).

¹⁴ *Id.* § 13:1E-57(a)(1).

¹⁵ *Id.* § 13:1E-57(a)(2).

¹⁶ *Id.* § 13:1E-57(a)(3).

¹⁷ Water table is defined as "the upper limit of the portion of the ground wholly saturated with water." WEBSTER'S NEW COLLEGIATE DICTIONARY 1314 (1981).

¹⁸ N.J. STAT. ANN. § 13:1E-57(a)(4) (West Supp. 1982-83).

¹⁹ *Id.* § 13:1E-57(a)(5).

²⁰ *Id.* § 13:1E-57(b)(1)-(5).

²¹ *Id.* § 13:1E-57(a). The Council was created by N.J. STAT. ANN. § 13:1E-54 (West Supp. 1982-83); its specific duties and powers are defined in N.J. STAT. ANN. §§ 13:1E-55, -56 (West Supp. 1982-83).

Council members are appointed by the Governor with the advice and consent of the Senate²² and must be representative of specific interest groups.²³ In addition to consulting with the Council, the Department must publish preliminary siting criteria within six months of the effective date of the Act²⁴ and hold public meetings throughout the State within eight months.²⁵ After the Department revises the criteria based upon the comments made at the public meetings, but within ten months of the effective date of the Act, a public hearing²⁶ must be held on the revised criteria.²⁷ The Department reviews the comments from the public hearing, revises the criteria as necessary, and adopts the final criteria within one year of the Act's effective date.²⁸

The Major Hazardous Waste Facilities Plan

The Major Hazardous Waste Facilities Plan is to be developed by the Hazardous Waste Facilities Siting Commission²⁹ in consultation with the Council. The Plan is to include the following:

1. information about all hazardous waste facilities within New Jersey;³⁰
2. identity of every person involved in hazardous waste collection, treatment, storage, or disposal within New Jersey;³¹

²² *Id.* § 13:1E-54(a).

²³ *Id.*

²⁴ *Id.* § 13:1E-57(b)(1) (West Supp. 1982-83). The effective date of the Act is September 10, 1981.

²⁵ *Id.* § 13:1E-57(b)(2) states: "Notice of these meetings shall be published, at least 30 days in advance thereof, in at least two newspapers circulating in the specific geographic area where the meeting will be held. Notice of these meetings shall also be transmitted, at least 30 days in advance thereof, to every municipal clerk and environmental commission within the specified geographic area where the meeting will be held."

²⁶ *Id.* § 13:1E-57(b)(3) states: "Notice of this hearing shall be published, at least 30 days in advance thereof, in at least four newspapers of general circulation in this State."

²⁷ *Id.* § 13:1E-57(b)(4).

²⁸ *Id.* § 13:1E-57(b)(5).

²⁹ *Id.* § 13:1E-58(a). The Commission was established pursuant to N.J. STAT. ANN. § 13:1E-52(a) (West Supp. 1982-83) and is independent of the Department of Environmental Protection. *Id.* It is composed of nine members appointed for three year terms by the Governor with the consent of the Senate. N.J. STAT. ANN. § 13:1E-52(b) (West Supp. 1982-83). The Commission shall be representative of various interest groups. *Id.* Its powers are defined in N.J. STAT. ANN. § 13:1E-53 (West Supp. 1982-83).

³⁰ *Id.* § 13:1E-58(b)(1).

³¹ *Id.*

3. an inventory of hazardous wastes generated within the State;³²
4. a projection of hazardous wastes which will be generated for each of the next three years;³³
5. an assessment of the need for new major hazardous waste facilities within New Jersey;³⁴
6. an analysis of whether existing hazardous waste facilities are meeting current and proposed state and federal laws;³⁵
7. an analysis of matters related to transportation of hazardous waste;³⁶
8. proposals on ways to encourage codisposal means to solve the hazardous waste disposal problem;³⁷ and,
9. research and recommendations on a regional solution to the hazardous waste problem.³⁸

The Commission must prepare a proposed Plan within six months of the effective date of the Act and make it available to all those interested in it.³⁹ Within eight months, it must conduct public hearings throughout the State on the proposed Plan.⁴⁰ After revising the Plan, based upon the comments made at the public hearings, but within one year of the effective date of the Act, the Commission must adopt the Plan.⁴¹

Site Designations

The Commission, after consultation with the Council, must identify and designate potential sites for hazardous waste facilities.⁴² Each site is initially selected after a determination has been made that it satisfies the statutory siting criteria.⁴³ The site designation must accommodate the

³² *Id.* § 13:1E-58(b)(2).

³³ *Id.* § 13:1E-58(b)(3).

³⁴ *Id.* § 13:1E-58(b)(4).

³⁵ *Id.* § 13:1E-58(b)(5).

³⁶ *Id.* § 13:1E-58(b)(6).

³⁷ *Id.* § 13:1E-58(b)(7).

³⁸ *Id.* § 13:1E-58(b)(8).

³⁹ *Id.* § 13:1E-58(c)(1).

⁴⁰ *Id.* § 13:1E-58(c)(2).

⁴¹ *Id.* § 13:1E-58(c)(3).

⁴² *Id.* § 13:1E-59(a).

⁴³ *Id.* § 13:1E-60(b)(3).

facility needs as determined by the Major Hazardous Waste Facilities Plan.⁴⁴ The Act establishes a detailed process which must be undertaken before the final site designations are adopted.

The Commission first must propose potential sites for new major hazardous waste facilities within six months of its receipt of the siting criteria adopted by the Department, but in no event later than eighteen months after the effective date of the Act.⁴⁵ The local governing body, board of health, planning board, and environmental commission of a local government in which a site has been proposed must be notified in writing by the Commission of the site proposal.⁴⁶ In addition to this notice, the local governing body must be awarded a grant which it will use to pay for a site suitability study.⁴⁷ The local governing body must transmit its completed study to the Commission within six months of receipt of the grant.⁴⁸

An adjudicatory hearing concerning the proposed site, conducted by an administrative law judge, must be conducted within forty-five days of the Commission's receipt of the local government's site suitability study.⁴⁹ The local government shall be a party of interest to the hearing and shall have all rights accorded to a party in an adjudicatory hearing.⁵⁰ The administrative law judge must transmit his recommendations to the Commission within thirty days after the end of the hearings,⁵¹ but the judge may not favorably recommend a proposed site unless he finds "clear and convincing evidence that locating a major hazardous waste facility on the proposed site will not constitute a substantial detriment to the public health, safety, and welfare of the effected municipality."⁵² The Commission must act on the administrative law judge's recommendations within thirty days.⁵³ It may either affirm, conditionally affirm, or reject the

⁴⁴ *Id.* § 13:1E-59(a).

⁴⁵ *Id.* Additional or alternative sites can be designated by the Commission after a request has been made by a representative of a hazardous waste industry. The industry, however, has the burden of proof concerning the suitability of the site in the process which is described in the text immediately following this footnote. N.J. STAT. ANN. § 13:1E-59(b) (West Supp. 1982-83).

⁴⁶ *Id.* § 13:1E-59(a)(1).

⁴⁷ *Id.*

⁴⁸ *Id.* § 13:1E-59(a)(2).

⁴⁹ *Id.* § 13:1E-59(a)(3).

⁵⁰ *Id.*

⁵¹ *Id.* § 13:1E-59(a)(4).

⁵² *Id.*

⁵³ *Id.* § 13:1E-59(a)(5). The membership of the Commission is expanded by two members during this Commission activity: one additional member is appointed by the county and one by the local government in which the proposed site is located. N.J. STAT. ANN. § 13:1E-52(c) (West Supp. 1982-83).

administrative law judge's recommendations based upon its analysis of whether the proposed site would pose a significant threat to the environment or to the public health.⁵⁴ The Commission's failure to act will constitute an affirmance of the administrative law judge's recommendations.⁵⁵ The Commission's actions concerning site designation are to be reported in the minutes of its meetings which are delivered to the Governor. The matters reported in the minutes take effect in ten days, or earlier if the Governor so approves, unless he vetoes the minutes.⁵⁶

Registration Statement and Engineering Design Applications

Once the siting criteria, the Plan, and the site designations have been completed, applications for approval of a registration statement and engineering design may be submitted to the Department.⁵⁷ A registration statement is the "operating license, approved by the department, for a major hazardous waste facility."⁵⁸ An engineering design is "the specifications and parameters approved by the department for the construction and operation of a major hazardous waste facility."⁵⁹ No major hazardous waste facility may be constructed without prior approval of the registration statement and engineering design by the Department,⁶⁰ in consultation with the Council.⁶¹

The section in the Act concerning the registration statement and engineering design application process⁶² is divided primarily into two main parts. The first⁶³ involves the substantive information which must be submitted by the applicant. The other,⁶⁴ lists the procedure which will be used to evaluate the application.

⁵⁴ *Id.* § 13:1E-59(a)(5).

⁵⁵ *Id.*

⁵⁶ *Id.* § 13:1E-52(j).

⁵⁷ N.J. STAT. ANN. § 13:1E-60(b) (West Supp. 1982-83) prohibits the Department from approving these applications unless the site to be used for the facility is one which has been designated by the Commission. Therefore, the site designation process must be completed before an application can be approved. The satisfactory completion of the site designation process necessarily means that the adoption of the siting criteria and the Plan must have been completed. *See supra* note 43.

⁵⁸ *Id.* § 13:1E-51(p).

⁵⁹ *Id.* § 13:1E-51(i).

⁶⁰ *Id.* § 13:1E-60(a).

⁶¹ *Id.* § 13:1E-60(b).

⁶² *Id.* § 13:1E-60.

⁶³ *Id.* § 13:1E-60(b).

⁶⁴ *Id.* § 13:1E-60(c).

The Department must review a disclosure statement⁶⁵ which is submitted by the applicant, an investigative report prepared by the New Jersey Attorney General, and an environmental and health impact statement prepared by the Commission.⁶⁶ The disclosure statement lists the names and addresses of officers, directors, partners, and certain others who may be involved with the applicant in the ownership or operation of the facility.⁶⁷ Also included in the disclosure statement is a description of the past or present experience and credentials of key employees, officers, directors, or partners who will be involved with the applicant.⁶⁸ Information concerning administrative orders, license revocations, and judgments of liability or conviction concerning collection, treatment, storage, or disposal of hazardous waste must be included as it pertains to those involved in the proposed project.⁶⁹

The Attorney General's report will be based, in part, on information included in the disclosure statement.⁷⁰ The environmental and health impact statement, "prepared by the commission at the applicant's expense,"⁷¹ must include specific information as identified in the definition of environmental and health impact statement.⁷² The Department may not approve an application unless it finds that the statement indicates that "the proposed facility will pose no significant threat to human health or to the environment"⁷³

The Department must also consider the applicant's prior performance in the hazardous waste industry.⁷⁴ If any party to the application has been convicted of certain crimes concerning hazardous waste matters within ten years, the Department will not approve the application.⁷⁵

Any person who wishes to submit an application for registration statement and engineering design approval must give ninety days notice of his intent to submit an application.⁷⁶ This notice is sent to the Depart-

⁶⁵ Disclosure statement is defined in N.J. STAT. ANN. § 13:1E-51(h) (West Supp. 1982-83).

⁶⁶ N.J. STAT. ANN. § 13:1E-60(b) (West Supp. 1982-83).

⁶⁷ See N.J. Stat. Ann. § 13:1E-51(h)(1)-(3) (West Supp. 1982-83) for a specific list of people or businesses which must be identified in the disclosure statement.

⁶⁸ N.J. STAT. ANN. § 13:1E-51(h)(4) (West Supp. 1982-83).

⁶⁹ *Id.* § 13:1E-51(h)(5)-(6).

⁷⁰ *Id.* § 13:1E-60(b).

⁷¹ *Id.*

⁷² *Id.* § 13:1E-51(j).

⁷³ *Id.* § 13:1E-60(b)(2).

⁷⁴ *Id.* § 13:1E-60(b)(1).

⁷⁵ *Id.*

⁷⁶ *Id.* § 13:1E-60(c)(1).

ment and to the governing body of the municipality where the facility may be located.⁷⁷ The Department will confer with the Council and local government officials to determine if the individual submitting the letter of intent should submit a full application. The Department's assessment must be made within sixty days.⁷⁸

After an application is filed, the Department must provide copies of it to the local governing body, the board of health, planning board, and the environmental commission.⁷⁹ The local government then conducts a review of the proposed facility, the site plan, and the operator.⁸⁰ This review must be completed within six months of receipt of the application.⁸¹ The applicant is required to pay for the local government's expense in conducting the review provided the cost does not exceed fifteen thousand dollars per application.⁸²

The Department must complete its review within eight months of receiving the application.⁸³ At the completion of the review, the Department must either reject the application or give tentative approval.⁸⁴ Notice of tentative approval is accompanied by a fact sheet. The fact sheet is a compilation and description of what the Department is tentatively approving and how it reached its decision. The local government and the applicant must receive copies of the Department's decision.⁸⁵ If the local government rejects the application, the fact sheet must also explain why the Department gave tentative approval.⁸⁶

Once tentative approval is granted, there must be an adjudicatory hearing within forty-five days.⁸⁷ The local government shall be a party of interest to that hearing.⁸⁸ The administrative law judge must make his recommendations for action on the application to the Department within thirty days of the close of the hearing.⁸⁹ The judge must not recommend

⁷⁷ *Id.*

⁷⁸ *Id.* § 13:1E-60(c)(2).

⁷⁹ *Id.* § 13:1E-60(c)(3).

⁸⁰ *Id.* § 13:1E-60(c)(4).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* § 13:1E-60(c)(5).

⁸⁴ *Id.*

⁸⁵ *Id.* § 13:1E-60(c)(6).

⁸⁶ *Id.*

⁸⁷ *Id.* § 13:1E-60(c)(7).

⁸⁸ *Id.*

⁸⁹ *Id.* § 13:1E-60(c)(8).

approval of an application unless certain financial information has been presented, and unless he finds that the proposed facility will not significantly threaten the local residents' health, safety, or welfare.⁹⁰ The Department must act upon the judge's recommendation within sixty days by affirming, conditionally affirming, or rejecting his recommendations.⁹¹ Failure of the Department to act constitutes affirmance of the administrative law judge's recommendations.⁹²

Miscellaneous Provisions of the Act

1. Strict liability of owners/operators

All owners or operators of "a major hazardous waste facility shall be jointly and severally strictly liable, without regard to fault, for . . . all direct and indirect damages, . . . proximately resulting from the operations or closure of the facility, . . . [as well as for] the cleanup and removal of any discharge of a hazardous substance, [from the facility]." ⁹³ The liability imposed upon owners and operators shall not exceed \$50 million.⁹⁴ In addition, valid defenses shall include war, sabotage, or acts of God.⁹⁵

2. Preemption of local zoning laws

Local and county zoning laws are preempted by the Act once the Department has approved a registration statement and engineering design for a facility.⁹⁶ It should be noted, however, that "[a]ll major hazardous waste facilities shall be constructed in compliance with the 'State Uniform Construction Code Act.'" ⁹⁷

3. Award for information on violations

A person who supplies "information which proximately results in the arrest and conviction of any other person for illegal treatment, storage, or

⁹⁰ *Id.*

⁹¹ *Id.* § 13:1E-60(c)(9).

⁹² *Id.*

⁹³ *Id.* § 13:1E-62.

⁹⁴ *Id.* § 13:1E-62(b).

⁹⁵ *Id.*

⁹⁶ *Id.* § 13:1E-63.

⁹⁷ *Id.* For Uniform Construction Code Act see N.J. STAT. ANN. §§ 52:27D-119 to -141 (West Supp. 1982-83).

disposal of hazardous wastes shall be awarded one-half of any penalty collected as a result thereof."⁹⁸

4. Conservatorship

A conservatorship can be established over the control of a facility by the Commission under certain conditions.⁹⁹ Conservators generally will be appointed when a registration is revoked or suspended. The Act is comprised of extensive and detailed provisions concerning the powers and duties of the conservator.¹⁰⁰

5. Taxation of a facility

A facility is to be taxed as any other real property. In the event that the facility is located at a site which is exempt from local property taxation, the facility owner is to make payments equal to the taxes which would have been paid had the site not been exempt.¹⁰¹ The facility owner must also pay five percent of the gross receipts of the facility to the local government.¹⁰² These revenues may be used for certain activities related to the location and operation of the facility within the local government's boundaries.¹⁰³

6. Eminent domain

The Commission may exercise the power of eminent domain to acquire land for use as a major hazardous waste facility or for other uses related to the construction and operation of such a facility.¹⁰⁴ The exercise of this power is contingent upon four factors. First, the Commission must approve and adopt a facility site. Second, the Commission and the hazardous waste industry have entered into an agreement stipulating that the latter will pay for the land. Third, the hazardous waste industry must obtain the land pursuant to the preceding requirement. Finally, a registration statement and engineering design of the hazardous waste industry must be approved by the Department.¹⁰⁵

⁹⁸ N.J. STAT. ANN. § 13:1E-67 (West Supp. 1982-83).

⁹⁹ *Id.* § 13:1E-69.

¹⁰⁰ *See* N.J. STAT. ANN. §§ 13:1E-69 to -79 (West Supp. 1982-83).

¹⁰¹ *Id.* § 13:1E-80(a).

¹⁰² *Id.* § 13:1E-80(b).

¹⁰³ *Id.* § 13:1E-80(c).

¹⁰⁴ *Id.* § 13:1E-81(a).

¹⁰⁵ *Id.* § 13:1E-81(b)(1)-(4).

7. Inspections, training, and enforcement

Provisions for state¹⁰⁶ and local weekly inspections,¹⁰⁷ training of local or county health personnel,¹⁰⁸ local enforcement,¹⁰⁹ right of entry by local, county, or department personnel,¹¹⁰ and other enforcement and closure actions¹¹¹ have also been included in the Act.

8. Public information program

Within ninety days of the effective date of the Act,¹¹² the Commission is required to establish a public information program after consulting with the Department and the Council.¹¹³ The program must address the hazardous waste problem in New Jersey, the need for new facilities, the responsibilities of the Commission, the Council, and the Department, and the opportunities for public participation as provided in the Act.¹¹⁴

9. Specific criteria for facilities

The facility must meet certain minimum standards such as construction above the existing grade of the land and physical access to the facility by inspection personnel. If the foregoing requirements cannot be met, the facility plan may still be approved if: all other alternatives are impracticable; all hazardous waste may be effectively monitored; the design will permit almost complete extraction of hazardous waste stored therein; and the design will minimize, to the greatest extent possible, any danger to human health or the environment.¹¹⁵

10. Financial responsibility

Owners or operators of major facilities must establish escrow accounts, post performance bonds, or otherwise commit financial resources

¹⁰⁶ *Id.* § 13:1E-42.1.

¹⁰⁷ *Id.* § 13:1E-64(a).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 13:1E-64(b).

¹¹⁰ *Id.* § 13:1E-65.

¹¹¹ *Id.* § 13:1E-66.

¹¹² *Id.* § 13:1E-58(d).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 13:1E-61.

to insure adequate funds for the operation, closure, and post-closure periods of the facility.¹¹⁶

11. Appropriations

Of the \$500 thousand appropriated to the Department, \$400 thousand is allotted to the Commission for the following purposes: first, for the preparation and adoption of the Plan; second, for the proposal and adoption of sites for facilities; and third, for grants to municipalities to review proposed waste facility sites. In addition, fifty thousand dollars is allocated to the Department for local training programs. Finally, fifty thousand dollars is allocated to the Council for its advice and review pursuant to N.J. Stat. Ann. §§ 13:1E-54 to -56.¹¹⁷

II. *Status Report Concerning the Implementation of the Act*

Section one of this article described the major substantive provisions of the Act and the time frame within which certain activities were to be completed. This section will review the time frame to determine whether the deadlines have been met.¹¹⁸

Preliminary siting criteria were to have been made public six months after the effective date¹¹⁹ or by March 10, 1982. The preliminary siting criteria were made public by the Department on July 1, 1982. Public meetings concerning the preliminary criteria were to be held eight months after the effective date¹²⁰ or by May 10, 1982. The Department, in cooperation with the Council, held seven public meetings from July 15, 1982 to July 29, 1982.

The Department, with cooperation from the Council,¹²¹ was to revise the criteria based upon the comments made at the public meetings within nine months of the effective date of the Act¹²² or by June 10, 1982. The Council scheduled several work sessions throughout the Fall of 1982 to revise the criteria.¹²³ The Department was to conduct a public hearing on

¹¹⁶ *Id.* § 13:1E-68.

¹¹⁷ *See* 1981 N.J. Laws 279.

¹¹⁸ Unless otherwise noted, the dates referred to in the Act are based on the time periods from the effective date of the Act, namely, September 10, 1981. *See supra* note 23.

¹¹⁹ N.J. STAT. ANN. § 13:1E-57(b)(1) (West Supp. 1982-83).

¹²⁰ *Id.* § 13:1E-57(b)(2).

¹²¹ *Id.* § 13:1E-57(a).

¹²² *Id.* § 13:1E-57(b)(3).

¹²³ Letter from Hazardous Waste Advisory Council to Concerned Citizens (August 24, 1982).

the revised criteria within ten months of the effective date¹²⁴ or by July 10, 1982. The Hazardous Waste Advisory Council anticipates that public hearings will take place early in 1983.¹²⁵ The Department was to adopt siting criteria within one year of the effective date of the Act¹²⁶ or by September 10, 1982. The Department cannot adopt the criteria until after the public hearing¹²⁷ which will not be held until early 1983.¹²⁸

The Commission was to prepare the Major Hazardous Waste Facilities Plan within six months of the effective date,¹²⁹ or by March 10, 1982. As of September 7, 1982, the Commission had not begun preparation of the Plan.¹³⁰ The Commission's site designation process¹³¹ cannot begin before the Department adopts both the siting criteria¹³² and the Plan.¹³³ The Act calls for site designations to be adopted no later than eighteen months after the effective date¹³⁴ or by March 10, 1983. No application for registration statement and engineering design approval may be submitted before the site designation process has been completed by the Commission.¹³⁵ The Commission was to have established a public information program not later than ninety days after the effective date.¹³⁶ This program has not been developed as of September 7, 1982.

III. *Viewpoints of Several Council and Commission Members*

Council Members

The Council is to be comprised of thirteen members from specific interest groups.¹³⁷ The three members interviewed for this article were

¹²⁴ N.J. STAT. ANN. § 13:1E-57(b)(4) (West Supp. 1982-83).

¹²⁵ See *supra* note 123.

¹²⁶ N.J. STAT. ANN. § 13:1E-57(b)(5) (West Supp. 1982-83).

¹²⁷ *Id.*

¹²⁸ See *supra* note 123.

¹²⁹ N.J. STAT. ANN. § 13:1E-58(c)(1) (West Supp. 1982-83).

¹³⁰ See *infra* text at Section III for a discussion of several Commissioners' viewpoints concerning the Commission's activities. For the author's viewpoint see *infra* text at Section IV.

¹³¹ See *supra* text at Section I.

¹³² While there is no specific prohibition in the Act against the Commission adopting site designations before the Department adopts siting criteria, the siting criteria obviously must be adopted by the Department first in order for the Commission to have criteria upon which site determinations can be made. See N.J. STAT. ANN. § 13:1E-59 (West Supp. 1982-83).

¹³³ N.J. STAT. ANN. § 13:1E-59(a) (West Supp. 1982-83).

¹³⁴ *Id.* § 13:1E-59(a)(1).

¹³⁵ *Id.* § 13:1E-60(b)(3).

¹³⁶ *Id.* § 13:1E-58(d).

¹³⁷ *Id.* § 13:1E-54(a).

Robert Gregory, Vice-President and Technical Director of Rollins Environmental Services, Inc. in Delaware, a representative of operators of hazardous waste facilities;¹³⁸ Dr. Thomas Hellman, Director of Health, Safety and Environmental Services for the Allied Chemical Company in New Jersey, a representative of industrial users of hazardous waste facilities;¹³⁹ and Katherine Montague, a Director of the New Jersey Toxics Project, a representative of environmental/public interest organizations.¹⁴⁰

All three believe that all Council members took their responsibilities very seriously. They felt that the Council was prepared to continue its hard work in order to complete its assigned tasks. There was a consensus that the Council had a slow start because the members did not know each other. Dr. Hellman commented that although the Council members had different perspectives, they all were devoted to the issue. The Council was not formally appointed until January, 1982 more than four months after the effective date of the Act. Their late appointment caused them to miss the deadlines referred to previously. There also was a consensus that the Department had been very supportive of the Council's efforts and had provided technical advice as needed.

The environmental representative stated that she thought the greatest strength of the law was the process which allowed the public to ascertain how siting decisions were made. The industry user and industry operator both stated that they felt the Commission's powers of eminent domain were the Act's strongest provisions. They were not sure that the public participation process mandated by the Act would overcome the "not in my backyard" syndrome of the local residents. None of the members interviewed identified any major weaknesses of the Act and each thought that it was too early to know whether substantial changes would be required.

Katherine Montague felt that the Commission's need to exercise its eminent domain powers depended upon the proposed facility and its

¹³⁸ Interview with Robert Gregory, Vice-President and Technical Director of Rollins Environmental Services, Inc. (September 1, 1982).

¹³⁹ Interview with Dr. Thomas Hellman, Director of Health, Safety and Environmental Services for Allied Chemical Company (August 31, 1982).

¹⁴⁰ Interview with Katherine Montague, a Director of the New Jersey Toxics Project (August 31, 1982). Each person interviewed was asked the following questions: 1) How is the Council's work going?; the Commission's?; the Department's?; 2) What are the strengths and weaknesses of the Act?; 3) What improvements in the Act would you suggest?; 4) Do you think the siting process will work without the Commission exercising its power of eminent domain?; and, 5) Do you think the Commission's effectiveness will be jeopardized if site-specific legislation (banning the establishment of a facility at a specific site) is enacted into law?

potential operator. Montague expressed the belief that a good company with people who are involved and genuinely committed to resolving local concerns and fears, would remove the necessity for eminent domain proceedings. She qualified this statement by indicating that she did not believe public opposition could be overcome for all types of hazardous waste facilities. Mr. Gregory and Dr. Hellman were not as confident that local concerns and fears could be overcome. Although both of them were hopeful that eminent domain proceedings would not be necessary, they thought that such proceedings were inevitable. All agreed that site-specific legislation banning the establishment of a hazardous waste facility at a particular site would be counterproductive to the siting process mandated by the Act.

The Commission Members

The Commission consists of nine members from different interest groups.¹⁴¹ The Commissioners who were interviewed for this article are as follows: George Polzer, Executive Vice-President for Commercial Services of the Witco Chemical Corporation, an industry representative; Dr. Roy Gottesman, Vice-President for Environmental and Regulatory Affairs of Tenneco Chemicals, an industry representative; and Ann L. Auerbach, Natural Resources Director for the New Jersey League of Women Voters, an environmental representative.¹⁴²

The two industry representatives believed that the Commission was making good or excellent progress. They identified such tasks as searching for an Executive Director of the Commission as among the Commission's important accomplishments. The environmental representative thought that the Commission was moving very slowly. Auerbach believed that many Commission members had not yet developed a thorough understanding of the issues which the Commission had to address. She also expressed her belief that the Commission had to meet more frequently if it was to fulfill the purposes for which it was created. All three representatives were very favorably impressed with both the Council's achievements and with the Department's support and cooperation.

¹⁴¹ N.J. STAT. ANN. § 13:1E-52(b) (West Supp. 1982-83).

¹⁴² Interviews with George Polzer, Executive Vice-President for Commercial Services of the Witco Chemical Corporation; Dr. Roy Gottesman, Vice-President for Environmental and Regulatory Affairs of Tenneco Chemicals; and Ann L. Auerbach, Natural Resources Director for the New Jersey League of Women Voters (September 1, 1982). See *supra* note 140 for questions posed.

Polzer, an industry representative, stated that the eminent domain provision was the strongest aspect of the Act. Dr. Gottesman believed that the opportunity for local government participation in the siting process, incentives for local government to accept a facility (five percent gross receipts payments to the local government) and eminent domain were important strengths of the Act. Auerbach, the environmental representative, thought that the public participation provisions were among the strongest aspects of the Act, provided that the Commission implements an aggressive and effective public information program. There was a consensus that it was too early to determine whether or not the Act had any major weaknesses or needed any major improvements.

Each of the Commissioners acknowledged the necessary inclusion in the Act of an eminent domain provision; however, none were convinced that the Commission would actually have to exercise these powers. They all stated that the public participation procedures might be effective enough to negate the need for eminent domain proceedings. Each of the Commissioners believed that enactment of legislation banning a specific site as a possible location for a hazardous waste facility would seriously undermine the effectiveness of the Act.

IV. The Author's Viewpoint

Improper treatment, storage, and disposal of hazardous wastes result in serious environmental damage to drinking water supplies, public and private lands, highways, air, rivers, lakes, and other bodies of water. The Major Hazardous Waste Facilities Siting Act¹⁴³ seeks to prevent present and future improper treatment, storage, and disposal of these health-threatening wastes.

The establishment of new hazardous waste facilities has become an almost impossible task in the past few years. Strong public opposition arises almost every time an announcement is made that a new facility has been proposed for a community. This opposition is based in part on the fear that the facility will present a danger to the health and safety of the local residents. Many of these fears are well-founded through past experience with polluted drinking wells, leaching landfills, and the like. Some of the opposition is based upon a lack of confidence in the site decision making process.

¹⁴³ N.J. STAT. ANN. §§ 13:1E-49 to -91 (West Supp. 1982-83).

There are at least four reasons for this opposition: 1) widespread publicity of the devastating damage caused by legitimate and illegitimate hazardous waste facilities; 2) inadequate technical and financial requirements for the siting and operation of existing facilities; 3) inaccessibility of the public to the relevant technical data which was relied upon by the decision makers when the necessary permits and licenses were granted; and 4) inability of the public both to assess the data which was available and to generate their own data concerning the proposed facility due to severe lack of resources. The Act should overcome most of the problems related to the last three reasons.

Public Participation

Although there are very good provisions in the Act for public participation through public meetings and hearings in the development of the siting criteria¹⁴⁴ and the Plan,¹⁴⁵ the site designations,¹⁴⁶ and applications for approval for registration and engineering design¹⁴⁷ only require municipal government approval. These provisions, however, will only be effective if the public actually takes advantage of them. The statutorily required public information program must be a major activity of the Commission. This program was to have been established within ninety days of the effective date of the Act,¹⁴⁸ or by December 10, 1981. The Commission did not even have a proposed draft of the program by September 9, 1982. The program obviously needs to be developed and implemented as expeditiously as possible.

Deadlines Established by the Act

The Department has missed the deadline for adopting the siting criteria¹⁴⁹ and the Commission has missed the deadline for adopting the Plan.¹⁵⁰ These dates were missed primarily because of the somewhat optimistic time frame set out in the Act. In addition, the late start-up of the Commission and Council added to the delay.¹⁵¹ Notwithstanding

¹⁴⁴ *Id.* § 13:1E-57.

¹⁴⁵ *Id.* § 13:1E-58(c).

¹⁴⁶ *Id.* § 13:1E-59.

¹⁴⁷ *Id.* § 13:1E-60.

¹⁴⁸ *Id.* § 13:1E-58(d).

¹⁴⁹ *Id.* § 13:1E-57.

¹⁵⁰ *Id.* § 13:1E-58.

¹⁵¹ The Commissioners were not sworn in until April 27, 1982 or more than seven months after the effective date of the Act. The Council has never been sworn in; however, they began their work in January, more than three months after the effective date.

these delays, the dates could have been met had the Department and the Commission been willing to publish inferior materials. A delay in publication to insure better quality work products should be supported as long as a new, aggressive time table is established and publicized in the near future.

The Progress of the Council and the Commission

The Council members seem to have worked well together from the beginning.¹⁵² They have devoted much of the early meetings to informal discussion so that the members could get to know one another, learn each other's perspectives, and develop a mutual trust. This process has been very successful since the Council is now a cohesive group with a shared understanding of the nature of the hazardous waste problem and its potential solutions. The diversity of opinions held by the Council members should insure that all points of view are given sufficient consideration. The Council members seem willing to continue to work hard to fulfill their responsibilities. The proposed siting criteria and the extensive public meetings for which it is largely responsible are evidence of the Council's achievements to date.

The Commission, however, does not appear to have developed the same working relationship.¹⁵³ Commissioners have not gotten to know each other as well as have the Council members; several Commissioners have shown their lack of diligence by missing Commission meetings and not demonstrating a clear understanding of the Act. Moreover, they have not begun work on the Plan. Some components of the Plan might be more effective if they were developed after the adoption of the siting criteria,¹⁵⁴ however, the Commission need not wait for the siting criteria before commencing work in other areas.¹⁵⁵ It is hoped that the Commission will earnestly begin its work in the very near future.

¹⁵² The Council had its first meeting on January 21, 1982 and has met regularly since that time. See Meeting Minutes of the Hazardous Waste Council (January 21, 1982). Even though N.J. STAT. ANN. § 13:1E-54(a) (West Supp. 1982-83) requires that the Council members be approved by the New Jersey Senate, no one seems concerned that this confirmation has never taken place.

¹⁵³ The Commission's first meeting was held on April 1, 1982. The members were sworn in on April 27, 1982 and have met regularly since that time. See Meeting Minutes of the Hazardous Waste Facilities Siting Commission (April 27, 1982).

¹⁵⁴ See N.J. STAT. ANN. § 13:1E-58(b)(4), (b)(6), (b)(8) (West Supp. 1982-83) for possible activities which arguably would be better addressed after the criteria are adopted.

¹⁵⁵ See N.J. STAT. ANN. § 13:1E-58(b)(1)-(3), (b)(5), (b)(7) (West Supp. 1982-83).

Major Hazardous Waste Facility

A major hazardous waste facility is "any commercial hazardous waste facility which has a total capacity to treat, store or dispose of more than 250 [thousand] gallons of hazardous waste," ¹⁵⁶ Nowhere in the Act is there an explanation of what the 250 thousand gallon limit actually means. Some people have interpreted the limit to mean a maximum capacity at any one time, while others understand the limit to be based on the throughput at the facility during a specific time period, *i.e.* a day, a week, or a month. An explanation of the meaning of this limit should be published soon.

Grants to Local Governments

The Act requires that funds be made available to a local government in which a potential hazardous waste site or facility has been proposed. The funds must be made available at two critical times, during the site designation process, ¹⁵⁷ and during the application process for approval of a registration statement and engineering design. ¹⁵⁸ These funds will provide the local government with the resources to determine whether the proposed site or facility is acceptable. By having its own resources, the local government will be able to make that determination independent of the Commission and Department. The local residents, however, will not be satisfied by this independent fact-finding process if they have no confidence in the research conducted. Without this confidence, the process could become politicized. Consequently, the local government will be forced to reject the proposed facility or site. ¹⁵⁹

The credibility of the local government's research has an additional hurdle to overcome. When a facility is sited in a local government's jurisdiction, the operator is required to make tax payments or payments in lieu of taxes, ¹⁶⁰ to that local government. The operator also pays the local government five percent of the gross receipts of the facility. ¹⁶¹ These payments will often be significant. As a result, the public perception as to

¹⁵⁶ *Id.* § 13:1E-51(*l*).

¹⁵⁷ *Id.* § 13:1E-59.

¹⁵⁸ *Id.* § 13:1E-60.

¹⁵⁹ The Commission's power of eminent domain neutralizes the local politicization. This use of the power, however, does nothing to enhance public confidence in the selected site or in the local officials. See N.J. STAT. ANN. § 13:1E-81 (West Supp. 1982-83).

¹⁶⁰ N.J. STAT. ANN. § 13:1E-80 (West Supp. 1982-83).

¹⁶¹ *Id.* § 13:1E-80(b).

the impartiality of the public leaders' motives might be negative. Therefore, local governments must develop and implement their own comprehensive public information and public participation program before they expend the funds made available under the Act.

Grants to Local Community Groups

The Act does not require that any funds be made available to local community groups concerned about a proposed site or facility. During the drafting of the Act, there was discussion concerning a funding mechanism for these groups.¹⁶² The funds would have been available to enable them to perform independent site and facility reviews similar to those conducted by the local government. It was decided, however, to omit such a provision since it would be difficult to select the community group or groups to receive the funds.¹⁶³ The drafters decided that the local government funding provisions were sufficient.¹⁶⁴

If local governments do implement an effective public participation program concerning the use of the funds as previously suggested, then the funding of local community groups may not be necessary. Funding for community groups should be established if a local government does not develop an effective public participation program. These funds could be made available in one of the following ways: 1) by the Department if it has discretionary funds for such use; 2) by the Commission if it is determined that there is authority for such a grant; 3) by the applicant for approval of a registration statement and engineering design; 4) by grants from private or public foundations; and, 5) by amending the Act to include appropriations for this use.

Site Specific Legislation

Legislation prohibiting the establishment of a hazardous waste facility at a specific site would seriously undermine the entire siting process which is mandated by the Act. Such legislation should be strongly discouraged. In its place, public officials and citizens in New Jersey should actively cooperate with the Department and the Commission to insure that there are adequate rules and regulations concerning the siting and

¹⁶² Conversation with Katherine Montague who participated in the drafting of the Act.

¹⁶³ See *supra* note 162.

¹⁶⁴ *Id.*

operation of hazardous waste facilities and that proposed facilities will comply with the applicable rules and regulations.

V. *Conclusion*

The Major Hazardous Waste Facilities Siting Act¹⁶⁵ can go a long way towards solving one of New Jersey's most serious problems, namely, the unsafe and often illegal disposal, storage, and treatment of hazardous waste. It is a complex law with many innovative and, as yet, untried components. Its success depends largely upon the effectiveness of the Hazardous Waste Facilities Siting Commission, the Hazardous Waste Advisory Council, and the New Jersey Department of Environmental Protection. The diligent efforts of each entity are not enough without the support and cooperation of the public, the local governments, and the affected industries. Future problems related to the disposal, treatment, and storage of hazardous waste in New Jersey can only be resolved through the combined effort of all.

¹⁶⁵ N.J. STAT. ANN. §§ 13:1E-49 to -91 (West Supp. 1982-83).

THE IMPLEMENTATION PROCESS OF THE MAJOR HAZARDOUS WASTE FACILITIES SITING ACT*

Deadlines are from the effective date of the act (9/10/82) except where noted, and reflect the maximum allowable deadlines.

| | 90 Days | 6 Months | 8 Months | 9 Months | 10 Months | 12 Months | 18 Months | 24 Months | 25 1/2 Months | 30 days After Hearing | 30 days After Recommendation | 10 days After Commission Decision |
|---|----------------------------------|-------------------------------|--------------------------|---------------------------|--------------------------|--|--|--|--|--|------------------------------|-----------------------------------|
| Siting Criteria | | | | | | | | | | | | |
| Activity of DEP in Consultation with Council | | Preliminary Criteria 57(b)(1) | Public Meetings 57(b)(2) | Revised Criteria 57(b)(3) | Public Hearings 57(b)(4) | Final Criteria 57(b)(5) | | | | | | |
| Plan | | | | | | | | | | | | |
| Activity of Commission in Consultation with Council | Public Information Program 58(d) | Proposed Plan 58(c)(1) | Public Hearings 58(c)(2) | | Plan Adopted 58(c)(3) | | | | | | | |
| Site | | | | | | | | | | | | |
| Designation Activities Performed (as described in blocks) | | | | | | Commission Proposes Site: Grants Distributed to Local Gov't 59(a)(1) | Site Suitability Study by Local Gov't 59(b)(2) | Administrative Law Judge Recommendation 59(a)(4) | Administrative Law Judge Recommendation 59(a)(3) | Site Selections by Commission 59(a)(5) | | Governor's Approval 52(f) |

THE APPLICATION PROCESS FOR A REGISTRATION STATEMENT AND ENGINEERING DESIGN

Deadlines noted are the maximum allowed under the act

| | Prior to Submittal of Application | | | After Submittal of Application | | | | |
|--|-----------------------------------|---|-----------------------|--------------------------------|--|-------------------------------|--------------------------------------|-------------------------------------|
| | 90 Days | 30 Days | Application Submitted | 6 Months | 8 Months | Approx. 9 1/2 Months | 30 Days After Hearing | 60 Days After A.L.J. Recommendation |
| Registration Statement and Engineering Design | | | | | | | | |
| Preliminary Documents Sent to DEP and Applicant | | | | Local Gov't Review 60(c)(3) | DEP Review of Application & Report: Gov't, Local Gov't, or Tentative Approval 60(c)(5),(6) | Adjudicatory Hearing 60(c)(7) | A.L.J. Judge Recommendation 60(c)(8) | Final DEP Decision 60(c)(9) |
| Documents of Intent | | Review by DEP and Council of Preliminary Documents 60(c)(2) | | | | | | |
| A Brief Description of nature of the Facility | | | | | | | | |

* N.J. Stat. Ann. §§ 13:1E-49 to -91 (West Supp. 1982-83). All references in chart are to N.J. Stat. Ann. §§ 13:1E-60 (West Supp. 1982-83). These charts were modified from those published by the Association of New Jersey Environmental Commissions—with its permission.