

## HAZARDOUS WASTE REGULATION: A PRESCRIPTION FOR CLEAN WATER

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Scarcely a month passes in which a new hazardous waste crisis does not present itself. It has become an all too familiar occurrence to see headlines proclaiming new discoveries of illicit dumps, contaminated wells, and illnesses related to poisoning by toxic wastes. The magnitude and severity of the hazardous waste problem is well documented<sup>1</sup> and has clearly emerged as one of the most critical environmental and public health problems facing the nation,<sup>2</sup> as well as the State of New Jersey.<sup>3</sup>

The crux of the problem lies in the staggering rate at which organic and inorganic chemical compounds have been and continue to be generated from industrial processes.<sup>4</sup> Many of these substances, when contacted, ingested, or inhaled present a substantial threat to human health and to the environment.<sup>5</sup> Although much attention has

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<sup>1</sup> See, e.g., U. S. COUNCIL ON ENVTL. QUALITY, 1977 ANNUAL REPORT 45-50 [hereinafter cited as 1977 ANNUAL REPORT]; H.R. REP. NO. 1491, 94th Cong., 2d Sess. 17, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6238, 6254; HAZARDOUS WASTE ADVISORY COMM'N, REPORT TO GOVERNOR BRENDAN BYRNE 1 (1980) [hereinafter cited as N.J. ADVISORY REPORT]; see also M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS (1979).

<sup>2</sup> See *United States v. Price*, 523 F. Supp. 1055, 1057 (D.N.J. 1981); Magnuson, *The Poisoning of America*, TIME, Sept. 22, 1980, at 58-69. In this article Dr. Irving Selikoff, director of the Environmental Sciences Laboratory of New York City's Mount Sinai Medical School, is reported as predicting that "[t]oxic waste will be the major environmental and public health problem facing the U.S. in the 80s." *Id.* at 58; see also Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L.J. 117, 117-22 (1980).

<sup>3</sup> N.J. ADVISORY REPORT, *supra* note 1, at 1, 64.

<sup>4</sup> The Federal Environmental Protection Agency (EPA) estimated in 1980 that industry generates approximately fifty-seven million metric tons of hazardous wastes per year. Current Developments, 11 ENV'T REP. (BNA) 635 (Aug. 27, 1980). The rate at which these wastes are generated is expected to increase from four to six percent each year. See U.S. GEN. ACCOUNTING OFFICE, HAZARDOUS WASTE MANAGEMENT PROGRAM WILL NOT BE EFFECTIVE: GREATER EFFORTS ARE NEEDED 2 (1979) [hereinafter cited as GAO REPORT].

<sup>5</sup> See generally DEPARTMENT OF HEALTH & HUMAN SERVICES, 96TH CONG., 2D SESS., HEALTH EFFECTS OF TOXIC POLLUTION: REPORT FROM THE SURGEON GEN. TO THE COMM. ON ENV'T & PUB. WORKS (Comm. Print 1980).

The most common cause-and-effect analysis for lethal chemicals has linked asbestos with lung cancer, benzene with leukemia, kepone with sterility, and vinyl chloride with cancer of the liver. Magnuson, *supra* note 2, at 63.

been focused on the problems of air pollution and contaminated lakes and streams, it is only recently that the more ominous problem of the poisoning of the nation's underground reservoirs has emerged.<sup>6</sup>

Traditionally, much of the chemical waste was disposed of in landfills, lagoons, or ditches without treatment.<sup>7</sup> Lagoons and improperly constructed landfills lacked the capacity to retain the waste; consequently, it simply soaked into the ground. It was often not until years later that the waste, borne by groundwater, resurfaced in domestic and community wells, or in rivers and lakes fed by underground percolation.<sup>8</sup> The United States Environmental Protection Agency (EPA) estimates that there are 30,000 hazardous waste disposal sites nationwide, many of which may be leaking into the soil and water.<sup>9</sup> New Jersey has approximately 10,000 generators of hazardous waste,<sup>10</sup> and generates more hazardous waste than any other state,<sup>11</sup> creating problems of crisis proportion.

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An Environmental Protection Agency report lists six ways in which improper disposal of hazardous wastes can affect the environment and/or the public health: (1) ground water pollution; (2) surface water pollution; (3) air pollution; (4) fires and explosions; (5) poisonings via the food chain; and (6) poisoning by direct contact. OFFICE OF WATER & WASTE MANAGEMENT, U.S. ENVTL. PROTECTION AGENCY, *EVERYBODY'S PROBLEM: HAZARDOUS WASTE 1-8* (1980) [hereinafter cited as *EVERYBODY'S PROBLEM*].

<sup>6</sup> Magnuson, *supra* note 2, at 66.

<sup>7</sup> The EPA has estimated that only 10% of hazardous waste is actually treated. Of that amount, 8% has been incinerated or subjected to a recovery process and 2% is disposed of in secure landfills. The remaining 90% is disposed of through environmentally unsound methods. See *EVERYBODY'S PROBLEM*, *supra* note 5, at 15.

<sup>8</sup> Epstein, *DEP Confirms Lone Pine Toxins Are Seeping into River, Aquifers*, Star-Ledger, June 23, 1982, at 21, col. 1. The EPA recently confirmed reports that two underground aquifers and the Manasquan River have become contaminated due to leakage from the Lone Pine Landfill in Freehold Township. EPA officials consider Lone Pine to be one of the most dangerous toxic waste sites in the country. Test wells had been placed around the perimeter of the site. Although the aquifers and surface waters at the site were not used for drinking water, it was determined that the contaminants would eventually penetrate local wells. The site was closed in 1979 by a superior court order. *Id.* Other examples of possible groundwater contamination in New Jersey include Pennsville Township, Salem County, where groundwater beneath a 40 acre chemical manufacturing site was contaminated by waste chemicals disposed of over a 50 year period, H.R. REP., *supra* note 1, at 17, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6255, and Price's Pit, where Atlantic City's major source of drinking water is endangered by leaking contaminants. See *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981); *infra* notes 22-28 and accompanying text.

<sup>9</sup> SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS BY THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., *HAZARDOUS WASTE DISPOSAL 1* (Comm. Print 1979). Currently, there are over 350 hazardous waste sites located throughout New Jersey. DEP'T OF ENVTL. PROTECTION, *HAZARDOUS WASTE MANAGEMENT IN NEW JERSEY 3* (Nov. 1982) [hereinafter cited as *WASTE MANAGEMENT IN N.J.*].

<sup>10</sup> N.J. ADVISORY REPORT, *supra* note 1, at 11. This estimate was obtained by accounting for the number of plants in the state whose manufacturing activities are known according to standard industrial classifications to involve the generation of hazardous waste. *Id.*

A series of catastrophic incidents has raised national awareness of the ever-growing number of hazardous waste "time bombs" planted in the environment.<sup>12</sup> New Jersey has suffered through more than its share of waste calamities, receiving both national and local attention. Among the more recent examples are the explosion and fire at the Chemical Control plant in Elizabeth in April, 1980,<sup>13</sup> the forced closure of wells in Jackson Township after hazardous wastes were discovered in drinking water,<sup>14</sup> and contamination of the Raritan River from the Kin-Buc Landfill in Edison.<sup>15</sup>

While health may be threatened by exposure to hazardous wastes or there may in some circumstances be a risk of fire or explosion,<sup>16</sup> it is the pollution of water, particularly groundwater, that will have the

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<sup>11</sup> See EVERYBODY'S PROBLEM, *supra* note 5, at 14.

EPA estimates that New Jersey generates eight percent of the nation's total hazardous waste, approximately 350,000 tons per year. *Id.*; see also Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 NAT. RESOURCES L.J. 249 (1979); Note, *The Regulation of Hazardous Waste Disposal: Cleaning up the Augean Stables with a Flood of Regulation*, 33 RUTGERS L. REV. 906, 913 n.41 (1981).

<sup>12</sup> H.R. REP., *supra* note 1, at 17-23, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6254-59. One of the more infamous incidents is that which occurred at the Love Canal in Niagara Falls, New York, where it was discovered that chemical wastes which had been buried there for 25 years had crept into the groundwater of adjacent homes. Over the years, numerous incidents of birth defects, miscarriages, and illnesses have been reported by families in the area and attributed to the contamination. Current Developments, 11 ENV'T REP. (BNA) 634-35 (Aug. 22, 1980); see Note, *supra* note 11, at 915-17.

Another "time bomb" site is located in Seymour, Indiana where 60,000 drums of chemical waste have been dumped and allowed to accumulate. Officials fear that the groundwater in that area has already become polluted, and the EPA has declared a water emergency and taken over the clean-up procedure, which is predicted to cost \$12 million. Magnuson, *supra* note 1, at 65-66.

<sup>13</sup> Chemical Control Corporation was engaged in disposing of the waste of other New Jersey chemical companies in Elizabeth, New Jersey. Chemical Control would collect the waste and store it for ultimate incineration. Although the company was to dispose of the waste in a safe manner, at least 50,000 drums had been left on the site for almost a decade. Despite a state clean-up which began in March 1978, on April 21, 1980, the drums exploded, resulting in an uncontrollable raging fire and waste leakage into a nearby river and underlying groundwaters. Unidentified chemicals continue to leak into the ground. *Hazardous Waste Disposal: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 46-49 (1980) (statement by Matthew J. Rinaldo). The state spent \$25 million cleaning up the site. Bishop, *Spill Tax Change to Target All Toxic Firms*, Star-Ledger, June 14, 1982, at 5, col. 1; see also N.J. ADVISORY REPORT, *supra* note 1, at 5; Magnuson, *supra* note 1, at 65-66.

<sup>14</sup> N.J. ADVISORY REPORT, *supra* note 1, at 6. In 1979, private wells at this site serving 200 families were condemned. *Id.*; see also DIVISION OF EPIDEMIOLOGY & DISEASE CONTROL, N.J. DEP'T OF HEALTH, GROUNDWATER CONTAMINATION AND POSSIBLE HEALTH EFFECTS IN JACKSON TOWNSHIP, N.J. (1980).

<sup>15</sup> Kin-Buc, the last commercial landfill to accept hazardous wastes, was closed in 1976. N.J. ADVISORY REPORT, *supra* note 1, at 5; M. BROWN, *supra* note 1, at 135-36, 153-54.

<sup>16</sup> N.J. ADVISORY REPORT, *supra* note 1, at 5.

gravest repercussions.<sup>17</sup> It was once conventional wisdom that groundwater was protected from pollution by the natural filtering action of soil and rock.<sup>18</sup> It is likely that because of this belief, coupled with man's propensity to bury that which he fears and desires to rid himself of,<sup>19</sup> it became accepted past practice to dispose of hazardous waste by landfilling, lagooning, or simply burying. More recent studies show, however, that groundwater is very vulnerable to contamination, especially by highly soluble organic chemicals.<sup>20</sup> Once discharged into groundwater, these contaminants move in an inexorable plume along the subsurface hydraulic gradient.<sup>21</sup> When the plume of poison reaches a well, river, or lake, the health of persons using that water may be seriously jeopardized.

The case of "*Price's Pit*" in Atlantic County, New Jersey is a classic example of groundwater contamination due to chemical dumping.<sup>22</sup> Price's Landfill #1, a former gravel pit, was operated as a landfill from 1969 to 1976.<sup>23</sup> Between 1971 and 1972, approximately nine million gallons of toxic and flammable chemical waste were discharged directly onto the ground from open valves on tank trucks or buried in drums of questionable integrity.<sup>24</sup> The wastes washed into the sandy strata below the landfill and moved toward the public wellfields of Atlantic City at a rate of .70 to .85 feet per day.<sup>25</sup> EPA estimates that toxic wastes will reach the city's water supply within approximately twelve to fifteen years of their disposal.<sup>26</sup> Already, many private wells in the vicinity of "*Price's Pit*" are contaminated by leachate<sup>27</sup> from the landfill.<sup>28</sup>

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<sup>17</sup> Groundwater supplies about half the drinking water in the nation. *Id.*

<sup>18</sup> Warren, *Water, Water Everywhere*, 3 AMICUS J. 1 (1981).

<sup>19</sup> See *United States v. Price*, 523 F. Supp. 1055, 1057 (D.N.J. 1981).

<sup>20</sup> U.S. COUNCIL ON ENVTL. QUALITY, *CONTAMINATION OF GROUNDWATER BY TOXIC ORGANIC CHEMICALS* (1981) [hereinafter cited as *COUNCIL STUDY ON TOXICS*].

<sup>21</sup> Water moves through porous soil or rock from areas of high pressure to areas of relatively low pressure. This pressure differential, not necessarily "uphill" or "downhill," is known as the hydraulic gradient, and is mathematically expressed in "Darcy's Law." See R. DEWIEST, *GEOHYDROLOGY* 165, 168 (1965); *COUNCIL STUDY ON TOXICS*, *supra* note 20, at 5.

<sup>22</sup> See *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981).

<sup>23</sup> *Id.* at 1059.

<sup>24</sup> *Id.* at 1061.

<sup>25</sup> *Id.* at 1064 (citing EPA estimates). This rate will vary with respect to different contaminants. *Id.*

<sup>26</sup> *Id.* at 1065.

<sup>27</sup> N.J. ADMIN. CODE tit. 7, § 14A-1.10 (1981) defines leachate as "any liquid, including any suspended components in the liquid, that has percolated through or drained from any waste." *Id.*

<sup>28</sup> *United States v. Price*, 523 F. Supp. 1055, 1065 (D.N.J. 1981).

The volume and variety of hazardous waste increases continually,<sup>29</sup> and, as disposal methods are proven unsafe or become obsolete, new wastes must be disposed of. The problem is two-fold: the necessity for effective cleanup of old waste sites and the prevention of continuing and new contamination.

National and state governments addressed many environmental issues during the activist fervor of the 1960's and early 1970's. In retrospect, while air and water regulations grew increasingly stricter the concern for hazardous wastes was conspicuously absent.<sup>30</sup> The issue finally surfaced, however, with the waste itself. Only then did states and the Federal Government enact legislation aimed specifically at managing hazardous waste.<sup>31</sup> This legislation and pursuant regulations establish a management strategy imposing strict operational requirements upon the hazardous waste industry.<sup>32</sup> Generally, the new hazardous waste laws impose an affirmative duty on waste generators, haulers, treaters, and disposers to insure that hazardous materials are properly handled, treated, stored, and disposed of.<sup>33</sup>

Unlike hazardous wastes per se, water pollution has long been a concern of government. Modern clean water laws take a comprehensive approach to assure abundant clean water,<sup>34</sup> generally proscribing any discharge of pollutants without a permit tailored for environmen-

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<sup>29</sup> See GAO REPORT, *supra* note 4, at 2 (predicting that production of hazardous waste will increase from four to six percent each year).

<sup>30</sup> N.J. ADVISORY REPORT, *supra* note 1, at 1. The Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 997, one of the earliest pieces of environmental control legislation, did not address hazardous wastes.

<sup>31</sup> Anderson, *Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 Wis. L. REV. 635.

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-8987 (1976 & Supp. III 1979), was the first major piece of federal legislation to deal specifically with the management of hazardous wastes. The Act prescribes federal regulation of hazardous wastes, encourages state management of solid waste, and funds recovery projects. For a comprehensive review of similar state statutes, see Note, *supra* note 11, at 959 n.329.

<sup>32</sup> See, e.g., 42 U.S.C. §§ 6921-6925 (1976 & Supp. III 1979); 40 C.F.R. §§ 262-265 (1981); N.J. STAT. ANN. §§ 13:1E-39 to -42, -46, -47, -60, -61 (West 1979 & Cum. Supp. 1982-1983); N.J. ADMIN. CODE tit. 7, §§ 26-1 to -7 (1980).

<sup>33</sup> 42 U.S.C. §§ 6921-6925 (1976 & Supp. III 1979); N.J. STAT. ANN. §§ 13:1E-39 to -42, -46, -47, -60, -61 (West 1979 & Cum. Supp. 1982-1983).

<sup>34</sup> See Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979). The stated objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). Among the national goals sought to be achieved are the elimination of pollutant discharges into navigable waters by 1985; 2) the attainment of water quality which protects and propagates fish and wildlife; 3) the prohibition of toxic pollutant discharges; 4) the construction of federally financed waste treatment works; 5) the development and implementation of state waste treatment management planning processes; and 6) the

tal safety.<sup>35</sup> The discharge of hazardous wastes into our waters is included within this proscription.<sup>36</sup>

There is then double protection against contamination by hazardous wastes: the prescriptive new laws which impose management and operational requirements, and the proscriptive water pollution control laws which restrict discharges into water. The purpose of this Article is to examine the relationship between water pollution laws and hazardous waste laws, and to evaluate their relative effectiveness, particularly as applied in New Jersey.

### I. SYNOPSIS OF HAZARDOUS WASTE MANAGEMENT LAWS

The new hazardous waste management laws take a two-pronged approach to the hazardous waste problem: clean-up of existing contamination and prevention of future contamination.<sup>37</sup> Federal and New Jersey statutes now address both issues. A brief summary of these statutes follows.<sup>38</sup>

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development of technology necessary to eliminate pollutant discharge into navigable waters, including the oceans. *Id.*

The statute provides for implementation of congressional and state legislative goals in controlling water pollution. *Id.* § 1251(b). For a judicial articulation of congressional intent in enacting this legislation, see *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding purpose of passing Federal Water Pollution Control Act was to establish all-encompassing program of water pollution regulation).

Similarly, the New Jersey Legislature declared pollution of ground and surface waters to be a danger to public health and aquatic life. N.J. STAT. ANN. § 58:10A-2 (West 1982). Declaring the policy of the state to be restoration of the integrity of its waters, the legislature implemented the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979), through the State Department of Environmental Protection. N.J. STAT. ANN. § 58:10A-2 (West 1982).

<sup>35</sup> 33 U.S.C. § 1343 (1976 & Supp. III 1979); N.J. STAT. ANN. § 58:10A-6 (West 1982).

<sup>36</sup> The term pollutant is defined in the Clean Water Act to mean those pollutants which will cause, *inter alia*, death, disease, or physical malfunctions. 33 U.S.C. § 1362(13) (1976 & Supp. III 1979).

New Jersey expressly includes hazardous waste within the general prohibition by listing specific hazardous wastes in the definition of pollutant. N.J. STAT. ANN. § 58:10A-3(n) (West 1982).

<sup>37</sup> This Article will not examine in detail the early federal efforts to control solid waste regulation, such as the Solid Waste Disposal Act of 1965 (SWDA), Pub. L. No. 89-272, 79 Stat. 997, which authorized the Secretary of HEW to research solid waste problems and solutions, and the Resource Recovery Act of 1970, Pub. L. No. 91-512, § 104(b), 84 Stat. 1226, 1227, which amended the SWDA. This early legislation reflected the Government's feeling that it should play an advisory role, rather than a regulatory one. See Note, *supra* note 11, at 921 n.89.

<sup>38</sup> For an exhaustive analysis of hazardous waste regulation, see Anderson, *supra* note 31, at 633-714; Note, *supra* note 11, at 920-63.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980<sup>39</sup> attacks hazardous waste clean-up problems by establishing the Hazardous Substance Response Trust Fund,<sup>40</sup> known colloquially as the "Superfund."<sup>41</sup> The Fund is financed primarily by excise taxes on the petroleum and chemical industries.<sup>42</sup> Revenues from the Fund may be used, at the direction of the Administrator of the EPA, to remedy the effects of releases of hazardous substances<sup>43</sup> into the environment.<sup>44</sup> The Fund's expenditures may then be charged to the parties, if identifiable, responsible for the contamination.<sup>45</sup> Except for limited defenses,<sup>46</sup> those parties are strictly liable to the Fund for costs of clean-up and for damages for injury to natural resources.<sup>47</sup> Before the case of *Price's Pit*, the EPA had not used the Superfund in any major instance, and the particulars of the Act were never judicially addressed.<sup>48</sup> The case of *Price's Pit* was the first significant application of the Superfund.

Prior to adoption of the Federal Superfund Act, New Jersey took a similar approach to hazardous substances<sup>49</sup> in the Spill Compensa-

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<sup>39</sup> 42 U.S.C.A. §§ 9601-9657 (West Supp. 1981).

<sup>40</sup> *Id.* § 9631.

<sup>41</sup> For a general discussion of the Superfund's provisions see Note, *Hazardous Waste Regulation: An Evaluation from an Historical Perspective*, 7 COLUM. J. ENVTL. L. 251, 275-83 (1982).

<sup>42</sup> I.R.C. §§ 4611, 4661, 4681 (Law Co-op. Cum. Supp. 1982). These taxes will account for 87% of the total \$1.6 billion fund, with the remaining money financed by the federal budget. Note, *supra* note 11, at 955-58; *Superfund Study Aid Opposed*, Star-Ledger, June 16, 1982, at 36, col. 9.

<sup>43</sup> Hazardous substances are defined in Superfund as "such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment." 42 U.S.C.A. § 9602(a) (West Supp. 1981). Section 9601(14) of the Act also includes as hazardous and subject to the provisions of Superfund, those substances designated as hazardous under provisions of the Toxic Substances Control Act, 15 U.S.C. § 2606 (1976), Federal Water Pollution Control Act, 33 U.S.C. § 1317(a), 1321(b)(2)(A) (1976 & Supp. III 1979), Safe Drinking Water Act, 42 U.S.C. § 3001 (1976), and the Clean Air Act, 42 U.S.C. § 7412 (Supp. III 1979).

<sup>44</sup> 42 U.S.C.A. § 9611 (West Supp. 1981).

<sup>45</sup> *Id.* § 9607(a).

<sup>46</sup> The statute provides that the only permissible defenses to liability are for those releases of hazardous substances which occur as a result of: 1) an act of God; 2) an act of war; 3) an act of a third party, less disassociated from the defendant who exercised due care with respect to the hazardous substance and foreseeable acts of any such third party; or 4) any combination of the above. *Id.* § 9607(b).

<sup>47</sup> *Id.* § 9607(b). Statutory strict liability for environmental contamination represents a legislative determination that pollution should be a cost of doing business rather than a burden upon injured parties. See H.R. REP. NO. 414, 93d Cong., 1st Sess. (1973); see also 42 U.S.C. § 1653 (1976); 33 U.S.C. § 1517 (1976 & Supp. III 1979); Note, *supra* note 2.

<sup>48</sup> *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981).

<sup>49</sup> N.J. STAT. ANN. § 58:10-23.11b(k) (West 1982) defines "hazardous substances" by reference to § 307, regarding toxic pollutants, and to § 311 of Federal Water Pollution Control Act

tion and Control Act of 1976 (SCCA),<sup>50</sup> which provided a clean-up fund<sup>51</sup> primarily financed by excise taxes on the petroleum and chemical industries.<sup>52</sup> The Spill Fund is supplemented by the Hazardous Discharge Bond Act,<sup>53</sup> which authorizes issue of state bonds in the sum of 100 million dollars for identification, clean-up, and removal of hazardous discharges not eligible for clean-up removal under the Spill Fund Act.<sup>54</sup> The Spill Fund is strictly liable for clean-up and removal costs,<sup>55</sup> but after financing a clean-up operation the Administrator of the Spill Fund may demand reimbursement, without proof of negligence, from culpable parties.<sup>56</sup> If any party refuses to cooperate with a

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Amendments of 1972 as amended by Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979); *see also supra* note 43.

<sup>50</sup> N.J. STAT. ANN. §§ 58:10-23.11 to .11z (West 1982); *see Goldshore, Trends in Environmental Litigation: A Survey of 1976 New Jersey Judicial Decisions*, 9 RUT.-CAM. L.J. 21 (1977).

<sup>51</sup> N.J. STAT. ANN. § 58:10-23.11i (West 1982). The fund is technically known as the "New Jersey Spill Compensation Fund." *Id.* In 1981, the State of New Jersey filed for a declaratory judgment on the issue of whether the Federal Hazardous Substance Response Trust Fund preempted the New Jersey Spill Compensation & Control Fund. *New Jersey v. United States*, No. 81-945 (D.D.C. Nov. 10, 1981). This action was dismissed for lack of a case or controversy. *Id.*

<sup>52</sup> N.J. STAT. ANN. § 58:10-23.11h (West 1982). The Fund raises about \$14 million a year from taxing major oil and chemical companies. Bishop, *supra* note 13, at 5, col. 1.

Legislation is now being proposed which would tax all the owners or operators of hazardous waste disposal facilities in New Jersey, not just the 100 major oil and chemical companies. N.J. Assembly 1900, 199th Leg., 1st Sess. (1982) (to be codified at N.J. STAT. ANN. § 58:10-23.11 (1982)). This tax, which would eventually be passed on to the 1500 hazardous waste generators in the state in the form of increased cost of disposal, will undoubtedly increase the Spill Fund. Currently, money for the Spill Fund comes from a 1% per barrel surcharge on petroleum products and a tax of 0.8% on the fair market value of chemicals manufactured in New Jersey. N.J. STAT. ANN. § 58:10-23.11h(b) (West 1982).

A problem for chemical companies arises in that they are required to pay into both the Superfund and the State Spill Fund. Accordingly, the chemical companies in a recent case challenged the State Spill Fund charging that it effectuated a double taxation and therefore should be preempted by the federal Superfund. *Exxon Corp. v. Hunt*, No. SC 303A-81 (N.J. Tax Ct., April 23, 1982). The court upheld the Spill Fund. *Id.*

The Superfund provisions also do not preclude states from levying their own tax on petrochemical companies to clean up abandoned sites and spills. 42 U.S.C.A. § 9614 (West Supp. 1981).

<sup>53</sup> Ch. 275, 1981 N.J. Sess. Law Serv. 767, 770 (West). The bond was passed by the voters of New Jersey in November 1981. Section 14 of the Act provides that the State Treasurer shall deposit in a special fund, known as the "Hazardous Discharge Fund," proceeds from the sale of the bonds. When there is a hazardous discharge, the treasury department shall seek to hold the party responsible for the full amount of the clean-up. *Id.* at 769. According to the Act, the treasury department "need prove only that an unlawful discharge occurred which was the responsibility of the discharger or other responsible party." *Id.*

<sup>54</sup> Ch. 275, § 15, 1981 N.J. Sess. Law Serv. 767, 770 (West).

<sup>55</sup> N.J. STAT. ANN. § 58:10-23.11g(a) (West 1982).

<sup>56</sup> N.J. STAT. ANN. § 58:10-23.11g(b), (c) (West 1982). This provision has been held to apply retroactively to provide for reimbursement to the Fund from defendants found liable for dis-



reimbursement directive issued pursuant to the Spill Act, treble damages may be assessed.<sup>57</sup>

A new piece of legislation, known as the Environmental Cleanup Responsibility Act, is being proposed which would crack down on firms which leave toxic materials on former manufacturing sites.<sup>58</sup> Such a bill, if passed, would require companies to formulate a state-approved clean-up plan to be implemented upon a shut down or transfer of a hazardous waste facility.<sup>59</sup> Plant operators would be required to purchase a bond or some other form of financial security as a guarantee that the clean-up plan would be implemented.<sup>60</sup> Advocates of the bill claim that the bill would save New Jersey taxpayers millions of dollars in clean-up costs.<sup>61</sup>

Unlike the Federal Superfund, which is available to injured claimants at the discretion of the EPA, New Jersey's Spill Fund is itself strictly liable to any person who has suffered damages as a result of an unpermitted discharge of hazardous materials.<sup>62</sup> Another important distinction between the Federal Superfund Act and the New Jersey

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charges occurring before the effective date of SCCA. *See, e.g.,* State v. Ventron Corp., 182 N.J. Super. 210, 440 A.2d 455 (App. Div. 1981), *certif. granted*, 91 N.J. 195, 450 A.2d 530 (1982) (court found no constitutional prohibition to retroactive application of 1980 SCCA amendment to impose liability for prior discharge of waste and those responsible were not entitled to indemnification from Spill Fund); New Jersey Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Law Div. 1980) (corporation liable for cost of removing hazardous substances discharged by predecessor corporation prior to effective date of the SCCA because there was substantial risk of imminent danger to public health and safety, and imminent and severe damage to environment; holding justified on theory that SCCA provided new remedy for wrong and could thus be applied retroactively).

<sup>57</sup> N.J. STAT. ANN. § 58:10-23.11f(a) (West 1982).

<sup>58</sup> N.J. Assembly 1231, 200th Leg., 2d Sess. (1982) (introduced by Assemblyman Lesniak).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Johnson, *Bill Would Make Firms Responsible for Their Waste*, Star-Ledger, Sept. 12, 1982, at 22, col. 1.

<sup>62</sup> N.J. STAT. ANN. § 58:10-23.11g(a) (West 1982). "The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained. . . ." *Id. Compare id. with* 42 U.S.C.A. §§ 9611, 9612 (West Supp. 1981).

On January 11, 1982 an act was passed creating the Hazardous Waste Health Care Task Force, Act of Jan. 11, 1982, ch. 456, 1981 N.J. Sess. Law Serv. 1692 (West) (codified at N.J. STAT. ANN. §§ 58:10-23.12 to -23.14 (West Cum. Supp. 1982-1983)), to supplement the Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11 (West 1982). The Task Force was created to develop and implement a program to classify and evaluate threats to health posed by exposure to hazardous discharges, to determine those of the greatest risk, to conduct diagnostic testing, to identify potential victims, and plan to reduce dangers to communities at high risk. Act of Jan. 11, 1982, ch. 456, § 2, 1981 N.J. Sess. Law Serv. 1692, 1692-93 (West) (codified at N.J. STAT. ANN. § 58:10-23.13 (West Cum. Supp. 1982-1983)).

Spill Act lies in the nature of activity giving rise to liability. Superfund may be used for any "release" of a hazardous substance into the environment.<sup>63</sup> Actual or potential contamination of water is not a condition precedent to activation of Superfund liability. The New Jersey Spill Act, on the other hand, is triggered only when there is a "discharge" of hazardous substances into water or onto land from which the substance might reach water.<sup>64</sup>

Seeking to prevent future improper disposal of discarded materials and hazardous wastes, Congress passed the Resource Conservation and Recovery Act (RCRA) in 1976.<sup>65</sup> Prior to RCRA, Congress had not taken any significant steps with regard to hazardous waste management.<sup>66</sup> RCRA addresses all "solid wastes,"<sup>67</sup> but expressly recognizes that a greater degree of regulation is necessary with respect to "hazardous wastes"<sup>68</sup> than to nonhazardous solid wastes.<sup>69</sup> The

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<sup>63</sup> 42 U.S.C. § 1961(b)(1982). Superfund defines release as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C.A. § 9601 (22) (West Supp. 1981).

<sup>64</sup> N.J. STAT. ANN. § 58:10-23.11g (West 1982). Discharge is defined as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substance into the waters of the State or onto lands from which it might flow or drain into said waters." *Id.* § 58:10-23.11b(h).

<sup>65</sup> Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. § 6901-6987 (1976 & Supp. III 1979)). See generally Kovacs & Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM. J. ENVT'L. L. 205 (1977).

<sup>66</sup> Although the Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 997 (1965), which established a program to research problems and solutions of improper solid waste disposal, was enacted prior to RCRA, the Act had no management or regulatory scheme and failed to make any reference to hazardous waste. See Kovacs & Klucsik, *supra* note 65, at 212-16; see also *infra* notes 67-77 and accompanying text. This early legislation reflects the Government's view that it should play an advisory role rather than a regulatory role. It was the responsibility of the states to deal with the hazardous waste situation. See Anderson, *supra* note 31, at 636.

<sup>67</sup> RCRA defines solid waste as "any garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27) (1976).

<sup>68</sup> "Hazardous waste" is defined under the provisions of RCRA as:  
a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

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

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

*Id.* § 6903(5). Defining hazardous waste as a "solid waste" is a misnomer since about 90% of all hazardous waste is in liquid or semi-liquid form. Anderson, *supra* note 31, at 638-39.

<sup>69</sup> 42 U.S.C. § 6901(b)(5) (1976). While not all solid wastes are hazardous wastes, RCRA subsumes both matters within the same Act. See definition of hazardous wastes *supra* note 68. Title III of the Act deals exclusively with hazardous waste management. 42 U.S.C. §§ 6921-6931 (1976 & Supp. III 1979).

regulatory strategy of RCRA<sup>70</sup> includes the following elements: 1) definition of hazardous wastes,<sup>71</sup> 2) delineation of the responsibilities of hazardous waste generators, including determining whether the waste is hazardous,<sup>72</sup> notifying EPA of hazardous waste activities,<sup>73</sup> record-keeping and reporting,<sup>74</sup> and pretransport requirements,<sup>75</sup> 3) creation of a manifest system whereby hazardous waste in transit may be followed on paper to its ultimate disposal,<sup>76</sup> and 4) promulgation of standards applicable to operators of treatment, storage, and disposal facilities,<sup>77</sup> and to transporters of hazardous wastes.<sup>78</sup> Under RCRA, a state may administer its own hazardous waste management program in lieu of the federal program, provided that the state program is essentially the equivalent of the RCRA hazardous waste management scheme.<sup>79</sup> In concert with RCRA and Superfund is the Toxic Substances Control Act (TSCA)<sup>80</sup> the purpose of which is to prevent unreasonably dangerous materials from ever entering the environment. The emphasis of TSCA is the testing, inspecting, and regulation of substances before they have had an adverse effect upon the public health or environment.<sup>81</sup>

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<sup>70</sup> Regulations passed pursuant to RCRA are compiled in title 40 of the *Code of Federal Regulations*. 40 C.F.R. §§ 260-267 (1981).

<sup>71</sup> A waste is "hazardous" if it has certain characteristics of ignitability, corrosivity, reactivity, or toxicity, or if the waste is listed by specific name or by the process which produces the waste. *Id.* §§ 261.20-.24; see also *id.* § 261.10 (1981).

<sup>72</sup> *Id.* § 262.11.

<sup>73</sup> *Id.* § 262.12. All generators who plan to treat, store, dispose of, or transport hazardous waste must receive an EPA identification number before beginning such activities. *Id.*

<sup>74</sup> *Id.* §§ 262.40-.43.

<sup>75</sup> *Id.* §§ 262.30-.34. These provisions cross-reference to the Department of Transportation regulations concerning the packaging, labeling, marking, and placarding of hazardous materials, *id.* §§ 262.30-.33, and include a special requirement for marking hazardous wastes in containers of 110 gallons or less. *Id.* § 262.32. The provisions also require that generators who store wastes on site for more than 90 days obtain a permit for such storage. *Id.* § 262.34.

<sup>76</sup> *Id.* §§ 262.20-.23. The generator who transports hazardous waste for off-site disposal must prepare a manifest. *Id.* § 262.20(a). Each transporter, treatment facility, and disposal facility must sign the manifest and keep a copy. *Id.* §§ 263.20, 265.71. Ultimately, the manifest is to be returned to the generator. *Id.* § 265.71(a)(4). If the manifest is not returned within 35 days, the generator must so report to the EPA. *Id.* § 262.42(a), (b).

<sup>77</sup> 42 U.S.C. § 6924 (1976 & Supp. III 1979); 40 C.F.R. §§ 264, 265 (1981).

<sup>78</sup> 42 U.S.C. § 6923 (1976 & Supp. III 1979); 40 C.F.R. § 263 (1981). See generally Anderson, *supra* note 31; *The Resource Conservation and Recovery Act of 1976—The Newest Environmental Sleeper*, 33 BUS. LAW. 2555 (1978); Eschwege, *Implementing the Resource Conservation and Recovery Act: Problems of the Present, Recommendations for the Future*, 9 CAP. U.L. REV. 467 (1980).

<sup>79</sup> 42 U.S.C. § 6926 (1976).

<sup>80</sup> 15 U.S.C. §§ 2608-2629 (1976 & Supp. III 1979).

<sup>81</sup> *Id.* §§ 2603, 2605, 2610; see Olphin, *Policing Toxic Chemicals*, 1976 UTAH L. REV. 85; Zener, *The Toxic Substances Control Act: Federal Regulation of Commercial Chemicals*, 32 BUS. LAW. 1685 (1977).

Closing some of the remaining loopholes of RCRA is an amendment recently passed by the House in September of 1982.<sup>82</sup> Sponsored by Congressman James J. Florio, this bill would effectively reduce the number of small generators<sup>83</sup> exempt under the present law.<sup>84</sup> Prior to the amendment, firms that generated up to 1000 kilograms of hazardous waste per month were allowed to dispose of their waste in sanitary landfills and municipal dumps.<sup>85</sup> The new bill, which has yet to be voted on by the Senate, will exempt only those firms which generate 100 kilograms per month.<sup>86</sup> In addition, the bill would increase the felony prison term for violators of the act.<sup>87</sup>

Before passage of RCRA, New Jersey tackled the problem of solid waste management, particularly hazardous wastes, through the New Jersey Solid Waste Management Act of 1970 (NJSWMA).<sup>88</sup> Recent amendments of the Act<sup>89</sup> make the statute more compatible with RCRA

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<sup>82</sup> See H.R. 6307, 97th Cong., 2d Sess. (1982) (introduced by Rep. Florio on May 6, 1982; 128 Cong. Rec. 6757 (1982)).

<sup>83</sup> Some examples of small generators are gas stations, dry cleaners, beauty parlors, hospitals, printshops, and textile finishers. Cohen, *House Closes a Toxic Waste Loophole*, Star-Ledger, Sept. 9, 1982, at 20, col. 3. Small generators account for between 5 and 10% (4 to 8 million tons) of all hazardous waste generated per year. J. Florio, Fact Sheet: "Small Generator" Loophole 2.

<sup>84</sup> Under the present law, small generators are "not required to manifest their wastes, keep any records . . . [or] dispose of their hazardous wastes at solid waste landfills and municipal dumps." J. Florio, *supra* note 83. Currently, 700,000 (or 92%) of all hazardous waste generators in the nation qualify for this exemption. *Id.*

<sup>85</sup> 40 C.F.R. § 261.5(a) (1981); see Cohen, *supra* note 83, at 20.

<sup>86</sup> H.R. 6307, *supra* note 82; see Cohen, *supra* note 83, at 20.

<sup>87</sup> H.R. 6307, *supra* note 82. The amendment increases the two year penalty to five years and the five year penalty to ten years. Office of Legislative Information, Office of the Clerk 3 (September 15, 1982) (legislative history of H.R. 6307, 97th Cong., 2d Sess. (1982)).

<sup>88</sup> Ch. 39, 1970 N.J. Laws 139. This Act became effective in 1970 and is concerned with solid waste management and resource recovery in general. *Id.* § 16, at 145. It empowered the DEP to promulgate regulations for collection and disposal of solid waste. *Id.* § 9, at 143. In 1975, the Act was amended to provide for solid waste management districts. Solid Waste Management Act, ch. 326, § 10, 1975 N.J. Laws 1278, 1289 (1975) (codified at N.J. STAT. ANN. § 13:1E-19 (West 1979)). In 1980, county health departments, in addition to the State Department of Environmental Protection (DEP) and local boards of health, were made enforcement agencies. Act of Feb. 6, 1980, ch. 395, 1979 N.J. Sess. Law Serv. 1387 (West) (codified at N.J. STAT. ANN. § 13:1E-9(a) (West Cum. Supp. 1982-1983)). Sections 13:1E-9(e) and (f) were added in 1982 to provide stiff penalties for persons who knowingly or recklessly transport waste without authorization, dispose, treat, or store hazardous waste without authorization or who make false statements on any hazardous waste application, label, or document. Act of Jan. 9, 1982, ch. 438, § 1, 1981 N.J. Sess. Law Serv. 1653, 1654 (West 1982).

<sup>89</sup> N.J. STAT. ANN. §§ 13:1E-42.1, -42.2 (West Cum. Supp. 1982-1983). As amended, the Act provides for weekly inspection of facilities handling or disposing of hazardous waste. *Id.* § 13:1E-42.1. The amendment deleted the term "special waste" and replaced it solely with the term hazardous waste. *Id.* Moreover, the DEP is now permitted to make an assessment against major hazardous waste facilities in the amount sufficient to cover the costs of these inspections. *Id.* § 13:1E-42.2.

statute more compatible with RCRA and enable the regulatory scheme to meet prerequisites of state administration of the RCRA program.<sup>90</sup> The final portions of New Jersey's hazardous waste management regulations were adopted October 8, 1981,<sup>91</sup> after incorporating changes to provide equivalency with changing federal regulation.<sup>92</sup> New Jersey is now ready to administer a hazardous waste management program consistent with the format of RCRA.

It cannot be said that the hazardous waste regulatory schemes of RCRA and the New Jersey Solid Waste Management Act are without criticism. The United States Chamber of Commerce has called the rules the most burdensome and costly of all federal regulations.<sup>93</sup> Several commentators have taken the RCRA regulatory approach to task, alleging it to be overly complex and patently ineffective.<sup>94</sup> It has been claimed that RCRA regulations are so complex that no one, not even within the EPA, completely understands the entire waste management system.<sup>95</sup> Further, it has been said that while the basis of RCRA is sound, the EPA has failed to adequately implement the Act, leaving deficiencies in the identification of hazardous wastes and in standards for disposal facilities.<sup>96</sup> Additionally, loopholes for certain generators may exist.<sup>97</sup>

Another complaint has been that in seeking to avoid interference with production, RCRA limits a waste generator's role to one of providing information concerning the amount of waste generated and the manner in which it is disposed.<sup>98</sup> Generators are not required to,

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<sup>90</sup> RCRA establishes certain minimum requirements that a state must meet in order to implement its own solid and hazardous waste management program. 42 U.S.C. §§ 6926, 6943 (1976 & Supp. III 1979).

<sup>91</sup> N.J. ADMIN. CODE tit. 7, §§ 26-7 to -12 (1981).

<sup>92</sup> The Federal RCRA regulations present somewhat of a moving target for states seeking to promulgate "equivalent" regulations. "Interpretations," "finalizations," and "non-significant changes" were reported almost daily in the Federal Register from October 1980 to July 1981. See NJDEP Hazardous Waste Regulations Cross Reference (June 1982) for a comparison of Federal and New Jersey regulations.

<sup>93</sup> U.S. Chamber of Commerce Report to Vice President George Bush (August 4, 1981).

<sup>94</sup> See, e.g., Friedland, *The New Hazardous Waste Management System: Regulation of Waste or Wasted Regulation?*, 5 HARV. ENVTL. L. REV. 89 (1981); Harrington, *The Resource Conservation and Recovery Act—Hazardous to Your Mental Health*, 54 WIS. B. BULL. 24 (1981).

<sup>95</sup> Friedland, *supra* note 94, at 101 n.93 (quoting EPA coherence study).

<sup>96</sup> *Id.* at 128-29. Friedland alleges that listing of wastes falls far short of the actual number of wastes that are hazardous and that EPA's method of toxicity testing is limited to only 14 substances. *Id.* at 109-10.

<sup>97</sup> *Id.* at 115-18. For example, RCRA regulations allow exemptions for small generators and generators of "domestic sewage." 40 C.F.R. § 261.4(a)(i) (1981). The disposal of domestic sewage which may contain hazardous wastes, in effect, avoids the regulatory scheme. However, an amendment enclosing the loophole for the "small generator" exemption, if implemented, would correct this deficiency. See *supra* notes 82-86 and accompanying text.

<sup>98</sup> Goldfarb, *supra* note 11, at 255.

and have little incentive to, improve the quality of their wastes; they need only report to the EPA.<sup>99</sup> By attempting to control hazardous wastes without inhibiting waste production, Congress has ignored the successful "technology forcing" approach of the Clean Air Act and the "available technology" orientation of the Clean Water Act.<sup>100</sup>

The success of RCRA is predicated upon the assumption that there will be adequate waste treatment capacity. Actually there is a severe shortage of treatment capacity,<sup>101</sup> which is bound to become more severe with the elimination of ocean dumping of sewage sludge<sup>102</sup> and the imposition of more stringent pretreatment standards.<sup>103</sup> Further, the problem of siting new hazardous waste treatment facilities is a thorny one, and is not adequately addressed by RCRA or NJSWMA. The New Jersey Legislature, recognizing this deficiency, enacted the Major Hazardous Waste Facilities Siting Act.<sup>104</sup>

The criticism of RCRA and collateral state statutes is cogent and valuable, and must be seriously considered in developing and implementing regulatory strategies. The RCRA scheme, however, should

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 255-56; see 33 U.S.C. § 1311(b)(1)(A), (2)(A) (1976 & Supp. III 1979); 42 U.S.C.A. § 7411(a)(1)(C) (West Supp. 1982). In establishing effluent limitations the Clean Air Act and Clean Water Act make it mandatory for polluters to develop the necessary technology to meet those standards. RCRA provides no direct limitation on generation rates of hazardous wastes. Goldfarb, *supra* note 11, at 255-56.

<sup>101</sup> See N.J. ADVISORY REPORT, *supra* note 1, at 21; Goldfarb, *supra* note 11, at 257.

<sup>102</sup> The Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1976 & Supp. III 1979) prohibits the discharge of hazardous waste in the territorial sea or contiguous zone without a permit. *Id.* § 1412a(a), (b).

<sup>103</sup> EPA continues to develop categorical pretreatment standards. See *infra* notes 156-64 and accompanying text; 1977 ANNUAL REPORT, *supra* note 1, at 49; N.J. ADVISORY REPORT, *supra* note 1, at 49; Goldfarb, *supra* note 11, at 258.

<sup>104</sup> Ch. 279, 1981 N.J. Sess. Law Serv. 814 (West) (codified at N.J. STAT. ANN. §§ 13:1E-49 to -91 (West Cum. Supp. 1982-1983)).

The purpose of the Act is to "provide for the siting, design, construction, operation and use of environmentally acceptable major hazardous waste facilities." N.J. STAT. ANN. § 13:1E-50 (West Cum. Supp. 1982-1983). Any existing hazardous waste facility which does not comply with the Act's standards is subject to the enforcement and closure provision of the Act. *Id.* §§ 13:1E-66 to -68. In addition, the Act explicitly nullifies local ordinances prohibiting the construction of state approved waste facilities within the locality. *Id.* § 13:1E-63.

A recent bill, N.J. Assembly 993, 200th Leg., 1st Sess. (1982), which was tabled by the Senate Energy and Environment Committee, would have established tougher siting criteria for minor hazardous waste disposals and storage facilities. See *Senate Panel Again Tables Criteria on Waste Plant Siting*, Star-Ledger, June 22, 1982, at 16, col. 1.

The Siting Act is the product of the findings of the Hazardous Waste Advisory Commission formed by Governor Byrne in 1979. See N.J. ADVISORY REPORT, *supra* note 1, at 1. The Commission found, among other things, that state regulatory programs have been ineffective, that there is a growing need for treatment facilities, and that public fear and opposition to hazardous waste facilities is the major obstacle to the siting of the new facilities. *Id.* at 1-2.

not be viewed as an isolated approach to mitigation of hazardous waste contamination. Rather, it is only a supporting member in an overall framework of environmental protection.

## II. PROTECTION FROM HAZARDOUS WASTES BY APPLICATION OF WATER POLLUTION LAWS

Long before hazardous waste was a national concern, clean water was on the agenda of Congress and state legislatures. Early federal water pollution control legislation was primarily directed at navigation<sup>105</sup> and/or public health. For example, the 1948 Federal Water Pollution Control Act,<sup>106</sup> predecessor of the modern Clean Water Act,<sup>107</sup> was enacted to secure benefits "to the public health and welfare by the abatement of stream pollution."<sup>108</sup>

New Jersey's legislative interest in protecting the purity of water goes back at least to 1876, when an Act to "prevent the willful pollution of the waters of any of the creeks, ponds or brooks" was passed.<sup>109</sup> In 1899, New Jersey enacted a water pollution control law "to secure the purity of the public supplies of potable waters,"<sup>110</sup> which was administered by the State Health Department, with only minor changes, for seventy-eight years.<sup>111</sup> The 1899 act prohibited the discharge of pollutants into waters, or onto the banks of waters, above the point from which any municipality obtained its domestic water supply.<sup>112</sup> A supplementary 1910 "Fresh Water Act"<sup>113</sup> extended the protection to all fresh water, defined as all water which may be used for human consumption.<sup>114</sup> The Fresh Water Act excepted discharges

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<sup>105</sup> The Federal Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121, prohibited the deposit of refuse in navigable waters, or tributaries from which such refuse could float or wash into navigable waters. *Id.* § 13, at 1152. The Secretary of War was authorized to allow the deposit of refuse if it was found that anchorage and navigation would not be injured. *Id.*; see also Oil Pollution Act, ch. 316, 43 Stat. 604 (1924) (repealed 1970).

The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979), also apply to "navigable" waters, but broadened the application of the Act by defining "navigable waters" as the "waters of the United States including the territorial seas." *Id.* § 1362(7).

<sup>106</sup> Ch. 758, 62 Stat. 1155 (1948) (extensively amended, expanded, and reorganized as the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979)).

<sup>107</sup> 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

<sup>108</sup> Ch. 758, § 1, 62 Stat. 1155, 1155 (1948).

<sup>109</sup> Act of Apr. 21, 1876, ch. 152, § 1, 1876 N.J. Laws 244, 244.

<sup>110</sup> Act of Mar. 17, 1899, ch. 41, 1899 N.J. Laws 73.

<sup>111</sup> See *infra* notes 113-18 and accompanying text.

<sup>112</sup> Act of Mar. 17, 1899, ch. 41, § 1, 1899 N.J. Laws 73, 73-74.

<sup>113</sup> Act of Apr. 9, 1910, ch. 215, 1910 N.J. Laws 337.

<sup>114</sup> *Id.* § 1, at 337.

from sewage treatment plants approved by the Health Department.<sup>115</sup> This exception was abrogated in 1921, when the Health Department was granted power to prohibit discharges from treatment plants if the effluent was of a nature that might injure the users of the receiving waters.<sup>116</sup> The 1921 law also prohibited the establishment of any factory above the point from which a public supply of potable water was taken unless a permit was obtained from the Health Department.<sup>117</sup> This permit regulation formed the basis of New Jersey's modern discharge permit system.<sup>118</sup>

The scope of water pollution control shifted dramatically with the enactment of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).<sup>119</sup> Rather than limiting the ambit of protection to potable water supplies, Congress recognized that it was in the best interests of the nation to maintain clean water everywhere, regardless of whether for public use or not.<sup>120</sup>

In 1977, Congress again took a major step when it implemented the "Clean Water Act" which shifted emphasis to chemical pollution, recycling, and overall environmental compatibility of the wastewater treatment systems.<sup>121</sup>

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<sup>115</sup> *Id.* The exception extended only to those effluents which were not considered "sewage, excremental matter, domestic refuse or other polluting matter." *Id.*

<sup>116</sup> Act of Apr. 11, 1921, ch. 280, § 2, 1921 N.J. Laws 823, 824. Any person or company which did not meet the requirements of the Health Department as to the type of effluent that was to be discharged was ordered by the Act to submit a plan to make such improvements as were necessary to bring the effluent up to the satisfactory level. A penalty of \$100 was charged to the party for not making the change within the prescribed time limit. *Id.* §§ 2-3, at 824.

<sup>117</sup> *Id.* § 1, at 823-24.

<sup>118</sup> See *infra* note 128 and accompanying text.

<sup>119</sup> Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1976 Supp. III, 1979)); see *supra* note 34; see also Hall, *The Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972*, 63 IOWA L. REV. 609 (1978).

<sup>120</sup> 33 U.S.C. § 1251(a) (1976). The Act cited as its national goals:

[T]he discharge of pollutants into the navigable waters be eliminated by 1985; . . . that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983; . . . the discharge of toxic pollutants in toxic amounts be prohibited; . . . Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and . . . that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

*Id.* § 1251(a)(1)-(6).

<sup>121</sup> 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979). The Act was passed as a result of the settlement of a suit between the Natural Resources Defense Council and the EPA, in which the



New Jersey began exercising control of water pollution with the enactment of three major laws in 1977. These included the Spill Compensation Control Act,<sup>122</sup> the Water Pollution Control Act,<sup>123</sup> and the Water Quality Planning Act.<sup>124</sup> New Jersey's Water Pollution Control Act (WPCA) takes a similarly broad approach to the regulation of water pollution, declaring it the policy of the State to "restore, enhance, and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life, and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water."<sup>125</sup>

The Water Quality Planning Act was designed to implement the Federal Water Pollution Control Amendments of 1972.<sup>126</sup> With the passage of the FWPCA, the EPA hoped most states would take over regulatory water pollution control.<sup>127</sup> Three major provisions of the State Water Pollution Control Act are: the permit system;<sup>128</sup> the

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EPA agreed to focus on prescribing limitations for 65 toxic substances discharged from 21 industrial categories by use of "best available technology." *Natural Resources Defense Council v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976); see Hall, *supra* note 119, at 616-24.

<sup>122</sup> N.J. STAT. ANN. §§ 58:10-23.11 to .11z (West 1982).

<sup>123</sup> *Id.* §§ 58:10A-1 to -20.

<sup>124</sup> *Id.* §§ 58:11A-1 to -11. The legislative findings of the Water Quality Planning Act (WQPA) emphasize public interest in the protection of quality of the water, including surface and groundwater. *Id.* § 58:11A-2. See generally Goldshore, *New Directions in Water Pollution Control*, 100 N.J.L.J. 797 (1977).

The Water Quality Planning Act was designed to conform New Jersey law to the areawide waste treatment planning process of the Federal Water Pollution Control Act Amendments of 1972. It set up an extensive planning process by DEP in cooperation with designated planning agencies throughout the state. The areawide plan would include, *inter alia*, 1) identification of treatment works necessary to meet anticipated municipal and industrial waste treatment needs over a 20 year period; 2) establishment of construction priorities; 3) establishment of a regulatory program; 4) identification of the measures required to implement the plan; and 5) process to address nonpoint sources of water pollution. N.J. STAT. ANN. § 58:11A-5 (West 1982).

<sup>125</sup> N.J. STAT. ANN. § 58:10A-2 (West 1982).

<sup>126</sup> *Id.*

<sup>127</sup> 33 U.S.C. § 1342(a)-(b) (1976 & Supp. III 1979).

<sup>128</sup> N.J. STAT. ANN. §§ 58:10A-6 to -7 (West 1982).

Lewis Goldshore termed the permit systems of the WPCA the "linchpin" of the entire act. See Goldshore, *supra* note 124, at 806-07. A consolidation of permit process and applicable regulations has been cited as a possible solution to the double-edged problem of adequately protecting the environment while keeping regulatory costs at a minimum. Note, *Oil Shale and Water Quality: The Colorado Prospectus Under Federal, State, and International Law*, 58 DEN. L.J. 715, 747 (1981).

Under the WPCA, New Jersey implemented FWPCA permit requirements. Except for those granted a federal permit, all dischargers of pollutants must obtain a permit from the DEP, known as a New Jersey Pollutant Discharge Elimination System (NJPDDES) permit, requiring them to meet water quality standards and areawide plans. N.J. STAT. ANN. § 58:10A-6(f) (West 1982).

regulatory and enforcement provision, which granted broad powers to the DEP Commissioner regarding, *inter alia*, pretreatment standards and classification of surface and groundwater;<sup>129</sup> and the penalty provision for violations.<sup>130</sup> The water pollution control standards are more stringent than those promulgated under the Federal Act because the problem in New Jersey is so serious.

With this law, the New Jersey Legislature in one stroke made obsolete prior water pollution control laws of more limited application.<sup>131</sup> Modern remedies reflect the severity with which society views violators of water pollution control laws. Under the early water pollution control laws, the Health Department had the power to seek an injunction<sup>132</sup> or levy small fines ranging from \$50 to a maximum of

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With the adoption of the New Jersey Pollutant Discharge Elimination System permit regulations on December 15, 1981, N.J. ADMIN. CODE tit. 7, §§ 14A-1 to -13.3 (1982), the state has assumed responsibility of administering an important function of hazardous waste management. The Federal Government will only resume involvement in the administration of the permit system if "the governor of a down-stream state demonstrates that waters are being polluted by permitted effluent discharges in another state," Kuchenbecker & Long, *Will Municipal Sewage Continue to Threaten Primary Water-Contact Recreation?: An Appraisal of the 1972 Water Pollution Control Act*, 4 RUT.-CAM. L.J. 260, 280 (1973) (citing EPA EXPLANATORY PAMPHLET ON 1972 AMENDMENTS TO THE FWPCA, WATER 10 (1972)), or the state permit does not conform to minimum federal guidelines. *Id.* Therefore, if federal regulations change, states must follow suit to conform.

<sup>129</sup> N.J. STAT. ANN. § 58:10A-4 (West 1982). One of the most important aspects of the regulatory and enforcement provisions is that it addresses the pollution of groundwater.

Pursuant to the WPCA, the Commissioner of the DEP has greater regulatory power with regard to groundwater pollution than his federal counterpart. The regulation of groundwater is not dealt with under the federal WPCA because at the time of enactment the general belief was that the problem of surface water contamination was more severe. Consequently, control over groundwater was left to the states. The belief that surface water presented more serious problems is unfounded in light of the nation's future dependency on groundwater for our drinking water supplies and the extreme difficulty of purifying contaminated groundwater. *See Days Concern: Ground Water*, TIME, September 22, 1980, at 66; *see also infra* notes 170-72 and accompanying text.

<sup>130</sup> N.J. STAT. ANN. § 58:10A-10 (West 1982). Upon finding a violation of the Act the DEP can issue an order to comply with the system, *id.* § 58:10A-10(a)(1), or institute a civil action, *id.* § 58:10A-10(a)(2), for injunctive relief and damages. *Id.* § 58:10A-10(c). In addition, the DEP is empowered to assess a maximum civil penalty of \$5,000. *Id.* § 58:10A-10(d). Criminal proceedings will be successful upon a showing of willful or negligent violation of the Act. *Id.* § 58:10A-10(f).

New Jersey is seriously pursuing the growing problem of illegal dumping. The state has created a strike force which utilizes air checks, stake-outs, and video equipment to discover illegal dumping in the state. *See WASTE MANAGEMENT IN N.J.*, *supra* note 9, at 1.

<sup>131</sup> For a list of those laws substantially amended or repealed by the WPCA, see the Historical Note to N.J. STAT. ANN. § 58:10A-1 (West 1982).

<sup>132</sup> *See, e.g.*, Act of Mar. 17, 1921, ch. 280, § 4, 1921 N.J. Laws 823, 834; Act of Apr. 9, 1910, ch. 215, § 4, 1910 N.J. Laws 337, 338; Act of Mar. 17, 1899, ch. 41, § 4, 1899 N.J. Laws 73, 76.

\$500.<sup>133</sup> A violator of the modern New Jersey WPCA is subject to civil and/or criminal penalties of up to \$25,000 per day of violation.<sup>134</sup>

As we have seen, a primary objective of the new hazardous waste management laws is to ensure a safe, clean supply of water. It is evident, however, that even without these new waste management laws, existing water pollution control laws, if effectively applied, would provide substantial protection against pollution by hazardous wastes.

#### *A. Discharge to Surface Water*

One of the goals of the Federal Clean Water Act (FCWA) is to eliminate the discharge of pollutants into navigable waters by 1985.<sup>135</sup> Whether this goal will be realized remains to be seen. Section 301 of the Federal Water Pollution Control Act Amendments of 1972 prohibits the discharge of any pollutant that does not conform with the Act's provisions.<sup>136</sup> Section 402 provides that the EPA may issue a permit for the discharge of any pollutant that meets the Act's requirements.<sup>137</sup> Therefore, all discharges to surface waters are prohibited unless authorized by such a permit. Permit administration may be delegated by the EPA to the states provided that the state has adequate legal authority, administrative capability, and enforceable regulations at least as stringent as EPA's discharge permit regulations.<sup>138</sup> New Jersey's Department of Environmental Protection (DEP) satisfies all these requirements. On December 15, 1981, the DEP took from the EPA the responsibility of administering discharge permits, via the New Jersey Pollutant Discharge Elimination System (NJPDDES).<sup>139</sup>

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<sup>133</sup> See, e.g., Act of Apr. 11, 1921, ch. 280, § 3, 1921 N.J. Laws 823, 824 (maximum penalty of \$500); Act of Mar. 17, 1899, ch. 41, § 3, 1899 N.J. Laws 73, 74 (penalty of \$100 per offense).

<sup>134</sup> N.J. STAT. ANN. § 58:10A-10(f) (West 1982). Offenders also may be subject to imprisonment for one year in addition to the fine. Second-time violators can be fined up to \$50,000 per day of violation, and may be subject to two years of imprisonment or both. *Id.*

<sup>135</sup> 33 U.S.C. § 1251(a)(1) (1976). An intermediate goal was set for 1983 which would provide for the protection of fish, shellfish, and wildlife, and for safe, contact recreation. *Id.* § 1251(a)(2). Although not specifying any time frame, New Jersey has espoused similar goals. See N.J. STAT. ANN. § 58:10A-2 (West 1982).

<sup>136</sup> Pub. L. No. 92-500, § 301, 86 Stat. 816, 844 (codified at 33 U.S.C. § 1311(a) (1976)).

<sup>137</sup> Pub. L. No. 92-500, § 402, 86 Stat. 816, 880 (codified at 33 U.S.C. § 1342(a)(1) (1976)). Prior to the issuance of a permit, a public hearing must be held and the Administrator must determine that the discharge complies with the requirements of 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1343 (1976), or any other conditions deemed necessary to fulfill the goals of the Act. *Id.* § 1342(a)(1).

<sup>138</sup> 33 U.S.C. § 1342(a)-(c) (1976 & Supp. III 1979).

<sup>139</sup> N.J. STAT. ANN. § 58:10A-6 (West 1982); N.J. ADMIN. CODE tit. 7, §§ 14A-1 to -13.3 (1981). The purpose of the NJPDDES program is to control the discharge of pollutants and of

Like their federal counterparts,<sup>140</sup> the NJPDES regulations provide that "[n]o person shall discharge any pollutant except in conformance with a valid . . . permit."<sup>141</sup> When a discharger applies for a permit, it is required that the permittee achieve effluent limitations consistent with water quality requirements<sup>142</sup> and areawide plans.<sup>143</sup> Specifically, the discharge must meet technology-based effluent limitations and standards,<sup>144</sup> or new source performance standards.<sup>145</sup>

Especially stringent effluent standards are applicable to toxic pollutants.<sup>146</sup> If the EPA identifies a new toxic pollutant, or changes a toxic effluent standard, existing permits are modified or revoked to incorporate the change.<sup>147</sup> For example, if a present standard allows discharge of 1.0 part per million nickel, and the EPA changes that

leachate from landfills into surface waters or groundwaters, and onto the land, and to control the discharge and storage of liquids and solids which may enter the state's waters. *Id.* § 14A-1.3(d).

<sup>140</sup> See *supra* notes 136-37 and accompanying text.

<sup>141</sup> N.J. ADMIN. CODE tit. 7, § 14A-1.3(c) (1981). The New Jersey Spill Act also expressly provides that discharge of hazardous substances is prohibited unless in conformance with a valid federal or state permit. N.J. STAT. ANN. § 58:10-23.11c (West 1982).

<sup>142</sup> N.J. STAT. ANN. § 58:10A-6(f)(1) (West 1982); see also N.J. ADMIN. CODE tit. 7, §§ 14A-1.4(c), -3.13(d) (1981). The DEP has promulgated water quality standards pursuant to the New Jersey Water Quality Planning Act (WQPA), N.J. STAT. ANN. §§ 58:11A-1 to -11 (West 1982). See N.J. ADMIN. CODE tit. 7, §§ 9-8.1 to -8.43 (1978).

<sup>143</sup> N.J. STAT. ANN. § 58:10A-6 (West 1982). Areawide planning is accomplished pursuant to the Water Quality Planning Act. *Id.* §§ 58:11A-4 to -5. NJDEP cannot grant any permit which is in conflict with an adopted areawide plan. *Id.* § 58:11A-10; see N.J. ADMIN. CODE tit. 7, §§ 14A-1.4(d) to -3.3(d) (1981).

<sup>144</sup> N.J. ADMIN. CODE tit. 7, § 14A-3.13(a) (1981). Standards are based on § 301 of the Federal Clean Water Act, 33 U.S.C. § 1311(2) (1976), or §§ 4 or 6 of the state Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-4, -6 (West 1982). Case-by-case effluent limitations, determined under § 402(a)(1) of the Federal Act, 33 U.S.C. § 1342(2) (1976), and §§ 4, 6, or 8 of the State Act, N.J. STAT. ANN. §§ 58:10A-4, -6, -8 (West 1982), must also be complied with.

<sup>145</sup> N.J. ADMIN. CODE tit. 7, § 14A-3.13a (1981). New source performance standards are promulgated under § 306 of the Federal Act in addition to §§ 4 or 6 of the State Act provisions. *Id.* 40 C.F.R. § 401-460 (1981) establishes performance standards for specific industries.

<sup>146</sup> NJPDES regulations define "toxic pollutant" as "those pollutants, or combinations of pollutants, including disease causing agents, which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism . . . may . . . cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions . . . or physical deformation, in such organisms or their offspring." N.J. ADMIN. CODE tit. 7, § 14A-1.10 (1982).

The Federal Clean Water Act requires the "best practicable control technology" for any discharge after July 1, 1977, and "best available technology" after July 1, 1983. 33 U.S.C. § 1311(b) (1976 & Supp. III 1979). "Toxic" pollutants must receive "best available technology" in any case. *Id.* § 1317(a)(2) (Supp. III 1979).

<sup>147</sup> See N.J. STAT. ANN. § 58:10A-7(b)(3) (West 1982); N.J. ADMIN. CODE tit. 7, § 14A-2.12(b)-(5) (1981).

standard to .5 part per million, existing discharge permits should be modified to limit the nickel discharge to only .5 part per million. Further, if the DEP determines that any permitted discharge endangers human health or the environment, the permit may be modified or revoked.<sup>148</sup> A discharger must report to the DEP any breach of permit requirements involving toxic pollutants<sup>149</sup> or any other discharges which may pose a threat to "human health, welfare, or the environment."<sup>150</sup> In addition, the discharger must have emergency plans to be implemented in exigent circumstances.<sup>151</sup>

Discharge of hazardous wastes to surface water without or in disregard of a Discharge to Surface Water NJPDES permit is a violation of the Federal Clean Water Act,<sup>152</sup> and New Jersey's Water Pollution Control Act,<sup>153</sup> and Spill Act.<sup>154</sup> Strict adherence to the regulations set out by water pollution control laws will reduce the threat to surface waters presently posed by hazardous waste dumping.

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<sup>148</sup> N.J. ADMIN. CODE tit. 7, § 14A-2.13(a)(4) (1981).

Permits may also be terminated or modified for noncompliance with the permit's conditions, for failure to pay fees, for failure to disclose facts or for misrepresenting facts during the permit issuance process, for noncompliance with any applicable facility, basin or areawide plans, for changes in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit, and finally, if the permit does not comply with any regulation or statute under federal or state law. *Id.* § 14A-2.13(a) (1)-(7).

<sup>149</sup> *Id.* § 14A-3.10(a)(1)(i) (1981). A permittee who learns that he has discharged a toxic pollutant in violation of the standards prescribed by § 307(a) of the Federal Act, or § 6 of the state Act, must provide to the Department, within two hours of the time he learns of such violation "[a] description of the discharge . . . [s]teps being taken to determine the cause of noncompliance . . . [s]teps being taken to reduce and eliminate the noncomplying discharge." *Id.* §§ 14A-3.10(a)(1)(i), -2.5 (1)(6)(i)(A)-(C).

Within 24 hours, of the time the permittee is aware he has violated the statute, he must provide information as to "the period of noncompliance, including exact dates and times and if the noncompliance has not been corrected, and the anticipated time when the discharge will return to compliance . . . [t]he cause of the noncompliance; and . . . [s]teps being taken to reduce, eliminate, and prevent reoccurrence of the noncomplying discharge." *Id.* § 14A-2.5(1)(6)(i)(D)-(F).

<sup>150</sup> *Id.* § 14A-3.10(a)(1)(ii). Such discharges include but are not limited to those which are proscribed under § 311 of the Federal Clean Water Act, 33 U.S.C. § 1321 (1976); § 6 of the state Water Pollution Control Act, N.J. STAT. ANN. § 58:10A-6 (West 1982); the Spill Act, *id.* § 58:10-23.11b(h), or under the Safe Drinking Water Act, *id.* § 58:12A-3(b); N.J. ADMIN. CODE tit. 7, § 14A-3.10(a)(1)(ii) (1981).

<sup>151</sup> N.J. ADMIN. CODE tit. 7, § 14A-3.12 (1981).

Such a plan report is designed to insure that the facility operates effectively under certain emergency conditions, such as a "natural disaster, civil disorder, strike, sabotage, faulty maintenance, negligent operation or accident." *Id.* § 14A-3.12(b).

<sup>152</sup> 33 U.S.C. § 1342(h) (1976 & Supp. III 1979).

<sup>153</sup> N.J. STAT. ANN. § 58:10A-6(a) (West 1982).

<sup>154</sup> *Id.* § 58:10-23.11c.

### B. Pretreatment

Under certain circumstances, industrial wastes may be discharged into a domestic wastewater treatment works (DTW).<sup>155</sup> In conjunction with the requirements set forth by the Federal Clean Water Act,<sup>156</sup> the New Jersey Legislature has recognized that DTWs may be unable to treat certain wastes because of the characteristics and composition of the wastes.<sup>157</sup> Such wastes must be "pretreated" before being discharged into a DTW.<sup>158</sup> The New Jersey pretreatment law authorizes the DEP to promulgate rules and regulations establishing pretreatment standards.<sup>159</sup> The DEP has incorporated its pretreatment rules into the NJPDES regulations. First, NJPDES adopts by reference<sup>160</sup> the EPA's General Pretreatment Regulations for Existing and New Sources of Pollution.<sup>161</sup> These regulations specifically prohibit discharges into DTWs of flammable or explosive material, corrosive or acidic substances, or any other pollutant which would interfere with operation of the DTW.<sup>162</sup> The EPA regulations further provide national pretreatment standards for specific industries, limiting the concentrations of pollutants or pollutant properties which may be discharged into a DTW.<sup>163</sup> For example, an electroplating facility may discharge a daily maximum of 4.1 parts per million nickel into a

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<sup>155</sup> New Jersey adopts the federal regulation, 40 C.F.R. § 403.5 (1981), which prohibits the discharge of industrial wastes into a publicly owned treatment works when those wastes would interfere with the operation of the works. N.J. ADMIN. CODE tit. 7, § 14A-13.1 to -13.3 (1981). See *infra* notes 161-66 and accompanying text.

"Domestic Treatment Works" (DTW) is defined in the NJPDES regulations as "a publicly or privately owned treatment works and shall include a treatment works processing domestic wastes together with any ground water, surface water, storm water or industrial process wastewater that may be present." N.J. ADMIN. CODE tit. 7, § 14A-1.10 (1981).

<sup>156</sup> 33 U.S.C. § 1317(b)(1). The Act allows the EPA Administrator to publish proposed regulations which establish pretreatment standards "for introduction of pollutants into treatment works . . . which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works." *Id.*; see 40 C.F.R. §§ 403.1-.16 (1981).

<sup>157</sup> N.J. STAT. ANN. § 58:11-49 (West 1982).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* § 58:11-51.

Pretreatment standards are "those standards as to physical, chemical or biological characteristics to which sewage must conform before it may lawfully be discharged into a public sewage treatment plant." *Id.* § 58:11-50.

<sup>160</sup> N.J. ADMIN. CODE tit. 7, § 14A-13(1)(a) (1981).

<sup>161</sup> 40 C.F.R. § 403.1-.16 (1981).

<sup>162</sup> *Id.* § 403.5(b).

<sup>163</sup> *Id.* § 403.6. Until recently, EPA had promulgated categorical pretreatment standards only for electroplating and timber processing facilities. *Id.* §§ 413, 429. The EPA has begun to release categorical standards for a number of other industries. See, e.g., 47 Fed. Reg. 38810 (1982)

DTW.<sup>164</sup> Unless a waste to be discharged into a DTW meets the standards or is pretreated so that it meets the standards, the discharge will not be authorized.<sup>165</sup>

The NJPDES regulations additionally provide that a Significant Industrial User<sup>166</sup> (SIU) must apply for a specific NJPDES permit to discharge wastes into a DTW.<sup>167</sup> This permit incorporates, in addition to general requirements for NJPDES permits, the prohibition of certain discharges in accordance with EPA rules, national pretreatment standards, local restrictions based on the DTW's peculiar treatment capacity, and notification and reporting requirements.<sup>168</sup> Thus, another possible avenue to dispose of hazardous wastes is brought under the restrictive ambit of water pollution control laws.

### *C. Discharge to Groundwater*

The contamination of groundwater by hazardous wastes is of paramount concern.<sup>169</sup> Wastes can enter the groundwater by seepage through lagoons or landfills, by spreading, dumping, or spraying the waste over land, or by injection into the ground through wells.<sup>170</sup> For some wastes, under proper conditions, these methods of disposal may indeed be adequate and safe. But for other wastes, under less favorable conditions, serious and irreparable contamination of underground sources of drinking water may result.<sup>171</sup>

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(textiles); *id.* at 45382 (coal mining); *id.* at 46434 (petroleum refining); *id.* at 52006 (pulp, paper, and paperboard).

<sup>164</sup> 40 C.F.R. § 413.14(b) (1981).

<sup>165</sup> N.J. STAT. ANN. § 58:11-52 (West 1982). The operator of the DTW must establish a program to enforce pretreatment standards. *See* 40 C.F.R. § 403.8-.11 (1981); N.J. STAT. ANN. § 58:11-53 (West 1982).

<sup>166</sup> A "significant industrial user" is "any user who discharges *on any one day* industrial process wastewater into a DTW where: . . . the volume exceeds 25,000 gallons per day . . . or five percent of the average daily flow of the treatment works." N.J. ADMIN. CODE tit. 7, § 14A-1.10 (1981).

<sup>167</sup> *Id.* § 14A-13.2(a).

<sup>168</sup> *Id.* § 14A-13.3.

<sup>169</sup> *See supra* note 129.

<sup>170</sup> *See Magnuson, supra* note 2, at 66.

<sup>171</sup> *See supra* notes 19 & 20 and accompanying text. A report of the Subcommittee on Oversight and Review of the Committee on Public Works and Transportation found that large concentrations of toxic chemicals present in drinking water may cause death or serious illness, damage or behavioral modification, or in the case of long-term exposure to small concentrations, cancer, genetic modifications or fetal deformities. SUBCOMMITTEE ON OVERSIGHT AND REVIEW OF THE COMM. ON PUBLIC WORKS AND TRANSPORTATION, 95TH CONG., 1ST SESS., REPORT ON THE IMPLEMENTATION OF THE FEDERAL WATER POLLUTION CONTROL ACT 33-34 (Comm. Print 1980).

The discharge permit scheme under the Federal Clean Water Act does not address discharges into groundwater.<sup>172</sup> The New Jersey Water Pollution Control Act, however, recognizes the hazards of groundwater pollution,<sup>173</sup> and prohibits the discharge of any pollutant into groundwater without a permit.<sup>174</sup> In order to discharge pollutants into groundwater by means other than an injection well,<sup>175</sup> a person must obtain a Discharge to Groundwater NJPDES permit.<sup>176</sup> Such a permit may be granted if the discharge will not degrade or continue to degrade the receiving aquifer.<sup>177</sup> The rules prescribe close monitoring of the aquifer to ensure that the discharge does not cause impermissible contamination.<sup>178</sup> The regulations impose a duty on the operator to implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater.<sup>179</sup> This system must include monitoring wells hydraulically upgradient<sup>180</sup> from the site and capable of providing sufficient background groundwater quality samples, and at least three wells downgradient so that significant amounts of waste or waste constituents will be detected immediately upon entering the groundwater.<sup>181</sup> The monitoring must be continued during the active life of the facility, and, for disposal facilities, during the postclosure period.<sup>182</sup> If contamination from the

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<sup>172</sup> *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975). "The disposal of chemical wastes into underground waters which have not been alleged to flow into or otherwise affect surface waters does not constitute a 'discharge of a pollutant' within the meaning of [the Federal Water Pollution Control Act]. The regulation of subsurface discharges is not within the enforcement purview of the Act." *Id.* at 1383. *But see* Wilson, *Groundwaters: Are They Beneath the Reach of the Federal Water Pollution Control Act Amendments*, 5 ENVTL. AFFAIRS L. REV. 545, 545-66 (1976).

<sup>173</sup> N.J. STAT. ANN. § 58:10A-2 (West 1982). The statute reads "The [state] Legislature . . . declares that pollution of the . . . [ground waters] . . . of this State continues to endanger public health; to threaten fish and aquatic life, scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water." *Id.*

<sup>174</sup> *Id.* § 58:10A-6. Absent a permit, discharges into the "waters of the State," defined as "the ocean and its estuaries, all springs, streams and bodies of surface or groundwater," *id.* § 58:10A-3(t), are prohibited. *Id.* § 58:10A-6.

<sup>175</sup> An injection well is a bored, drilled or driven shaft, or a dug hole, whose depth is greater than its largest surface dimension, and into which fluids are injected. N.J. ADMIN. CODE tit. 7, § 14A-1.10 (1981). Those wishing to discharge by means of underground injection must obtain an Underground Injection Control (UIC) permit. *Id.* § 14A-5.2.

<sup>176</sup> *Id.* § 14A-1.3(c).

<sup>177</sup> *Id.* § 9-6.4. An "aquifer" is a "geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring." *Id.* § 14A-1.10.

<sup>178</sup> *Id.* § 14A-6.

<sup>179</sup> *Id.* § 14A-6.2.

<sup>180</sup> See *supra* note 21.

<sup>181</sup> N.J. ADMIN. CODE tit. 7, § 14A-6.3(a)(1)-(2) (1981).

<sup>182</sup> *Id.* § 14A-6.2(a).



discharge is discovered, the rules prescribe detailed evaluation and response measures.<sup>183</sup> A bill<sup>184</sup> recently proposed in New Jersey requires major water companies to periodically test for toxic pollutants in their drinking water.<sup>185</sup> Smaller industrial firms and farmers who supply water to fewer than twenty-five persons would be exempt from compliance under the bill.<sup>186</sup> If passed, the bill would be the first in the nation to require standards for the testing of toxic pollutants.<sup>187</sup>

For discharges to groundwater through injection wells, the NJPDES regulations include a section on Underground Injection Control (UIC).<sup>188</sup> The UIC program is authorized by the Federal Safe Drinking Water Act,<sup>189</sup> and like the surface water discharge permit program of the Federal Clean Water Act, may be administered by the state upon approval by the EPA.<sup>190</sup> The UIC program prescribes various requirements for different types of injection wells.<sup>191</sup> New wells used to dispose hazardous wastes into or above a formation which contains an underground source of drinking water within two miles of the well bore are generally prohibited; any such existing wells are to be rapidly phased out.<sup>192</sup> NJDEP can authorize an exception only when such disposal is an acceptable method to alleviate an

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<sup>183</sup> *Id.* § 14A-6.5. Upon discovery by the owner or operator that his facility is affecting the groundwater, he must submit to the DEP a groundwater quality assessment program. In addition, he must determine how rapidly the hazardous waste is migrating in the groundwater, and the concentration of a hazardous waste in the groundwater. *Id.*

<sup>184</sup> N.J. Assembly 280, 200th Leg., 1st Sess. (1982) (amending and supplementing the Safe Drinking Water Act, N.J. STAT. ANN. §§ 58:12A-1 to -11 (West 1982)).

<sup>185</sup> *Id.* § 1.

<sup>186</sup> *Id.* § 5.

<sup>187</sup> Johnson, *Measure Calls on Water Firms to Periodically Test for Toxins*, Star-Ledger, June 22, 1982, at 15, col. 3.

<sup>188</sup> N.J. ADMIN. CODE tit. 7, §§ 14A-5.1 to -5.17 (1981). The term "[u]nderground injection means the subsurface emplacement of fluids by well injection." *Id.* § 14A-5.1(b). The regulations provide that the UIC program regulates both well injection disposal and underground storage of fluids. *Id.*

<sup>189</sup> 42 U.S.C. § 300h (1976 & Supp. III 1979). The Safe Drinking Water Act was designed to protect groundwater "which supplies or can reasonably be expected to supply any public water system." *Id.* § 300h(d)(2).

<sup>190</sup> *Id.* § 300h-1. States are given primary enforcement responsibilities, though the EPA will prescribe an Underground Injection Control program until the State's application is approved, or if the State fails to adequately implement the program. *Id.* § 300h-1(c). New Jersey, as of this writing, has not made formal application to the EPA for a UIC program approval but has been negotiating with EPA over the substantial contents of the application.

<sup>191</sup> See N.J. ADMIN. CODE tit. 7, §§ 14A-5.2 to -5.5 (1981). There are five classes of injection wells under the rules: Class I—wells used to inject municipal and industrial wastes; Class II—wells which inject fluids; Class III—wells which inject for extraction of minerals or energy; Class IV—wells used by hazardous waste generators to dispose of wastes into or above a formation which contains an underground source of drinking water within two miles of the well; Class V—types of wells not included in the four other classes. *Id.*

<sup>192</sup> *Id.* § 14A-5.7(a).

imminent and substantial threat to public health or safety.<sup>193</sup> The burden of proof is on the operator to show that the injection will cause no harm to public health or violate water quality standards.<sup>194</sup> All other wells used to dispose of hazardous wastes may be permitted only upon compliance with stringent construction, testing, monitoring, and reporting requirements.<sup>195</sup> Even when the injection is remote from a usable aquifer, every safeguard must be employed to alleviate the possibility of contamination.<sup>196</sup>

Disposal of hazardous wastes by injection into the ground is not and has never been widely practiced in New Jersey.<sup>197</sup> Under the UIC regulations, it is unlikely that well injection will ever constitute a substantial threat to underground water supplies.

#### *D. Industrial Waste Management Facilities*

The NJPDES regulations prescribe additional permit requirements for Industrial Waste Management Facilities (IWMF).<sup>198</sup> An IWMF is any facility which 1) receives, treats, or stores intracompany, intrastate hazardous wastewater or sludge, 2) treats or stores hazardous wastes in a surface impoundment, 3) treats hazardous wastes by land application, or 4) injects hazardous wastes into wells.<sup>199</sup> The NJPDES/IWMF permit must be obtained in addition to, not in lieu of, a NJPDES discharge permit and Hazardous Waste Facility permit.<sup>200</sup> The NJDES/IWMF permit is a special operating permit, embodying a hybrid of waste management and water pollution control concepts.<sup>201</sup>

### III. INTEGRATION OF WASTE MANAGEMENT AND WATER POLLUTION CONTROL LAWS

Because water pollution control laws and hazardous waste management laws are complementary, it is of utmost importance that they

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<sup>193</sup> *Id.* § 14A-5.7(b). The DEP only authorizes the construction of such a well when the waste "shall not adversely affect the health of persons or cause a violation of either primary drinking water standards or applicable groundwater quality standards." *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* § 14A-5.14.

<sup>196</sup> *Id.* § 14A-5.7(b).

<sup>197</sup> Most injection wells in New Jersey are used to recycle coolant water.

<sup>198</sup> *Id.* §§ 14A-4.1 to -4.6.

<sup>199</sup> *Id.* § 14A-4.2(a)(1)-(4). An owner or operator who is granted a UIC permit in effect owns an IWMF permit as long as there is compliance with the requirements of § 4.5(a).

<sup>200</sup> *Id.* § 14A-4.2(c).

<sup>201</sup> *Id.* § 14A-4.4.

be consistent. Congress, the New Jersey Legislature, and regulatory agencies have attempted to succeed in this regard.

RCRA was enacted to "[eliminate] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes."<sup>202</sup> It may seem, however, that New Jersey, unlike the Federal Government and most other states, has effectively closed that loophole by requiring the operator of every landfill, lagoon, seepage pit, and land application site in New Jersey to apply for and receive a Discharge to Groundwater NJPDES permit. The dangerous discharge of hazardous wastes into the water supplies of the state is reduced under current water pollution control legislation. Along with the criticism of RCRA and associated state statutes, the question is raised whether federal and state hazardous waste regulation as applied in New Jersey is in fact necessary. The answer must be in the affirmative.

To begin, not all problems associated with hazardous wastes are related to the contamination of water. Wastes may be dangerous to other aspects of the environment through fire or explosion, toxic fumes, surface contact, or the food chain.<sup>203</sup> More importantly, hazardous waste management laws serve as a critical complement to water pollution control laws. The legislative history acknowledges that RCRA is necessary to ensure that other environmental laws are both cost and environmentally effective.<sup>204</sup> While water pollution control statutes prohibit discharge of dangerous substances into surface and ground waters *de jure*, waste management laws are designed to ensure that dangerous materials are in fact disposed of properly.

The ability to promulgate regulations is meaningless without the power to enforce them. Water pollution control agencies by themselves found it difficult to identify, apprehend, and successfully prosecute illicit dischargers. With manpower and funding inadequate to conduct rigorous inspection and enforcement on a wide scale, water pollution authorities were often in the position of enforcing regulations against relatively minor infractions committed by permitted dischargers while largely ignoring major violations committed by unpermitted dischargers.

Hazardous waste management rules fill in this enforcement gap. By requiring generators to step forward, comply with operational standards, and manifest the waste stream from cradle to grave, the

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<sup>202</sup> H.R. REP., *supra* note 1, at 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6241.

<sup>203</sup> See *supra* note 5 and accompanying text.

<sup>204</sup> H.R. REP., *supra* note 1, at 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6241.

new regulations place much of the burden of compliance upon the hazardous waste industry itself. A generator who before implementation of RCRA-style rules did not have a need to know, and did not want to know, where his wastes went now must take responsibility, through the manifest system and reporting requirements, for disposal of those wastes.

Because the waste manifest is ultimately returned to the generator,<sup>205</sup> the success of the manifest scheme depends on the good faith of the industry and self-policing. Under these ideal conditions, enforcement of waste management rules by government authorities would need occur only in exceptional circumstances, or when there is evidence of substantial noncompliance. Trained enforcement personnel, supported by revenue from waste facility fees,<sup>206</sup> will enable the government to enforce waste management laws in the breach, assist industry in compliance, and respond to emergency situations.

The hazardous waste management rules will have the greatest impact on generators whose waste is transported off-site for disposal by another firm. Before the rules were enacted, the disposer alone would be in violation of water laws if he illegally discharged the waste. Under the present waste manifesting, operating, and reporting rules, it would take a virtual conspiracy of generator, hauler, and disposer to discharge improperly. The compliance burden upon the industry will be a heavy one. Adequate treatment of hazardous wastes and the procedures required to assure proper treatment and disposal are costly.<sup>207</sup> Nevertheless, substantial expenses are justified to alleviate the dangers posed by hazardous wastes.

Perhaps of most significance, definitions of hazardous waste are parallel in both water pollution control laws and hazardous waste management laws. NJPDES regulations define "hazardous wastes"<sup>208</sup> as those substances so defined under the criteria, identification, and

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<sup>205</sup> Under the federal manifest scheme the disposed facility must, within 30 days after delivery of the wastes, send a copy of the manifest to the generator. 40 C.F.R. § 264.71(a)(4) (1981). One of the major flaws of the New Jersey manifest system is that it has no such requirement. Imposing such a requirement would put the generator on notice of any discrepancies between the wastes manifested and those received at the disposal facility.

<sup>206</sup> N.J. STAT. ANN. § 13:1E-42.2 (West Cum. Supp. 1982-1983). The DEP is authorized to assess fees against hazardous waste disposal facilities in amounts sufficient to cover costs of inspection. *Id.*

<sup>207</sup> N.J. ADVISORY REPORT, *supra* note 1, at 26.

The New Jersey Hazardous Waste Advisory Commission expressed the belief that generators should be forced to bear the full cost of treatment and disposal since this would provide the most easily administered incentive for reducing generation. *Id.*

<sup>208</sup> N.J. ADMIN. CODE tit. 7, § 14A-1.10 (1981).

listing provisions of the state's new hazardous waste management regulations.<sup>209</sup> Not all hazardous materials are wastes. New Jersey's Spill Act prohibits the permitless discharge of any hazardous substances, defining "hazardous substances"<sup>210</sup> as one so identified under the Federal Clean Water Act.<sup>211</sup> The NJPDES regulations employ the same definition by reference.<sup>212</sup> The same hazardous materials, wastes or otherwise, are consistently regarded under both water pollution control and hazardous waste management laws.

RCRA itself claims a supportive role in environmental protection,<sup>213</sup> calling on the Administrator of the EPA to integrate the provisions of RCRA with the Federal Clean Water Act and other environmental legislation.<sup>214</sup> To avoid enforcement and administrative redundancy, RCRA does not apply to matters already subject to the Federal Clean Water Act, except to the extent that such application is not inconsistent.<sup>215</sup> Rather, enforcement of RCRA is to be coordinated with other pollution control laws. Presumably, strict compliance with RCRA and collateral state regulations will minimize violations of water pollution laws with respect to unauthorized discharge of hazardous wastes.

It is of utmost importance that agencies charged with administering and enforcing hazardous waste management and/or water pollution control laws coordinate their efforts.<sup>216</sup> Redundant or inconsistent application of the laws could result if responsible administrators do not consider the mandates and activities of their counterparts. Thoughtful delegation and delineation of responsibilities by upper management is imperative for successful implementation of our pollution control regulations.

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<sup>209</sup> *Id.* § 26-8.1. These regulations, like the RCRA regulations, see *supra* note 71, identify characteristics attributable to "hazardous" wastes, and list specific wastes by process stream and chemical name. *Id.*

<sup>210</sup> N.J. STAT. ANN. § 58:10-23.11b(k) (West 1982).

<sup>211</sup> 33 U.S.C. § 1321(b)(2) (1976 & Supp. III 1979).

<sup>212</sup> N.J. ADMIN. CODE tit. 7, § 14A-1.10 (1981).

<sup>213</sup> 42 U.S.C. § 6905(b) (1976 & Supp. III 1979).

<sup>214</sup> *Id.* Acts included within this directive are the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1976 & Supp. III 1979), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979), the Marine Protection, Research, and Sanctuaries Act of 1922, 33 U.S.C. §§ 1401-1444 (1976 & Supp. III 1979), the Safe Drinking Water Act, 42 U.S.C. § 300f-300i (1976 & Supp. III 1979), and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1976 & Supp. III 1979).

<sup>215</sup> 42 U.S.C. § 6905(a) (1976).

<sup>216</sup> At the time of RCRA's creation, Congress realized that the then existing methods of hazardous waste disposal "often result[ed] in air pollution, subsurface leachate and surface runoff, which affect air and water quality." H. R. REP., *supra* note 1, at 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6242. Congress proposed that RCRA would eliminate these problems and provide coordination of all environmental laws. *Id.*

## IV. CONCLUSION

A primary objective of RCRA hazardous waste management regulations and similar state rules is to prevent dangerous wastes from contaminating water supplies. Even in the absence of hazardous waste management rules, existing water pollution control statutes in New Jersey prohibit harmful discharge of hazardous wastes into surface and groundwater. Hazardous waste management rules, however, must be regarded as complementary to, rather than independent of, water pollution control laws. Hazardous waste management regulations fill gaps in the practical enforcement of water pollution control laws, and broaden responsibility for proper treatment and disposal. To be completely effective, administration of hazardous waste management regulations must be thoroughly coordinated with water pollution control.

Although great progress has been made in the last ten years in enacting legislation to maintain clean water and keep hazardous waste dumping to a minimum, such strides are nugatory without proper enforcement. It appears that the Environmental Protection Agency has taken a position of "deregulation, de-federalization and defunding."<sup>217</sup> The cost of pollution control is increasingly being exploited as an excuse to relax environmental rules for the benefit of big business. This is unacceptable. For example, a recent change that permits textile mills to employ the less stringent standard of "best practical technology" instead of "best available technology" is an attempt to help defray the costs of conforming to pollution regulations.<sup>218</sup> In addition, wastewater discharged into treatment plants is now only required to meet "the general requirements of all industries,"<sup>219</sup> rather than specific requirements peculiar to a particular industry. Moreover, in February of 1982, EPA's Administrator, Ann Gorsuch, ordered a ninety day suspension of the regulation banning the burial of hazardous waste drums containing toxic liquids.<sup>220</sup> A recent proposal by the EPA would require only ten percent of industrial manufacturers to submit annual reports.<sup>221</sup> By eliminating the annual reporting requirement, it will be more difficult to ensure compliance

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<sup>217</sup> *Mrs. Gorsuch and the Mirror*, N.Y. Times, July 9, 1982, at 22, col. 1.

<sup>218</sup> 47 Fed. Reg. 38,821 (1982) (proposed amendment to 40 C.F.R. § 410.12). The proposed rule would save the textile industry about \$70 million in investment costs and \$41 million in subsequent annual costs. N.Y. Times, Sept. 12, 1982, at 25, col. 1.

<sup>219</sup> Shabecoff, *Rule on Reporting Waste Suspended*, N.Y. Times, Mar. 15, 1982, at B12, col. 1.

<sup>220</sup> See 47 Fed. Reg. 12,316 (1982).

<sup>221</sup> *Id.* at 44,932 (1982); see also Shabecoff, *supra* note 219, at B12, col. 1.

since the EPA will have little information with which to identify or survey pollution violators.<sup>222</sup>

Easing the rules in the interest of big business will exacerbate the problem; the environment will be irreparably harmed. Eventually, the problems will resurface and industry will be burdened with twice the expense. The ultimate goal is prevention. Tougher standards need to be implemented and enforced as the costs of attempting to repair the damage already incurred become overwhelming. By enforcing manifesting and record-keeping requirements, thereby forcing generators to deliver their wastes to licensed facilities and assuring that these facilities are properly operated, waste volumes will be properly managed and water pollution reduced.

Perhaps the most egregious offense has been in the area of federal funding. The EPA itself has shrunk its permanent staff positions by almost 30%,<sup>223</sup> reduced the present research budget by 40%,<sup>224</sup> and received only \$960 million for the 1983 budget, an overall 40% reduction from 1982.<sup>225</sup> Furthermore, the EPA has been accused of foot-dragging on the distribution of the \$300 million deposited in Superfund.<sup>226</sup> In 1985, the federal cost share for sewage construction projects will be reduced from 75% to 55% for new sewage plants.<sup>227</sup> Future federal appropriations for treatment plants will be decreased from \$9.6 billion<sup>228</sup> to \$2.4 billion.<sup>229</sup> According to Anne Gorsuch, there will eventually be an end to all federal assistance to the states for the purpose of promulgating national environment laws.<sup>230</sup> Due to political and economic pressures a likely reaction will be to cut the state's own budgets in response to the lack of federal aid.<sup>231</sup> Curtailed

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<sup>222</sup> Shabecoff, *supra* note 219, at B12, col. 1.

<sup>223</sup> Environmental Protection Agency, Justification of Appropriations Estimates for Committee on Appropriations for 1983, XI (1982) [hereinafter cited as Justification of 1983 Appropriations].

<sup>224</sup> *Id.* at IV.

<sup>225</sup> *Id.* at X.

<sup>226</sup> Shabecoff, *45 More Toxic Waste Sites Listed as Health Hazards*, N.Y. Times, July 24, 1982, at 8, col. 3.

<sup>227</sup> Clean Water Act, 33 U.S.C. § 1282(a)(1) (1976 & Supp. III 1979); see News from the Office of Congressman Robert A. Roe (Dec. 10, 1981) (announcing Senate-House Conference Agreement on Water Pollution Control Bill). Funding for sewage plants already under construction and approved by the EPA will remain at 75%. *Id.*

<sup>228</sup> Environmental Protection Agency, Clean Water Fact Sheet (Jan. 1982).

<sup>229</sup> Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1983, Pub. L. No. 97-272, 96 Stat. 1165, 1167 (1982) (to be codified at 33 U.S.C. § 1281); Justification of 1983 Appropriations, *supra* note 223, at IV.

<sup>230</sup> Shabecoff, *E.P.A. Chief Forecasts Cut in Aid to the States*, N.Y. Times, July 23, 1982, at D16, col. 5.

<sup>231</sup> See *id.*

local funding means minimum enforcement of existing regulations, and a further setback in achieving clean water goals.<sup>232</sup>

Paralleling the cuts in national spending is a policy of lowering federal standards and placing more responsibility on the states to regulate their own water quality. New rules, proposed by the EPA in October of 1982, indicated that state governments will be given more discretion in determining what pollution standards should be applied to a particular body of water.<sup>233</sup> The rationale behind the new regulations is that more states will be able to comply with the Federal Act and keep the federal funding they now have. The problem, however, is that it will be easier for states to degrade high quality water by lowering their own standards as to what is acceptable.<sup>234</sup>

These rules epitomize a dangerous philosophical change in the present administration of water protection, reflecting a "partial reversion" toward the "once-discredited water quality standards."<sup>235</sup> In 1981, Congress relaxed the definition of what constitutes acceptable secondary treatment technology.<sup>236</sup> Now, the Administration hopes to convince Congress to approve regulations that would lessen the restrictions on the pretreatment standards prescribed for dumping toxic wastes into sewers.<sup>237</sup> The danger is that if the Administration continues along this course, it will eventually allow states to totally ignore the "fishable-swimmable" standard if the costs are assessed as too high.

Perhaps the most subtle method of nonenforcement has been evidenced in the number of enforcement cases the EPA has sent to the Justice Department for prosecution.<sup>238</sup> The number of civil action referrals dropped from 252 in 1980 to 78 in 1981.<sup>239</sup> In February, 1982, the Commissioner of the EPA refused to appeal a decision by a federal judge allowing continued ocean dumping.<sup>240</sup>

The EPA's advertisement of its new proposals as "improvements" to the Clean Water Act is in reality a disguised metaphor for abrogat-

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<sup>232</sup> Roe, Guest Editorial, *Construction Outlook Monthly Newsletter*, Mar., 1982, at 10.

<sup>233</sup> Environmental Protection Agency, *Water Quality Standards Regulation Proposed Rule*, 1982 (revising 40 C.F.R. §§ 35, 120).

<sup>234</sup> Shabecoff, *E.P.A. to Propose Changes in Rules on Water Quality*, N.Y. Times, Oct. 20, 1982, at 1, col. 3.

<sup>235</sup> Boffey, *Efforts to Gain 'Fishable-Swimmable' Waters Appear to Falter*, N.Y. Times, Oct. 12, 1982, at C1, col. 1.

<sup>236</sup> Federal Water Pollution Control Act, 33 U.S.C.A. § 1314(d)(4) (West Cum. Supp. 1982).

<sup>237</sup> 47 Fed. Reg. 42,703 (1982) (proposed amendment to 40 C.F.R. § 403); see Boffey, *supra* note 235, at C1, col. 1.

<sup>238</sup> See Shabecoff, *Pollution Control Industry in Peril*, N.Y. Times, July 4, 1982, at F4, col. 2.

<sup>239</sup> House Energy and Commerce Subcommittee on Oversight and Investigations, Oct. 11, 1982.

<sup>240</sup> Carney, *Long Fight Seen on Dumping*, N.Y. Times, Feb. 28, 1982, at 17, col. 1.



ing every legislative objective that has been accomplished in the last decade. Abandoning uniform national standards and reverting to old approaches will result in failure, as the 1960's proved. A strong federal commitment to clean water and responsible waste disposal is essential.